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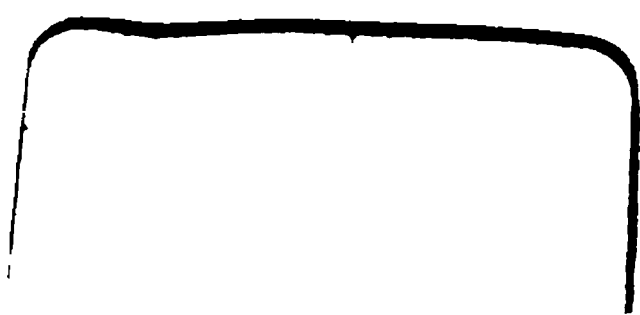
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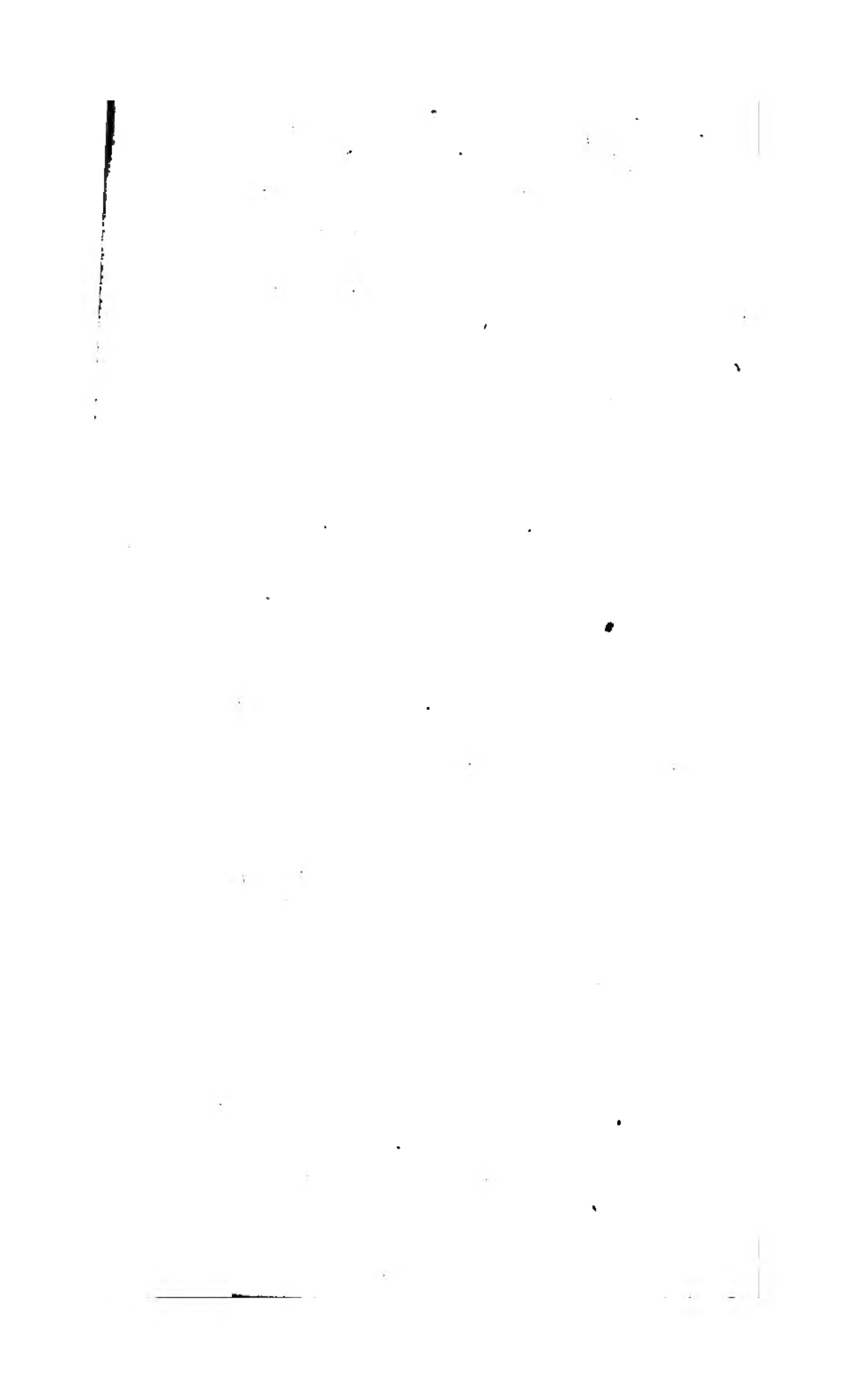
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OF THE

LAW OF NISI PRIUS.

VOL. I.

1. ACCOUNT.
2. ADULTERY.
3. ASSAULT AND BATTERY.
4. ASSUMPSIT.
5. ATTORNEY.
6. AUCTION.
7. BANKRUPT.
8. BARON AND FEME.
9. BILLS OF EXCHANGE AND
PROMISSORY NOTES.

10. CARRIERS.
11. COMMON.
12. CONSEQUENTIAL DA-
MAGES.
13. COVENANT.
14. DEBT.
15. DECEIT.
16. DETINUE.
17. DISTRESS.

BY WILLIAM SELWYN,

OF LINCOLN'S INN, ESQUIRE, ONE OF HER MAJESTY'S COUNSEL,
LATE RECORDER OF PORTSMOUTH.

*Quilibet scriptor adeo anxie sit sollicitus, ut ad veritatem dicat, perinde ac si totius operis
fides uniuscujusque periodi fide niteretur.—PRÆF. 6 REP.*

WITH THE NOTES AND REFERENCES

TO THE DECISIONS OF THE COURTS OF THIS COUNTRY, BY THE FORMER EDITORS,

HENRY WHEATON, THOMAS L. WHARTON AND EDWARD E. LAW.

Seventh American Edition,

WITH ADDITIONAL NOTES AND REFERENCES TO AMERICAN CASES,

BY ASA I. FISH.

FROM THE ELEVENTH LONDON EDITION.

PHILADELPHIA:

ROBERT H. SMALL, LAW BOOKSELLER,

NO. 21 SOUTH SIXTH STREET.

1857.

VVA 931 03043473

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PREFACE

TO THE

SEVENTH AMERICAN EDITION.

THE former editions being no longer in print, the publisher has requested the present editor to add such notes and references as he deemed requisite. In complying with this request, the editor has, perhaps, been led into a more extended field of inquiry than he at first supposed would be desirable. The excellent and full notes of the late Mr. Wheaton—the exact and succinct annotations of the late Mr. Wharton and the concise references of Mr. Law, the former editors—have been substantially retained, but greatly enlarged and somewhat modified to meet the present state of the authorities. The cumbersome modes of reference adopted in the former editions has been justly complained of, and in this edition a simple and usual method of reference is used, which enables the reader at a glance to see both the text and any accompanying note.

The editor fears that the length of some of the notes may subject him to the criticism of his professional brethren; but when it is recollected that many years have elapsed since Mr. Selwyn first prepared his accurate and methodical labours; that the same branches of law so fully and luminously discussed by him, have much engaged professional and judicial attention in this country; that the greatly increased commerce of an extended territory has brought into existence many new applications of commercial law not found in England; and when the real practical value of a *Nisi Prius* or any other hand-book must be in its comprehensive and compact character, he conceives that no other course would have been satisfactory.

The editor submits his labors to that indulgent professional candor which has been more than once extended to him, and which regards an intention to aid the researches and lighten the labor of the student and practitioner, with high favor.

Philadelphia, July 1st, 1857.

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TO THIS

ELEVENTH ENGLISH EDITION.

THE Clauses in the several statutes made since the last Edition, have been inserted under the proper heads, together with the modern decisions, except in a few instances, which, coming too late for insertion there, will be found in the Addenda. The Compiler, being anxious to preserve the original design and character of these volumes, has continued to expunge all those portions of the work, which were inconsistent with the law as it stands at present; excepting only those statutes and decisions, which are necessary for the explanation of the new law, and those to which the latter statutes have reserved a temporary or partial operation.

Notwithstanding these endeavors, the additions rendered necessary by the late important statutes and decisions, have unavoidably increased the length of the work; but, by continuing the enlarged page, which was adopted in the last Edition, and by a careful economy of space, the printer has been enabled to comprise the present Edition in volumes not much larger than their predecessors. The Tables of Statutes, and of New Rules, have been again prefixed to the first volume: and in consequence of the great increase in the number of reporters, and for the convenience of students, a list of abbreviations has been added. The General Index has been remodelled and greatly enlarged.

Much labour has again been bestowed upon the attempt to secure, as far as possible, universal accuracy of reference, as well to the different parts of this work, as to the Reports and other books which are cited; and it is hoped that the present Edition will be found not to be inferior to the last in this particular.

The Compiler has been assisted in the preparation of this and the last two Editions, by *his son*, C. J. Selwyn, of Lincoln's Inn, *Esq.*; but as his own retirement from the active duties of the profession, and his son's engagements as a Chancery Barrister, have prevented them from giving that constant attention to the course of the decisions and practice in the Courts of Common Law, which is necessary for the revision of this work, they have on this occasion availed themselves of the additional assistance of W. G. Romain, of the Inner Temple, *Esq.*; to whose learning and industry the present Edition is under many and great obligations.

P R E F A C E.

THE object of the following work is to investigate and explain that branch of jurisprudence, which teaches the nature and extent of the remedies prescribed by the law of England for the redress of private wrongs, or, as they are frequently termed, civil injuries. Considering the utility and importance of the subject, it cannot fail to excite the surprise of the reader, when he is informed that a well digested treatise on the law of actions remained for so great a length of time a desideratum in the profession, that it was not until the year 1767, that an anonymous compilation, (the first deserving any notice,) entitled "An Introduction to the Law relative to Trials at Nisi Prius," was published. The same work was *republished* by the late Mr. J. Buller, in the year 1772. Although the title-page is silent as to this being a second edition; yet, from an examination of the contents, it appears very clearly that Mr. J. Buller's book is merely a republication of the anonymous treatise published in 1767. It is very remarkable, that so many different opinions should have existed as to the real author of this compilation; some persons having ascribed it to Mr. Ford, others to the late Mr. J. Clive, and others to Mr. Bathurst. It was the received opinion at the bar, *ut ego audivi*, upon the first appearance of this work, that it had been compiled by Mr. Bathurst, (who was created Lord Apsley in 1771, and succeeded his father Allen, Earl Bathurst, in 1775,) for his own private use; but the dedication by Mr. Buller to Lord Apsley, prefixed to the edition in 1772, which must have escaped the notice of those persons who ascribed this work to a different author, places the question beyond the reach of controversy. That dedication expressly recognizes this treatise as owing its origin to a collection of notes formerly made by Mr. Bathurst for his own private use. This book, having passed through several editions, was succeeded by a similar work, entitled "A Digest of the Law of Actions and Trials at

Nisi Prius," by Mr. Espinasse, of which there have been four editions. The Compiler of the following pages conceived that a treatise intended as a companion at the sittings in London and Middlesex, and on the circuit, might be cast into a more convenient form than that adopted by either of the former writers: and that the cases might be abridged with greater accuracy and precision. Under this impression, the Abridgment of the Law of Nisi Prius was prepared and published in three parts successively, in the years 1806, 1807, 1808. The Eleventh Edition is now submitted to the candour of the Profession.

Lincoln's Inn, February, 1845.

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TABLE OF ABBREVIATIONS.

A. & E.	Adolphus and Ellis's Reports.
Add. E. R.	Addams's Ecclesiastical Reports.
Aleyne	Aleyne's Reports.
Ambl.	Ambler's Reports.
And.	Anderson's Reports.
Andr.	Andrews's Reports.
A. P. B. Dampier MSS. } L. I. L. }	Ashurst, J., Paper Book.(1)
Aston's Ent.	Aston's Entries.
Atk.	Atkyns's Reports.
Bac. Abr.	Bacon's Abridgment.
B. & A.	Barnewall and Alderson's Reports.
B. & Ad.	Barnewall and Adolphus's Reports.
B. & C.	Barnewall and Cresswell's Reports.
Batty	Batty's Irish Reports.
Beav.	Beavan's Reports.
Beaw.	Beawes's Lex Mercatoria.
Bingh.	Bingham's Reports.
Bingh. N. C.	Bingham's New Cases.
Bl. Comm.	Blackstone's Commentaries.
Bl. H.	Henry Blackstone's Reports.
Bl. R.	Mr. Justice Blackstone's Reports.
Bli.	Bligh's Reports of Cases in the House of Lords.
Bli. N. S.	Bligh's New Series.
Bos. & Pul.	Bosanquet and Puller's Reports, in 3 vols.
Bos. & Pul. N. R.	Bosanquet and Puller's New Reports.
B. P. B.	Paper Book of Buller, J.(2)
Bro. Abr.	Brooke's Abridgment.
Broderip	Broderip's Reports.
Brod. & Bingh.	Broderip and Bingham's Reports.
Bro. Ca. C.	Brown's Reports of Cases in the Court of Chancery.
Bro. P. C.	Brown's Cases in Parliament.
Brownl.	Brownlow's Reports.
Bull. N. P.	Buller's Nisi Prius.
Bulst.	Bulstrode's Reports.
Bunb.	Bunbury's Reports.
Burn. E. L.	Burn's Ecclesiastical Law.

(1) These MSS. consist of the Paper Book of *Ashurst, J., Buller, J., Lawrence, J., and Dampier, J.*, in an uninterrupted series from T. T. 9 Geo. III., to M. T. 56 Geo. III. They are in Lincoln's Inn Library, and are referred to in the following pages as P. B. *Dampier, MSS. L. L. L.*, preceded by the initial of the judge.

(2) See note (1).

Burr.	Burrows' Reports.
Burr. S. C.	Burrows' Settlement Cases.
Campb.	Campbell's Nisi Prius Cases.
Carth.	Carthew's Reports.
Ca. Temp. Holt	Cases in the time of Holt, Chief Justice of King's Bench.
C. T. H.	Cases in the time of Lord Hardwicke.
C. T. N.	Cases in the time of Lord Chancellor Northington.
C. T. T.	Cases in the time of Lord Chancellor Talbot.
Cl. & Fi.	Clark and Finnelly's Reports in House of Lords.
Clayton	Clayton's Reports.
Clift	Clift's Entries.
Co. R.	Coke's Reports.
Co. Ent.	Coke's Entries.
Co. Lit.	Coke upon Littleton.
Co. B. L.	Cooke's Bankrupt Law.
Coll.	Collyer's Reports, V. C. Knight Bruce.
Com. R.	Comyn's Reports.
Com. Dig.	Comyn's Digest.
Comb.	Comberbach's Reports.
Cowp.	Cowper's Reports in the King's Bench.
Cox	Cox's Chancery Cases.
Cro. Car.	Croke's Reports in time of Charles 1st.
Cro. Eliz.	Croke's Reports in time of Elizabeth.
Cro. Jac.	Croke's Reports in the time of James 1st.
Cr. & J.	Crompton and Jervis's Reports.
Cr. & Mee.	Crompton and Meeson's Reports.
Cr. M. & R.	Crompton, Meeson and Roscoe's Reports.
Cr. & P.	Craig and Phillips's Reports.
Curt. Ecc. Rep.	Curteis's Ecclesiastical Reports.
Dalton's Shff.	Dalton's Sheriff.
Dav.	Davis's Reports.
Degge	Degge's Parson's Companion.
Doct. Pl.	Doctrina Placitandi.
Doct. & Stud.	Doctor and Student.
Doug.	Douglas's Reports in King's Bench.
Dowl. P. C.	Dowling's Practice Cases.
D. P. B.	Dampier, J., Paper Book.(3)
D. & R.	Dowling and Ryland's Reports in King's Bench.
Dyer	Dyer's Reports.
East, P. C.	East's Pleas of the Crown.
East	East's Reports in King's Bench.
Eden	Eden's Reports.
Eq. Ca. Abr.	Equity Cases Abridged.
Esp. N. P. C.	Espinasse's Nisi Prius Cases.
Fitzgib.	Fitzgibbon's Reports.
Fitz. Abr.	Fitzherbert's Abridgment.
F. N. B.	Fitzherbert's Natura Brevium.
Fort.	Fortescue's Reports.
Freem.	Freeman's Reports.
G. & D.	Gale and Davison's Reports.
Gilb. Debt	Gilbert's Treatise on Debt.
Gilb. R.	Gilbert's Reports.
Gilb. C. B.	Gilbert's History of Common Pleas.
Gilb. Evid.	Gilbert's Evidence.
Gouldsborough	Gouldsborough's Reports.
Gow's N. P. C.	Gow's Nisi Prius Cases.
Gundry	Gundry, MSS.(4)
Gwm.	Gwillim's Tithe Cases.
Hagg. Cons.	Haggard's Consistory Reports.
Hagg. Ecc. R.	Haggard's Ecclesiastical Reports.
Hale, H. C. L.	Hale's History of the Common Law.

(3) See note (1), p. xciii.

(4) These MSS. were purchased of Nathaniel Gundry, Esq., the only son of Mr. Justice Gundry, by whom the notes were taken; and will be found in Lincoln's Inn Library.

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Hard.	.	.	.	Hardress's Reports.
Hare	.	.	.	Hare's Reports, V. C. Wigram.
Hawk. P. C.	.	.	.	Hawkins's Pleas of the Crown.
H. Bl.	.	.	.	Henry Blackstone's Reports.
Hob.	.	.	.	Hobart's Reports.
Holt	.	.	.	Reports Temp. Holt, C. J., of the King's Bench.
Holt's N. P. C.	.	.	.	Holt's Nisi Prius Cases.
Inst.	.	.	.	Coke's Institutes.
Jac.	.	.	.	Jacob's Reports.
J. & W.	.	.	.	Jacob's and Walker's Reports.
Jon. T.	.	.	.	Sir Thomas Jones's Reports.
Jones, W.	.	.	.	Sir W. Jones's Reports.
Keb.	.	.	.	Keble's Reports.
Keen	.	.	.	Keen's Reports.
Kenyon	.	.	.	{ Notes by Lord C. J. Kenyon, when at the Bar, Edited by Hanmer.
Law J. (N. S.)	.	.	.	Law Journal, New Series.
Lord Raym.	.	.	.	Lord Raymond's Reports.
Leon.	.	.	.	Leonard's Reports.
Lev.	.	.	.	Levinz's Reports.
Lib. Ass.	.	.	.	Liber Assisarum.
Lib. Int.	.	.	.	Liber Intrationum.
Lill. Ent.	.	.	.	Lilly's Entries.
L. I. L.	.	.	.	Lincoln's Inn Library.
Lit.	.	.	.	Littleton's Tenures.
L. P. B.	.	.	.	Paper Book of Lawrence, J.(5)
Lutw.	.	.	.	Lutwyche's Reports.
M'Clel.	.	.	.	M'Cleland's Reports.
M. & Y.	.	.	.	M'Cleland and Younge's Reports.
Madd.	.	.	.	Maddock's Chancery Reports.
M. & Gr.	.	.	.	Manning and Granger's Reports.
March	.	.	.	March's Reports.
Marsh. R.	.	.	.	Marshall's Reports.
Marsh.	.	.	.	Marshall on Insurances.
M. & S.	.	.	.	Maule and Selwyn's Reports.
M. & Ry.	.	.	.	Manning and Ryland's Reports.
M. & W.	.	.	.	Meeson and Welsby's Reports.
Mer.	.	.	.	Merivale's Reports.
Middx. Sit.	.	.	.	Sittings for Middlesex, at Nisi Prius.
Mod.	.	.	.	Modern Reports.
Mod. Ent.	.	.	.	Modern Entries.
Mont. & A.	.	.	.	Montagu and Ayrton's Reports.
Mont. & B.	.	.	.	Montagu and Bligh's Reports.
Mont. & Ch.	.	.	.	Montagu and Chitty.
M. D. & D.	.	.	.	Montagu, Deacon, and De Gex's Reports.
Mont. & M'A.	.	.	.	Montagu and M'Arthur's Reports.
M. & Malk.	.	.	.	Moody and Malkin's Reports.
M. & Rob.	.	.	.	Moody and Robinson's Reports.
Mo. & P.	.	.	.	Moore and Payne's Reports.
Moore (C. P.)	.	.	.	Moore's Common Pleas Reports.
M. & Sc.	.	.	.	Moore and Scott's Reports.
Moor	.	.	.	Sir Francis Moor's Reports.
M. & Cr.	.	.	.	Mylne and Craig's Reports.
M. & K.	.	.	.	Mylne and Keene's Reports.
Nev. & Man.	.	.	.	Neville and Manning's Reports.
Nev. & P.	.	.	.	Neville and Perry's Reports.
N. R.	.	.	.	Bosanquet and Puller's New Reports.
Noy	.	.	.	Noy's Reports.
Owen	.	.	.	Owen's Reports.
Palm.	.	.	.	Palmer's Reports.
Park.	.	.	.	Parker's Reports.
Park's Ins.	.	.	.	Park, J. A. on Insurance.
Peake's Ad. Ca.	.	.	.	Peake's Additional Cases.

Peake's N. P. C.	.	.	Peake's Nisi Prius Cases.
P. & D.	.	.	Perry and Davison's Reports.
Phill.	.	.	Phillips's Reports.
Phill. Ecc. Rep.	.	.	Phillimore's Ecclesiastical Reports.
Phillipps's Ev.	.	.	Phillipps on Evidence.
Plowd.	.	.	Plowden's Commentaries.
Pollexf.	.	.	Pollexfen's Reports.
Postleth. Dict.	.	.	{ Postlethwayt's Universal Dictionary of Trade and Commerce.
Prec. in Chanc.	.	.	Precedents in Chancery.
Pri.	.	.	Price's Reports in the Court of Exchequer.
P. Wms.	.	.	Peere Williams's Reports.
R. A.	.	.	Rolle's Abridgments.
Rast. Ent.	.	.	Rastall's Entries.
Raym.	.	.	Lord Raymond's Reports.
Raym. T.	.	.	Sir Thomas Raymond's Reports.
Rep.	.	.	Sir E. Coke's Reports.
Rep. Ch.	.	.	Reports in Chancery.
Rich. C. P.	.	.	Richardson's Practice, Common Pleas.
R. T. H.	.	.	Reports time of Hardwicke, C. J. B. R.
R. T. H.	.	.	Reports time of Holt, C. J. B. R.
Rob. A. R.	.	.	Robinson's Admiralty Reports.
Rol. Abrid.	.	.	Rolle's Abridgment.
Rol. R.	.	.	Rolle's Reports.
Rose	.	.	Rose's Cases in Bankruptcy.
Run. Eject.	.	.	Runnington's Ejectment.
Russ.	.	.	Russell's Reports.
Russ. & M.	.	.	Russell and Mylne's Reports.
Ry. & M.	.	.	Ryan and Moody's Nisi Prius Reports.
Salk.	.	.	Salkeld's Reports.
Saund.	.	.	Saunders's Reports.
Say.	.	.	Sayer's Reports.
Sch. & Lef.	.	.	Schoale and Lefroy's Reports.
Scott	.	.	Scott's Reports, C. P.
Scott's N. R.	.	.	Scott's New Reports.
Sess. Ca.	.	.	Session Cases.
Shep. Touch.	.	.	Shepherd's Touchstone.
Show.	.	.	Shower's Reports.
Show. P. C.	.	.	Shower's Parliamentary Cases.
Sidf.	.	.	Siderfin's Reports.
Sim.	.	.	Simons's Reports.
Sim. & St.	.	.	Simons and Stuart's Reports.
Skin.	.	.	Skinner's Reports.
Starkie N. P. C.	.	.	Starkie's Nisi Prius Cases.
Str.	.	.	Strange's Reports.
Sty.	.	.	Style's Reports.
Sugd. V. & P.	.	.	Sugden's Law of Vendors and Purchasers (10th Edit.)
Swanst.	.	.	Swanston's Reports.
Taunt.	.	.	Taunton's Reports.
Tidd. Pr.	.	.	Tidd's Practice.
T. R.	.	.	Durnford and East's Term Reports, K. B.
Turn.	.	.	G. Turner's Reports.
Turn. & R.	.	.	Turner and Russell's Reports.
Tyrw.	.	.	Tyrwhitt's Reports.
Tyrw. & G.	.	.	Tyrwhitt and Granger's Reports.
Vaugh.	.	.	Vaughan's Reports.
Ventr.	.	.	Ventris's Reports.
Ves.	.	.	Vesey, senr's Reports.
Ves. jun.	.	.	Vesey, junr's Reports.
Ves. & B.	.	.	Vesey and Beames's Reports.
Vet. entr.	.	.	Veteres Intrationes.
Vid. Ent.	.	.	Vidian's Entries.
Vin. Abr.	.	.	Viner's Abridgment.
Went. Off. Exor.	.	.	Wentworth's Office of Executor.
West, C. T. H.	.	.	West's Cases in Time of Lord Hardwicke.

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Willes	Willes's Reports.
Wils.	Wilson's K. B. & C. P. Reports.
Winch.	Winch's Reports.
Winch. Ent. . . .	Winch's Entries.
H. Wood	Hutton Wood's Decrees in Tithe Cases.
Yelv.	Yelverton's Reports.
Younge	Younge's Reports.
Y. & C.	Younge and Collyer's Reports in Exchequer.
Y. & C. N. C. . .	{ Younge's and Collyer's New Cases in Chancery, V. C.
Y. & J.	{ Knight Bruce.
	Younge's and Jervis's Reports.

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REPORTS.	STATES.	ABBREVIATIONS.
Addison	Penn.	Addis. R.
Aiken	Vt.	Aik. Vt. R.
Alabama	Ala.	Ala. R.
American Law Register	Penn.	Am. L. R.
Angell	R. I.	Rh. Isl.
Anthon's Nisi Prius Cases	N. Y.	Anth. N. P. C.
Appleton	Me.	Maine R.
Ashmead	Penn.	Ashm. R.
Bailey	S. Car.	Bail. R.
Bailey's Chancery	S. Car.	Bail. Chy. R.
Baldwin	U. S. 3d Cir. Ct.	Baldw. R.
Barbour's	N. Y.	Barb. R.
Barbour's Chancery	N. Y.	Barb. Chy. R.
Barr	Penn.	Pa. State.
Bay	S. Car.	
Bee	U. S. Dist. S. Car.	
Bibb	Ken.	
Binney	Penn.	Binn. R.
Blackford	Ind.	Blackf. R.
Bland's Chancery	Md.	
Blatchford	U. S. 2d Cir. Ct.	Blatch.
Bradford	N. Y. Sur.	Brad.
Brayton	Vt.	Brayt. R.
Breese	Ill.	
Brevard	S. Car.	Brev. R.
Brightly	Penn. N. P.	Bright.
Brockenbrough	U. S. 4th Cir. Ct.	Brock. R.
Brockenbrough and Holmes's Cases	Va.	1 Va. Ca.
Brockenbrough's Cases	Va.	2 Va. Ca.
Browne, (P. A.)	Penn.	Browne's R.
Burritt	Wisconsin	Bur.
Caines' N. Y. Term	N. Y.	Cain. R.
Caines' Cases in Error	N. Y.	Cain. Cas. R.
Carolina Law Repository	N. C.	Car. L. Rep.
Call	Va.	
Cameron and Norwood	N. C.	Cam. & Nor. or C. & N.

ABBREVIATIONS OF AMERICAN REPORTS.

REPORTS.	STATES.	ABBREVIATIONS.
Carter	Ind.	Cart.
Casey	Penn.	Penn. St. Rep.
Charlton, (T. U. P.)	Ga.	Charlt. R.
Charlton, (R. M.)	Ga.	R. M. Charlt. R.
Cheves	S. Car.	Ch. S. C. R.
Chipman, (N.)	Vt.	N. Chipm. R.
Chipman, (D.)	Vt.	Chipm. R.
Clarke's V. Chancery	N. Y.	Clarke's Ch'y.
Cobb	Ga.	Geo. R.
Coleman's Cases	N. Y.	Col. Ca.
Coleman's Caines' Cases	N. Y.	Col. & Ca. Ca.
Comstock	N. Y.	Coms.
Conference. See Cameron and Norwood	N. C.	
Connecticut	Conn.	Conn. R.
Constitutional	S. Car.	Const. R.
Constitutional. New Ser.	S. Car.	Const. R. N. S.
Cooke	Tenn.	
Cowen	N. Y.	Cow. R.
Coxe	N. J.	
Crabbe	U. S. Pa. Dist.	Crabbe.
Cranch	U. S. S. C.	Cran. R.
Cushing	Mass.	Cush.
Dallas	Penn.	Dall. R.
Dana	Ky.	Da. Ky. R.
Day	Conn.	
Daveis	U. S. Me. Dist.	Dav.
Denio	N. Y.	Den. R.
Dessaussure	S. Car.	Dessaus. R.
Devereux Equity	N. Car.	Dev. Eq. R.
Devereux Law	N. Car.	Dev. R.
Devereux and Battle	N. Car.	Dev. & Bat. R.
Devereux and Battle's Equity	N. Car.	Dev. & Bat. Eq. R.
Douglass	Mich.	Doug. R.
Dudley	Ga.	Dud. Ga. R.
Dudley's Law and Equity	S. Car.	Dud. S. C. R.
Edwards's Chancery	N. Y.	Edw. Ch. R.
English	Arkansas	Eng.
Fairfield	Me.	Fairf. R.
Freeman's Chancery	Miss.	Free. Chy.
Gallison	U. S. 1st Ct. Ct.	Gall. R.
Gill	Md.	
Gill and Johnson	Md.	Gill & Johns. R.
Gilmer	Va.	Gilm. R. or Va. R.
Gilman	Id.	
Gilpin	U. S. Pa. Dist.	Gilp. R.
Grattan	Va.	Grat. Va.
Gray	Mass.	Gray.
Green	N. J.	
Green	Iowa	
Green's Chancery	N. J.	
Greenleaf	Me.	Greenl. R. (Maine R.)
Griswold	Ohio	Ohio R.
Hall's Superior Court	N. Y.	Hall's R.
Halsted	N. J.	Halst. R.
Hammond	Ohio	Ham. R. & Ohio R.
Hardin	Ky.	Hard. R.
Harper's Law	S. Car.	Harp. R.
——— Equity	S. Car.	Harp. Eq. R.
Harrington	Del.	Harringt. R.
Harris	Pa.	Pa. State R.
Harris and Gill	Md.	Har. & Gil.
——— and Johnson	Md.	Har. & Johns.
——— and M'Henry	Md.	Har. & McH.

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REPORTS.	STATES.	ABBREVIATIONS.
Harrison	N. J.	Har. N. J. R.
Hawks	N. C.	Hks. N. C. R.
Haywood. Vols. 1 & 2 ,	N. C.	Hay. R.
——— Vols, 3, 4 & 5	Tenn.	Hay. R.
Henning and Munford	Va.	Hen. & Mun. R.
Hill	N. Y.	Hill's N. Y.
———	S. Car.	Hill's S. C.
Hill's Chancery	S. Car.	Hill's Ch. R.
Hoffman	N. Y.	Hoff. R.
Hopkins's Chancery	N. Y.	Hopk. R.
Hopkinson's Admiralty Dec.	U. S. D. C.	Gilp. R.
Howard	Miss.	How. Mi.
———	U. S. S. Ct.	How. S. C.
Hughes	Ken.	Hugh. R.
Humphrey	Tenn.	Hum. Ten.
Iredell's Law	N. C.	Ire. N. C.
———, Equity	N. C.	Ire. N. C. Eq.
Jefferson	Va.	Jef. Va.
Johnson	N. Y.	Johns. R.
Johnson's Cases	N. Y.	Johns. Cas.
——— Chancery	N. Y.	Johns. Ch. R.
Jones	Penna.	Pa. State.
Kelly	Geo.	Geo. R.
Kentucky Decisions	Ken.	Ken. Dec.
Kentucky	Ken.	Ken. R.
Kernan	N. Y. Ct. App.	Ker.
Kirby	Conn.	Kirby.
Leigh	Va.	Leigh.
Littell	Ken.	Litt. R.
Littell's Select Cases	Ken.	Litt. Sel. Ca.
Louisiana	La.	La. R.
Magruder	Mar'd	Mar'd R.
Maine	Me.	Maine R.
Manning's	Mich.	Mich. R.
Martin's (N. Car.)	N. Car.	Mart. N. C. R.
Martin	La.	Mart. R.
———, (New Ser.)	La.	Mart. R. N. S.
——— and Yerger	Tenn.	Mar. & Yer. R.
Marshall's (A. K.)	Ken.	A. K. Marsh. R.
——— (J. J.)	Ken.	J. J. Marsh. R.
Mason	U. S. 1st Cir. Ct.	Mas. R.
Massachusetts	Mass.	Mass. R.
McCord	S. Car.	McC's R.
McCord's Chancery	S. Car.	McC's Ch. R.
McLean	U. S. 7th Cir. Ct.	McL's C. C. R.
McMullan's Chancery	S. Car.	McM's Chy. R.
McMullan	S. Car.	McM's R.
Meigs	Tenn.	Meigs's R.
Metcalf	Mass.	Metc. R.
Minor	Ala.	Min. R.
Miles	Penn.	Miles.
Missouri	Mo.	Mo. R.
Monroe	Ken.	Monr. R.
Monroe's (B.)	Ken.	B. Mon.
Munford	Va.	Munf. R.
Murphy	N. Car.	Murph. R.
New Hampshire	N. H.	N. Hamp. R.
New York Term. See <i>Caines</i> .		
North Carolina Term. See <i>Taylor</i> .		
Nott and McCord	S. Car.	N. & McC.
Ohio. See <i>Hammond</i> .		
Overton	Tenn.	Overt. or Tenn. R.
Paige's Chancery	N. Y.	Paige R.

REPORTS.	STATES.	ABBREVIATIONS.
Paine	U. S. 2d Cir. Ct.	Paine R.
Parson's	Pa. Chy.	Par.
Peck	Tenn.	Peck's R.
—	Ill.	Ill. Rep.
Pennington	N. J.	Penn. N. J. R.
Pennsylvania, by Rawle, Penrose & Watts	Pennsyl. R.
Peters's Admiralty	Pet. Ad. R.
— Circuit Ct	U. S. 3d Cir. Ct.	Pet. C. C. R.
Peters	U. S. Sup. Ct.	Pet. R.
Pickering	Mass.	Pick. R.
Pike	Arkansas	Pike's R.
Porter	Ala.	Por. R.
Randolph	Va.	Rand. R.
Rawle	Penn.	Rawle's R.
Rawle, Penrose & Watts. See <i>Pennsyl.</i>		
Rice	S. Car.	Rice R.
Rice's Equity	S. Car.	Rice Eq. R.
Richardson's Law	S. Car.	Rich. R.
— Equity	S. Car.	Rich. Eq. R.
Riley's Chancery Cases	S. Car.	Riley's Chy. Cas.
— Law Cases	S. Car.	Riley's Cas.
Robinson	Va.	Rob. Va. R.
—	La.	Rob. La. R.
Root	Conn.	Root.
Rogers's City Hall Recorder	N. Y.	Rog. Rec.
Ruffin (bound with Hawks).		
Sandford's V. Chancery	N. Y.	Sand. Chy.
Sandford's	N. Y.	Sand.
Saxton's Chancery	N. J.	Sax. Chy. R.
Scammon	Ill.	Sca. I. R.
Sergeant and Rawle	Penn.	S. & R.
Shaw, (10th and 11th Ver.)	Vt.	Vt. R.
Shepley	Me.	Shep. R. (M. R.)
Slade	Vt.	Verm. R.
Smedes and Marshall	Miss.	S. & M.'s Mi. R.
Smedes and Marshall's Ch.	Miss.	S. & M.'s Chy. R.
Smith	Ind.	Smith's R.
Southard	N. J.	South R.
South Carolina	S. Car.	S. Car. R.
Spear	S. Car.	Spr.'s R.
Spear's Eq.	S. Car.	Spr.'s Eq. R.
Spencer	N. J.	Spen.'s R.
Stanton	Ohio	Ohio R.
Stewart	Ala.	Stew. R.
Stewart and Porter	Ala.	Stew. & Por. R.
Story	U. S. 1st C. C.	Story's C. C.
Strobhart's	S. Car.	Strob. R.
— Chy	S. Car.	Strob. Chy. R.
Sumner	U. S. 1st C. C.	Sumn. R.
Taylor	N. Car.	Tayl. R.
Tennessee. See <i>Overton.</i>		
Tyler	Vt.	Tyler's R.
Tyng. (1st Mass.)	Mass.	Mass. R.
Van Ness	U. S. Dis. of N. Y.	V. N. P. C.
Vermont	Vt.	Vt. R.
Virginia	Va.	Va. Cas.
Wallace	U. S. 3d C. Ct.	Wal. R.
Wallace, Jr.	U. S. 3d Ct.	Wal. Jr.
Walker	Mis.	Walk. R.
Walker's Chancery	Michigan	Walk. Chy. R.
Ware	U. S. Dis. of Me.	
Washington's Ct. Ct.	U. S. 3d Cir. Ct.	Wash. C. C. R.
Washington	Va.	Wash. R.

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REPORTS.	STATES.	ABBREVIATIONS.
Watts	Penn.	
Watts and Sergeant	Penn.	W. & S. R.
Weston. (12th Vt.)	Vt.	Vt. R.
Wharton	Penn.	Whar. R.
Wheeler's Criminal Cases	N. Y.	W. Crim. C.
Williams	Verm.	Will. Verm.
Wright	Ohio	Wri. O. R.
Wendell	N. Y.	Wend. R.
Wheaton	U. S. Sup. Ct.	Wheat. R.
Wilcox	Ohio	Ohio R.
Woodbury & Minot	U. S. 1st C. C.	Wood. & M.'s R.
Wythe's Chancery	Va.	Wythe's R.
Yates's Select Cases	N. Y.	Ya. S. C.
Yeates	Penn.	Yeates's R.
Yerger	Tenn.	Yerg. R.
Zabriskie	New J.	Zab. (N. J. R.)

AN ABRIDGMENT
OF
THE LAW OF NISI PRIUS.

CHAPTER I.
OF THE ACTION OF ACCOUNT.

- I. IN WHAT CASES THE ACTION OF ACCOUNT MAY BE MAINTAINED. p. 1.
II. OF THE PLEADINGS AND EVIDENCE. p. 4.
III. OF THE JUDGMENT. p. 4.
I. *To Account*, p. 4. 2. *Final*, p. 6.—*Execution*, p. 6.
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I. *In what Cases an action of Account may be maintained.*

A PREFERENCE having, for many years, been given to the mode of proceeding by bill in a court of equity,(1) (where a discovery by the defendant's answer upon oath may be obtained,) and having the account taken before a master in the Court of Chancery, the action of account has in a great measure fallen into disuse.(2) It will not, therefore, be necessary to enter fully into the nature of this action, but briefly to apprise the reader in what cases it may be maintained,(3) what pleas

(1) Where plaintiff has an adequate remedy at law by action of account, it is held in Connecticut that chancery has no jurisdiction. *Stannard v. Whittlesey*, 9 Conn. Rep. 556. It has also been held in Connecticut, that no action at law will lie for the settlement of a partnership account, where the number of partners exceeds two; the remedy is in equity. *Beach v. Hotchkiss*, 2 Conn. 425. But it is otherwise in Pennsylvania, and probably in most of the other states. *Whelen v. Watmough*, 15 S. & R. 153; *Griffith v. Willing*, 3 Binn. 317.

(2) The want of a Court of Chancery has led to the revival and frequent use of this action, in Pennsylvania, and some other states. The reader will find a great deal of information upon its principles and proceedings, and an examination of the ancient, and, in England, obsolete learning upon the subject, in *James v. Browne*, 1 Dall. 339. *Crounlat v. McCall*, 5 Binn. 433; 3 S. & R. 7. *Whelen v. Watmough*, 15 S. & R. 153. Legislation has greatly aided this action in Pennsylvania, and much simplified its former complicated machinery. See Brightly's Purdon's Dig. tit. Account, p. 20, 8th ed. 1853; 2 Troubat & Haly's Pract. 131-160, 3d ed. 1853.

(3) In general it lies in all cases where one has received money as the agent of another, and where relief may be had in chancery. Per *Rogers, J.*, *Bredin v. Kingland*, 4 Watts, 422. By a client against an attorney at law to obtain an account of moneys received. *Ibid.* By a *cestui que trust* against trustee appointed by will to obtain an account of his receipts and expenditures; *Bredin v. Dwen*, 2 Watts, 95. But not for the

may be pleaded to it; and in what form judgment may be entered. To maintain an action of account, (a) there must be either a privity in deed, by the consent of the party (for an action of account does not lie against a disseisor or other wrong-doer,) or a privity in law, as in the case of a guardian, &c. (1) By the common law, an action of account for the rents and profits may be maintained by the heir, after [*2] he has attained the age of 14 years, (b) against the guardian (2) in socage; (3) so at the common law account will lie against a

(a) 1 Inst. 172, a.

(b) Lit. s. 123; 1 Inst. 89, a.

recovery of mesne profits by plaintiff in ejectment, even where the action of trespass is lost by the death of the defendant, unless, perhaps, under circumstances of peculiar hardship. *Harker v. Whittaker*, 5 Watts, 474.

"In Pennsylvania, the action of account render lies between partners; between client and attorney; tenants in common; guardian and ward; trustee and *cestui que trust*; against an executor for a legacy, and in general in all cases where one man has received money as the agent of another, and where relief may be had in chancery. Thus, an action of account render will lie upon a contract of lease, by the landlord against the tenant, to recover that portion of the profits of the demised property which, by his contract, he was bound to render as rent. But to support this action, generally a contract, express or implied, must be shown; the liability to account for the profits of an infant's lands, is an excepted case. So, also, it lies for and against executors and administrators.

"The action of account render is a very unfit instrument to ascertain and adjust the real merits of long, complicated, and cross accounts. It is inapplicable to a vast variety of cases of equitable claims, of constructive trusts, of fraudulent contrivances, and of tortious misconduct. There is a want of due power to draw out the proper proofs from the party's own conscience; and there is also an inconvenience in taking the account at law, by reason of the incapacity of the legal procedure to operate beyond the immediate plaintiff and defendant, or to include rights or claims which may be collaterally involved.

"The difficulties thus existing at law, are effectually obviated by the procedure in equity. A foundation is first laid for all necessary inquiries, by the discovery elicited by the defendant's answer. The account is then referred to a master, who is armed with power, not only to examine witnesses, but also to examine the parties themselves, and to compel production of books and documents. It is not liable to interruption by controversies on particular items, but is carried on continuously, to its close. The master reports the final result to the court. The report may be excepted to on any points which are thought objectionable; and all such points are simultaneously re-examined by the court, and either at once determined, or, if necessary, referred back to him for review. As soon as the report is finally settled and confirmed, a decree is made for payment of the ultimate balance. If the interests of other persons are entangled in the account, the court may require that they be made parties to the suit, or may direct, if necessary, the institution of cross suits; and thus, having all their interest before it, may so modify a single decree, as effectually to embrace and arrange them all." *Brightly's Eq. Jur.* §§ 121, 122, 123; *Adams's Eq.* 225; 1 *Story's Eq.* § 449.

(1) *S. P. King of France v. Morris*, cited 3 Yeates, 251; 15 S. & R. 159. If the sale of a chattel by one tenant in common be authorized or ratified by the other tenant, and the purchaser acquiesce in the claims of the latter, this creates a privity between the latter tenant and the purchaser, which is sufficient to maintain this action. *Oviatt v. Sage*, 7 Conn. Rep. 95.

(2) It is the only action that can be brought against a guardian *qua* guardian in a court of law, other than an action on his bond. *Green v. Johnson*, 3 Gill & Johnson, 390. The moment a ward is emancipated from the authority of his guardian by reaching the age prescribed by law, his cause of action is complete. The relation which existed between them ceases to be a subsisting trust: an action of account may be immediately instituted in a court of law, and from that time the act of limitation dates the commencement of its operation. *Ibid.*

(3) The guardian in socage, like all other accountants, by the common law may claim an allowance of all his reasonable costs and expenses.

bailiff(1) or receiver,(c) and in favor of trade and commerce by one merchant against another.(d) But this action did not lie for one joint-tenant, or tenant in common, against his companion, although he should have taken the whole profits to his own use, unless he had been appointed bailiff to render an account.(e) But now, by stat. 4 Ann. c. 16, s. 27, an action of account may be maintained by one joint-tenant, or tenant in common, his executors or administrators, against the other, as bailiff, for receiving more than his share or proportion,(2) and against the executors or administrators of such joint-tenant or tenant in common. One tenant in common brought an action of account against another,(f) and charged him as bailiff and receiver. As to the account given against him as bailiff, the defendant entered into the account; and as to the account against him as receiver, demurred specially, because the plaintiff did not state by whose hands the defendant received the money: the court held the exception good, notwithstanding 4 Ann. c. 16, s. 27, for that statute only empowered the plaintiff to charge the defendant as bailiff; but as the plaintiff had gone further, and charged the defendant as receiver, he ought to have shown by whose hands he received the money, as was required by the common law.(g) As the statute is a general statute, it is not necessary for the plaintiff to set it forth, or to refer to it; but he must set forth so much as to bring his case within the statute;(h) and, therefore, in an action for account by one tenant in common against another, upon this statute, the plaintiff must state in his declaration, that he and defendant were tenants in common, and that defendant has received more than his just share.(3) It is not sufficient to charge defendant merely as bailiff.(4)

(c) 1 Inst. 172, a.

(d) Cited by *Tindal*, C. J., in *Cottam v. Partridge*, 4 M. & Gr. 284; 4 Scott's N. R. 819.

(e) 1 Inst. 200, b.

(f) *Walker v. Holyday*, Comyn's Rep. 272.

(g) 1 Inst. 172, a.

(h) *Wheeler v. Horne*, Willes, 208; *Sturton v. Richardson*, 13 Law J. (N. S.) Exch. 281.

(1) By bailiff is understood a servant who has administration and charge of lands, goods, and chattels, to make the best benefit to the owner. Against such bailiff an action of account lies for the profits which he hath raised or made, or might by his industry or care have reasonably raised or made, his reasonable charges and expenses being deducted. *Sergeant v. Parsons*, 12 Mass. 149. An infant shall not be charged on such account. 1 Inst. 172, a. "Every person who enters on the estate of an infant, enters as a guardian or bailiff for the infant." Per *Ld. Hardwicke*, C., in *Dormer v. Fortescue*, 3 Atk. 130; 2 Troub. & Haly's Pr. 133, 3 ed.

(2) A tenant in common is entitled to a deduction of a just proportion of such expenses as were necessarily disbursed for the common estate. *Anderson v. Greble*, 1 Ashmead, 136.

(3) One tenant in common cannot bring an action for money had and received, against co-tenant, for his share of the rent received by such co-tenant, but his remedy is only by action of account. *Thomas v. Thomas*, 14 L. S. 467.

(4) *S. P. Irvine v. Hanlon*, 10 S. & R. 221; *Griffith v. Willing*, 3 Binn. 317; *M'Fadden v. Sallada*, 6 Barr, 283; *Jourdan v. Wilkins*, 2 Wash. C. C. R. 482. Under the stat. of 4 Anne, a tenant in common is answerable only for so much as he has actually received more than his just share, and not, as in the case of bailiffs at common law, for what he might have made. *Irvine v. Hanlon*, *M'Fadden v. Sallada*, *Jourdan v. Wilkins*, *supra*. *Quære*, Whether, if one tenant in common receive the whole profits, claiming them as his own, and denying the right of the other, he would be liable to this action. *Id.* 222. At common law, independently of the 3 & 4 Anne, one tenant in common may bring an action of

An action of account against a tenant in common on this statute differs from an action of account against a bailiff at common [*3] law; *for a bailiff at common law was answerable, not only for his actual receipts, but for what he might have made of the lands without his wilful default: but, by the words of this statute, a tenant in common, when sued as bailiff, is answerable only for so much as he has actually received more than his just share and proportion.(i)

Where there is a running account between a merchant and broker, the proper remedy for recovering the balance is by an action of account and not of assumpsit;(k) but for the balance of an account assumpsit lies, though the items on each side are numerous.(l) (1) At the common law(m)(2) executors in general could not have this action for an account to be made to the testator, because the account rested in privity; but the stat. Westm. 2, 13 Ed. I. stat. 1, c. 23, gave this action to executors, and (according to Sir Edward Coke, 1 Inst. 89, b. 2 Inst. 404,) the statute of 31 Ed. III. stat. 1, c. 11,(3) to administrators.

(i) Per Willes, C. J., delivering the opinion of the court in *Wheeler v. Horne*, Willes, 209, 210.

(k) *Scott v. M'Intosh*, 2 Campb. 238.

(l) *Tomkins v. Willshear*, 5 Taunt. 431. See also *Arnold v. Webb*, 5 Taunt. 432, n.

(m) Lit. s. 125; 1 Inst. 89, b. 90, b; 2 Inst. 403.

account against his co-tenant, as bailiff, where the latter is so expressly appointed. *M'Adam v. Orr*, 4 W. & S. 550. The English statutes have been more or less re-enacted in the United States. Clay's Alabama Rev. Laws, 226; 1 Morehead & Bro. Rev. Laws of Ky. 315; Rev. Laws of Vt., 1839, 219; Rev. Laws of N. J., 1847, 46; Howard & Hutch. Rev. Laws of Mississippi, 547; Rev. Laws of Arkansas, 1838, 60; Rev. Laws of Missouri, 1845, 56; 2 R. S. of New York, 306; Rev. Laws of Wisconsin, 1839, 311; Purdon's Dig. of Pa. Laws, 1841, 41, 1037; 1855, 20.

(1) "The right to file a bill for an account has been considered in numerous cases, though never to my knowledge precisely limited. As a general rule, such a bill may be filed in cases where the account is complicated and consists of a great variety of items, so that it cannot be properly taken at law, or when a court of equity has jurisdiction on some other ground, as where a fiduciary relation existed between the parties, or in cases of trust. The relation of principal and factor has been deemed one of those relations. The factor is considered to partake of the character of a trustee. And so it is, as has been said, 'with regard to an agent dealing with any property; he obtains no interest himself in the subject-matter beyond his remuneration; he is dealing throughout for another, and though he is not a trustee according to the strict technical meaning of the word, he is *quasi* trustee for that particular transaction for which he is engaged; and therefore, in these cases, the courts of equity have assumed jurisdiction.' *Foley v. Hill*, 2 Ho. Lords Cas. 28, 35. There can, I think, be no doubt where the dealings between merchant and merchant have been continuous through a series of years, and especially where they have never been finally closed, and there are various items of accounts on both sides, it is a proper case for a bill for an account. It would certainly appear to be unjust to allow a final balance to be exacted, while there was any thing in the previous dealings unadjusted or only adjusted by a settlement made in ignorance of a just and proper claim." *Roots v. Wye*, 2 Handy, 234, per Gholson, J.

(2) One of two or more joint purchasers of a tract of land, under an agreement to resell and divide the profits, may sue the party who received the proceeds for his share in *assumpsit*, and need not resort to the action of account render, as there is but one item to settle between them. *Brubaker v. Robinson*, 3 Penn. Rep. 295. So also on any single transaction; *Galbreath v. Moore*, 2 Watts, 86; *M'Faddin v. Erwin*, 2 Wharton, 40. So also for his share of loss without a balance struck or promise to pay; *Peltzer v. Sewall*, 12 Wend. 386.

(3) This statute empowers the ordinary, in the case of intestacy, to depute the next and most lawful friends of the intestate to administer his goods; which deputies shall have an action to demand and recover, as executors, the debts due to the intestate. See a precedent of a declaration in account by an administrator. *Vidian's Entries*, 75.

The stat. 25 Ed. III. stat. 5, c. 5, has extended the same remedy to the executors of executors.(1) At the common law this action did not lie *against* the executors of the accountant;(2) but by stat. 4 Ann. c. 16, s. 27, an action of account may be maintained against the executors or administrators of a guardian, bailiff, or receiver. This action does not lie against an infant;(n)(3) nor by one executor against another,(o) for the possession of the one is the possession of the other.(4)

(n) 1 Inst. 88, b; 1 Inst. 172, a.

(o) F. N. B. 271, 4to edit. note (f).

(1) But where A. died, having appointed his widow B., together with C. and D. his executors, and B. afterwards married E. who received money of the estate and died, having appointed F. his executor, it was held that an action of account might be maintained by B. C. and D. against F. *Smith v. Chipman*, 6 Conn. Rep. 14.

(2) These rules of the common law, viz.: 1. That account did not lie *by* executors,* 2. That account could not be maintained *against* executors, had some exceptions. As to the first, an account might have been maintained at the common law by the executors of *merchants*; as to both, in the case of the king, the action lay.† It should also be remarked, that though at the common law executors in general were not compellable to account; yet if they consented to settle an account, they were liable to an action of debt for the balance.‡

(3) Hence an infant cannot be guardian in socage. 1 Inst. 88, b. Guardianship in socage is said not to exist in Pennsylvania. Gord. Law of Decedents, 426-434.

(4) *In what cases the Action of Account may be maintained.*—The action of account, or account render, is an existing common law remedy in the United States, where it has not been abolished by statutory enactments; 2 Greenl. Evid. § 34; but it has fallen into disuse; the bill in equity or the action of assumpsit being substituted for it.

In some of the States, assumpsit and debt have been substituted for account, while in others, courts of equity are resorted to, having concurrent jurisdiction with courts of law in most matters of account. If a man receives money belonging to another, and renders an account of it, the remedy for the balance due from him is by assumpsit or debt. But if he refuses to render an account of the money received by him, and the owner has no evidence of the receipt, the only mode of compelling him in a court of law to render an account and pay over the balance, is by action of account. The foundation of the remedy being, that the plaintiff wants an account and is not able to prove the items without it. Pulling on Acc. 115; 1 Arch. N. P. 196; 1 Steph. N. P. 1. The remedy by action of account is said to have been first brought into use in the time of Hen. 3; 1 Spence's Chancery, 49.

In Connecticut it will lie in every case where a person has received money to the use of another; especially if it be received of a third person, to be delivered over. *Mumford v. Avery*, Kirby, 163.

It also lies against a woman as receiver of property, though she were a *feme covert* the time of receiving it. *Green v. Johnson*, 3 Gill & John. 388; *Smith v. Woods*, 3 Verm. 485. And it has been held that where one assumes to be guardian, or agent of a guardian, and as such enters on an infant's lands and receives rents, the infant may treat him as a trespasser, or waive the tort and bring an action of account or bill in equity. *Sherman v. Ballou*, 8 Cow. 304; *Stanard v. Whittlesey*, 9 Conn. 556.

"Upon examination of the cases," says Kennedy, J., in *Thouren v. Paul*, 6 Whart. 615, "it will be perceived that the action of account render is only maintainable by the plaintiff against the defendant, upon the ground that the latter has been intrusted with the care of the lands belonging to the former, and had the capacity at least to receive, if he did not actually receive the rents and profits thereof, for the use of the owner, or with the management and disposition of goods, partly if not wholly belonging to the plaintiff, and been in receipt of the moneys arising therefrom, either in part or in whole. And as between merchants, who are copartners in trade, it is also quite clear that at common law the action of account render can only be maintained by one against the other, upon the ground that the defendant has been intrusted with the goods belonging to them, to be disposed of by him for the common benefit of both, or has received moneys for the use of both." Account render will lie upon a contract of lease by the landlord to recover

* Hargrave's Co. Lit. 90, b, n. (3).

† F. N. B. 117; 11 Rep. 90, a.

‡ F. N. B. 267, Lord Hale's note.

*II. *Of the Pleadings and Evidence.*

THE defendant may plead in bar to this action, (p) that he was never bailiff or receiver, or that he has fully accounted, or that he has ac-

(p) 1 R. A. 121, vet. Intr. 16; Rast. Entr. 17, 19, 21.

the portion of the profits of the property leased which, by his contract, he was bound to render as rent. *Long v. Fitzimmons*, 1 Watts & Serg. 530.

And if the tenant sells the landlord's share of the profits without his consent, he becomes liable for the price, although the buyer has become insolvent, which the landlord may recover in account render. *Ib.*

In account render a count charging the defendant as bailiff of the plaintiff's land, may be joined to a count charging him as tenant in common with the plaintiff. *M'Adam v. Orr*, 4 Watts & Serg. 550. The declaration may be amended by adding such count. *Ib.* If an agreement of settlement between partners be set aside, in an action upon it, on the ground of fraud in obtaining it, the parties are thereby restored to their original rights and liabilities, and an action of account render will afterwards lie by one against the other. *Leonard v. Leonard*, 1 W. & S. 342; *Cochran v. Perry*, 8 Ib. 262.

Receiving an account rendered without objection, does not preclude the party from afterwards showing an unobserved error which passed without notice by the common blunder of both parties. *Jones v. Dunn*, 3 W. & S. 109. In an action of account render, the declaration stated that the plaintiff was possessed of an undivided third part of a certain limekiln, and that the defendant had the care and management of the whole, &c.; and, as bailiff of the plaintiff, to render an account to the plaintiff of his share, &c. It appeared that the plaintiff and defendant, together with a third person, were tenants in common of the limekiln. It was held, that the third tenant in common was a competent witness for the plaintiff, and that his testimony was admissible to prove the tenancy in common, &c.; and the receipt of money by the defendant. *Steffen v. Hartzell*, 5 Whart. 448. Account render lies against an attorney at law, at the suit of his client, to obtain an account of moneys received. *Bredin v. Kingland*, 4 Watts, 420; *Walton v. Dickerson*, 7 Barr, 376. The foundation of the action of account render, by one partner against another, is that each must account for that portion received by him, and that one is not bound for the deficiencies of the others, unless a joint liability is distinctly proved. *M'Fadden v. Salada*, 6 Barr, 283; *Whelen v. Watmough*, 15 S. & R. 153. Account render will lie for a landlord against a tenant, where by the terms of the lease, the latter was to deliver an account to the former for a proportion of the profits received, *e. g.* for tolls at a mill. *Long v. Fitzimmons*, 1 W. & S. 530. The plaintiffs being the owners of certain goods, sold one half of them to A. and took from him his note at six months, for the price, under an agreement that all the goods should be shipped to a foreign port, on their joint account; the shipment to be under the control of the plaintiff, and the profit and loss to be equally divided between them. The shipment was accordingly made by the plaintiff, but resulted in a loss. None of the goods or of the proceeds, went into the hands of A. Held, that under these circumstances the plaintiff could not maintain an action of account render against A. *Thouron v. Paul*, 6 Whart. 615. Account render does not lie by the administrator of a wife, against her husband's grantee, for the profits of land conveyed by him without her separate acknowledgment. *Conklin v. Bush*, 8 Barr, 514. The plaintiff and defendant, with two others, entered into a contract to perform certain work. Plaintiff, defendant, and one of the others, contributed all the capital. The amounts contributed by each did not appear. All the capital advanced, and all the payments received, were sunk in the works. Held, that in such a case, account render would not lie, but relief must be obtained by a bill in equity under the act of assembly of 13th of October, 1840. *M'Fadden v. Salada*, 6 Barr, 283. Account render lies against a trustee to enforce payment to his *cestui que trust* of the trust fund. *Dennison v. Gochring*, 7 Barr, 175; *Bredin v. Dwen*, 2 Watts, 95.

The action of account lies to recover a balance which may be found due upon the settlement of the partnership, and not to recover a specific sum of money received by one partner for the benefit of the concern. *Wood v. Merrow*, 25 Verm. (2 Deane,) 340. Where the privity which exists between the parties arises from the connection between them as partners, the connection should be stated in the declaration. Where the action is to recover money which the defendant has received as part of the capital stock of the firm

counted - before auditors assigned by the plaintiff; or that he has accounted before to the plaintiff himself; (*q*) or any matter which tends to show that he was never accountable; or a release.(1) When the plaintiff charges the defendant as receiver from such a time to such a time, (*r*) the defendant must answer the whole time(2) precisely. By stat. 21

(*q*) F. N. B. 117. D. note (*d*), recognized in *Baxter v. Hozier*, 5 Bingh. N. C. 298.

(*r*) *Southcot v. Rider*, T. Raym. 57.

and for which he ought to account, he should be charged as receiver and not as bailiff. *Wood v. Merrow*, 25 Verm. 340.

But this action does not lie against an infant, nor a wrong-doer, or any other person where no privity exists. *Harker v. Whitaker*, 5 Watts, 474. Nor for the settlement of partnership accounts, unless there be a joint liability on the part of the defendant to render an account to the plaintiff. *Whelen v. Watmough*, 15 S. & R. 153; *Brach v. Hotchkiss*, 2 Conn. 424, 430. Nor to recover mesne profits. *May v. Williams*, 3 Verm. 239; nor between tenants in common and joint tenants of goods, occupying the goods in common. *Murray v. Rawson*, 3 Hill, 59; nor to recover damages as for a tort. *Brensmid v. Mayo*, 9 Vt. 31.

In England, the action of account lies in all common law courts of record. F. N. B. 129; 2 Inst. 380. And both in England and in this country, in matters of account courts of equity possess a concurrent jurisdiction in most if not in all cases with courts of law. *Mitchell v. Great Works Milling and Manufacturing Company*, 2 Story, 648; *Post v. Kimberly*, 9 John. R. 470; *Jones v. Bullock*, 2 Dev. Ch. 368; *Nelson v. Harris*, 1 Yerg. 360; *Bruce v. Burdet*, 1 J. J. Marsh. 80.

(1) "The general issue in account render is, 'never bailiff or receiver,' or, as it is expressed in the old law language, *ne unques* bailiff or receiver. Whatever matter goes to show the defendant never was accountable, may be so pleaded. The defendant may also plead in bar, *plene computavit*, (fully accounted,) or a release or nonage, or payment to the plaintiff or the plaintiff's order. So he may plead he was the plaintiff's servant, to drive his plough or keep his cattle, for then he was never accountable. So an award of all matters between the parties, so that the plaintiff accepted the plaintiff's bond for the same sum. So that the account is barred by the statute of limitations, for this is a plea in bar. So he may plead the general issue, and *plene computavit*; and when this latter plea is so added, it is like the plea of payment added to *non est factum*. The making of the deed is still denied. So *plene computavit* thus added does not admit of record a liability to account; nor would the jury be confined to the inquiry whether the defendant had fully accounted. The two pleas, taken together, make the defendant say to the plaintiff: 'We never were joint bailiffs and receivers; but if you prove we were, then I will show that I have fully accounted.'"

Where the action is brought against two jointly, one of whom pleads the general issue, and the other makes default, on which judgment by default is entered against him, the former shall account alone; as writs of summons and *capias* are originals in this state, and no process of outlawry can be had against the absent defendant.

It is a rule with respect to pleading, in this action, 1. That whatever matter can be pleaded in bar to the action, must be so pleaded; and that whatever matter which may be so pleaded in bar, cannot afterwards be pleaded before the auditors; the reason is, to avoid trouble and charge to the parties.

2. Except in case of release or *plene computavit*, if the party is once chargeable and accountable, he cannot plead in bar, but must plead before auditors; these exceptions are because a release and having fully accounted are total extinctions of the right of action, which the court is to judge of; and even in those cases they must be pleaded specially, and cannot be given in evidence on *ne unques receiver*. Therefore he cannot plead in bar that he has made payment of the money he received to account with, or that he has made satisfaction for the same; for these pleas, being matters that show he was once accountable, are only to be pleaded before auditors. 2 Troubat & Haly's Pract. 145, 3rd ed. 1853, and cases there cited.

(2) It is a general rule in pleading, that the plea must answer every material part of the declaration. If a plea begin with an answer to the whole, but in truth the matter pleaded be only an answer to part, the plea is bad, and the plaintiff may demur; but if the plea begin as an answer to part, and is in truth an answer to part only, it is a discontinuance, of which the plaintiff may take advantage; the plaintiff, however, ought not

Jac. I. c. 16, s. 3, actions of account (other than such accounts as concern the trade of merchandize between merchant and merchant, their factors, or servants) must be commenced and sued within six years next after the cause of action.^(s) If the defendant plead, that he was never receiver,^(t) he cannot give in evidence a bailment to deliver to another person, and that he has delivered accordingly: for though this special matter prove that he is not accountable, yet, as, upon the delivery, he was accountable conditionally (*viz.* if he did not deliver over,) the evidence does not support the plea. So a release cannot be given in

(s) See *Cottam v. Partridge*, 4 M. & Gr. 271; 4 Scott's N. R. 819; *post*, tit. Assumpsit.

(t) 2 Roll. Abrid. 683, (F.) pl. 1.

to demur in this case, but to take his judgment for the part unanswered by *nil dicit*; for if the plaintiff demurs, or pleads over, the whole action is discontinued. 1 Roll. Abrid. 487, pl. 10; *Weeks v. Peach*, 1 Salk. 179; *Market v. Johnson*, 1 Salk. 180; *Vincent v. Boston*, 1 Lord Raym. 716; *Peers v. Henriques*, 2 Lord Raym. 841; Gilb. Hist. C. B. 155, 158.

"There must be evidence of a privity, either by contract, express or implied, or by law; and if the defendant is charged as bailiff, or guardian, or receiver, or tenant in common, or joint tenant, he must be proved to have acted in the specific character charged; for the measure of their liability is different; tenants in common and joint tenants being answerable for what they have actually received, without deducting costs and expenses; receivers being charged in the same manner, but allowed costs and expenses, in special cases, in favor of trade; and guardians and bailiffs being held to account for what they might, with proper diligence, have received, deducting reasonable costs and expenses." 2 Greenl. on Evid. § 37. *Sargent v. Parsons*, 12 Mass. 149; *Griffith v. Willing*, 3 Binn. 317; *Jordan v. Wilkins*, 2 Wash. C. C. R. 482; *Irvine v. Hanlon*, 10 S. & R. 221.

The defendant may plead, in bar to this action, that he was never guardian, bailiff, or receiver, or that he has fully accounted, or that he has accounted before auditors assigned by the plaintiff; or that he has accounted before to the plaintiff himself; or his infancy; or, if he be charged as receiver, that the plaintiff gave him the money, or assigned it for satisfaction of his debt, or he may plead in his discharge a release from the plaintiff of all actions, an arbitrament, or the statute of limitations, or that he was the plaintiff's hired servant or apprentice. 1 Steph. N. P. 3; Pull. Acc. 121; *Jordan v. Wilkins*, 2 Wash. C. C. 482; *Spaulding v. Dunlap*, 1 Root, 319; *Real v. Bertrand*, 4 Wash. C. C. R. 556; *Pickett v. Pearsons*, 17 Vt. 470; or any matter which tends to show that he was never accountable. All defences which admit the defendant to be once accountable, should be reserved for pleading by way of discharge before the auditors.

If the plea is that defendant accounted before two, it will be supported by evidence that he accounted before one of them only; for the accounting is the substance. Bull. N. P. 127, 4th ed. A plea of *plene computavit*, in an action of account, against a tenant in common and bailiff, is not satisfied by defendant's showing that he rendered an account of the produce of the sales of goods belonging to himself and plaintiff, together with an account of the charges attending the sales; he ought also to render an account of the loss, if any, accruing from the sales, or an account which shows an agreed-upon balance between plaintiff and defendant. *Baxter v. Hosier*, 5 Bing. N. C. 288.

An action of account by one partner against his copartners, for a settlement of the partnership accounts, must be commenced within five years next after the cause of action, and, unless so commenced, will be barred by the statute of limitations, for such accounts do not concern the trade of merchandise between merchant and merchant; and, therefore are not embraced by the exceptions to the statute. Pull. Acc. 23; *Perkins v. Turner*, 1 Har. & McHen. 400.

The proof under the plea of *plene computavit*, is different from what it is before the auditor, on the issue of nothing in arrear. The former defence seems to rest upon the ground of an express settlement of the dispute, and a surrender of all the property pertaining to the trust, while the latter issue is sustained by merely showing that there is nothing now in the defendant's hands for which he is liable to account; which may be shown either by proving that the property has been surrendered to the plaintiff, or to a third person by the plaintiff's direction, or that it has been destroyed, or has perished without the fault of the defendant. *Pickett v. Pearsons*, 17 Vt. 470.

evidence under the plea, that the defendant was never receiver.^(u) In account against the defendant^(x) as receiver by the hands of A. it is sufficient for the plaintiff to prove that A. directed the defendant to borrow of another to pay the plaintiff: that the defendant borrowed accordingly, and that A. gave bond to the lender.⁽¹⁾

(u) *Willoughby v. Small*, 1 Broul. 24.

(x) *Harrington v. Deane*, Hob. 36.

(1) The evidence for the plaintiff must support the material averments in the declaration. If the defendant is charged as bailiff or receiver, the allegation must be proved as laid; and if he is tenant in common, or joint tenant, he must be so charged, and proved to have acted in the specific character alleged; for the liability of persons acting in these several capacities is different. Tenants in common and joint tenants are only answerable for what they have actually received, and are not allowed costs and expenses; guardians and bailiffs are answerable for what they might have received, deducting reasonable charges and expenses; while receivers account for what they actually receive, without any allowance for costs and expenses, except in special cases in favor of trade and merchandise. *Griffith v. Willing*, 3 Binn. 319; *Jordan v. Wilkins*, 2 Wash. C. C. R. 482; *Irvine v. Hanlon*, 10 S. & R. 221; *Brensmid v. May*, 9 Vt. 31.

As between partners, it is sufficient to charge the defendant generally with the receipt of money to their joint benefit; and if the plaintiff prove that a partnership existed, that the defendant was the acting partner, and that he received any part of the sum charged, from any of the persons mentioned in the declaration, he is entitled to a general verdict on the issue of *ne unques receiver*. *James v. Browne*, 1 Dall. 339. But if the declaration is for the money of the plaintiff, and the proof is of money belonging to the plaintiff and others, as partners, the declaration is not supported. *Jordan v. Wilkins*, 2 Wash. C. C. R. 482. If there are several defendants, they must be proved to be jointly and not severally liable. *Whelen v. Watmough*, 15 S. & R. 158. A declaration in account, which alleges that the defendant was bailiff of the plaintiff of certain property, and which shows that the parties were joint tenants of the property, is sustained by evidence tending to show a joint ownership of the property, and that the defendant has received more than his share of the avails of the property, and this evidence, upon the issue whether the defendant was bailiff and receiver, will entitle the plaintiff to a verdict. *Pickett v. Pearsons*, 17 Vt. 359.

Where a claim has been assigned for valuable consideration, with power to collect the same for the use of the assignee, who afterwards receives the money, he is not bailiff and receiver, and the assignor, having parted with the legal interest, cannot maintain an action of account against him. His only remedy, if any, is in chancery, and not at law. *Dexter v. Hitchcock*, 10 Conn. Rep. 209.

A declaration in an action of account, by an administrator against a surviving partner in the business of attorneys, with the intestate, as bailiff and receiver, is good, although the declaration does not aver of what the defendant was bailiff, and does not aver of whom the defendant received. *Robinson v. Wright*, Brayt. 22. As between partners, it is sufficient for the plaintiff to charge the defendant generally with the receipt of the money to their joint benefit; and having proved a receipt by the hands of any one of the persons mentioned in the declaration, he is entitled to a general verdict upon the issue of *ne unques receiver*. *James v. Browne*, 1 Dall. 339. If the declaration charge the defendant as bailiff of certain goods belonging to the plaintiff, to make profit of for the plaintiff, and as receiver of certain sums by the hands of A. and B., being the money of the plaintiff; and the evidence is of money received from C. and D., on partnership account, the plaintiff and defendant being partners, the variance is fatal. *Jordan v. Wilkins*, 2 Wash. C. C. R. 482. In an action of account, for a note given by A., in the name and in favor of the plaintiff, received by the defendant, to be accounted for; on a plea of "never bailiff," &c., a note given by A. to the selectmen, for the use and benefit of the plaintiff, supports the issue. *Spalding v. Dunlap*, 1 Root, 319. A count against one as receiver, without stating what moneys were received, is bad. *May v. Williams*, 3 Vt. 239. Where plaintiff consigned to defendant a cargo of goods, to be sold on commission, he agreeing to return what were unsold, and he sold a part and delivered to the plaintiff an account current, debiting himself with all the goods and crediting the sales, leaving a large balance of unsold and unreturned goods; it was held, that these facts did not maintain the plea of "fully accounted," as the plaintiff could not have had "*in simul computassent*" against the defendant for the balance of account. *Reed v. Betran*, 4 Wash. C. C. R. 556; *Baker v. Biddle*, 1 Baldw. C. C. R. 418.

III. *Of the Judgment.*1. *To Account.* 2. *Final.—Execution.*

1. THERE are two judgments in this action:—the first judgment is, that the defendant do account, (y) usually termed a judgment [*5] **quod computet*. (1) This is in the nature of an award of the court, interlocutory only, and not definitive, (z) and whereon a writ of error does not lie. (2) It is, however, essentially necessary that this judgment should be entered; (a) for where the defendant pleaded that he had fully accounted, and issue being joined thereon, the jury found for the plaintiff, and assessed damages and costs, and judgment was entered accordingly, and execution taken out; the court, on motion, set aside the judgment and execution, observing that the judgment was wrong, for it ought have been only a judgment to account: and they compared the irregularity in this case to the irregularity of signing final judgment before interlocutory judgment. (3)

(y) Co. Ent. 46, b; Rast. Ent. 17.

(z) *Metcalf's case*, 11 Rep. 38, a.

(a) *Hughes v. Burgess*, Ca. Temp. Hard. 394.

(1) The form of this judgment, in the case of *Godfrey v. Saunders*, 3 Wils. 88, was as follows:—"Therefore it is considered, that the defendant account with the plaintiff of the time aforesaid, in which he (defendant) and the said S. S. were the bailiffs of the plaintiff, and had the care and administration of the aforesaid goods and merchandizes, &c. to be merchandized and made profit of for plaintiff; and the defendant in mercy, &c., because he hath not before accounted," &c. See forms of all the pleadings, &c., in this action, in Brownlow's Entries, tit. "Account Render." They are also copied into 5 Penn. Law Jour. p. 49.

(2) Accord. *Butler v. Zeigler*, 1 Penn. Rep. 135; 2 Troub. & Haly's Practice, 148, 3d edition, 1853.

(3) After the judgment, *quod computet*, (which may be by default and is then interlocutory only,) and auditors are assigned, the defendant may show before them any thing amounting to a discharge from the debt, as payment, delivery over of the money or goods, expenditure on behalf of the plaintiff, inevitable accident, or that he was robbed of them without his default, or that they were cast into the sea for the preservation of the ship, or that they were seized by the king's enemies, &c., provided the matter of discharge so pleaded be consistent with the previous verdict and judgment, and does not amount to a plea in bar of the action altogether. Pull. Acc. 128; 1 Steph. N. P. 3.

It is the province of the auditors to weigh the evidence and investigate the facts, and determine thereon, and a report will not be set aside for a mistake of facts. *Parker v. Avery*, Kirby, 353; *Wood v. Barney*, 2 Vt. 369. The report of the auditors must be certain, and state a special account. *Finney v. Harbeson*, 4 Yeates, 514. Exceptions must be made before the auditors, and cannot be taken after the report has been returned. *Moore v. Hunter*, 4 Yeates, 358; *Crousillat v. McCall*, 5 Binn. 433.

The plaintiff may recover in the final judgment, a larger sum than that demanded in his declaration, and where he declares for the value of his property as well as damages in rendering the judgment, each should be distinguished. *Gratz v. Phillips*, 5 Binn. 564, 568.

In an action of account against the defendant as receiver, to render an account, if the defendant come at the first day and submit to account, the plaintiff, it is said, cannot recover damages; but if he plead to the action *ne unques son receivor*, he is liable to damages. It is also said that damages are not recoverable in an action of account against a man as receiver of money, to deliver over or to redeliver upon request; but that in an action of account against a man, as receiver of moneys to merchandise with, damages are recoverable for the profit which has been, or might have been made of the money. 1 Steph. N. P. 5.

The individual members of a co-partnership, who have advanced money for the benefit of the firm, are entitled to interest on such advances from the time they are made.

After the judgment to account, the defendant usually offers to account, and thereupon the court assigns auditors to take and declare the account between the parties. The auditors assigned, (b) are, in general, some of the officers (1) of the court, who may convene the parties before them from day to day, until the account is determined. If the auditors find the parties remiss and negligent, they must certify to the court that they will not account. By stat. 4 Ann. c. 16, s. 27, the auditors are empowered to administer an oath, and examine the parties touching the matters in question, and for the trouble in auditing and taking such account, shall have such allowance as the court shall judge reasonable, to be paid by the party on whose side the balance of account shall be. Special bail is not to be found until after judgment to account. (c) (2) If the defendant, (d) after the judgment to account, does not personally appear in court to give bail to account, there must issue a *capias ad computandum* for the purpose of bringing him into court. With respect to pleading before the auditors, (3) the following rules are to be *observed:—1. In order to avoid trouble and charge to the parties, (e) what might have been pleaded in bar to the action shall

(b) *Williams v. Lee*, 1 Mod. 42. See the form, 3 Wils. 89.

(c) *Reeves v. Gibson*, 1 Lev. 300.

(d) *Chester v. Hunt*, C. B. M. 13 Geo. II.

(e) *Taylor v. Page*, Cro. Car. 116; 3 Wils. 113, S. P.

Hodges v. Parker, 17 Vt. 242; and a claim by one partner, for services rendered subsequent to the dissolution of the firm, in settling its concerns, is a proper item to be adjusted in an action of account between the partners, brought for the liquidation of their partnership accounts. *Bradley v. Chamberlien*, 16 Vt. 613.

All articles of account between the parties incurred since the commencement of the suit, are included by the auditors, and the whole is brought down to the time when they make an end of the account. *Couscher v. Tulam*, 4 W. C. C. R. 442. A report that the plaintiff has no legal demand at present is sufficiently certain and final. *Ib.* *Kitchen v. Strawbridge*, Id. 84.

But a general verdict for the plaintiff and judgment of *quod computet* do not conclude the defendant as to the dates and sums mentioned in the declaration. *Newbold v. Sims*, 2 S. & R. 317.

(1) In *Godfrey v. Saunders*, C. B. 3 Wils. 73, the three prothonotaries were assigned auditors.

(2) It was said, by all the prothonotaries in the Court of Common Pleas, that the defendant upon the first writ should not be held to special bail, yet, in special cases, by the discretion of the court, he shall find bail. *Noy*, 28.

(3) Auditors take the account and refer objections and issues to the court; and if the party neglect to tender issues in fact and law to them, he cannot afterwards come into court in a summary way and object to the items. *Wilson v. Wilson*, 2 South, 791. They may report a balance in favor of the defendant. *Dickerson v. Whittlesey*, 2 Root, 121. The principles of law on which auditors proceed, may be examined; and their proceedings may be amended. *Spencer v. Usher*, 2 Day, 116; *Parker v. Avery*, Kirby, 353; *Wood v. Barney*, 2 Vt. 369. A report that the defendant had fully accounted is bad. It should find that he was nothing in arrear. *Spencer v. Usher*, *supra*. So a report that the defendant shall pay a sum to the plaintiff, without finding how much he owed, is bad. *Thomas v. Alsop*, 2 Root, 12. They may be inquired of as to the principles on which they made up the sum found by them to be due to the plaintiff. *State v. Worthington*, 1 Root, 137; *Spalding v. Dunlap*, 1 Id. 319. Exceptions must be made before the auditors, and cannot be taken after the report is returned. *Crousillat v. McCall*, 5 Binn. 432; *Moore v. Hunter*, 4 Yeates, 358; *Moore v. Hunter*, 3 Binn. 475, note. *Contra*, *Gratz v. Phillips*, 3 Binn. 474. A judgment of *quod computet* being interlocutory, is within the control of the court, and may be opened at a term after it was entered. *Kitchen v. Strawbridge*, 4 Wash. C. C. 84. But after such judgment, an objection to the plaintiff's disability comes too late. *Bredin v. Dwen*, 2 Watts, 95; see 2 Troub. & Haly's Pract. p. 155, 3d ed., cases cited in note (b).

not be allowed as a discharge before the auditors. 2. If the party is once chargeable and accountable, (f) he cannot plead any matter in bar, except a release, or *plene computavit*; but must plead before the auditors. (1) The exceptions proceed on this ground, that a release, and the having fully accounted, are total extinctions of the right of action, (g) of which the court is to judge; and even in these cases they must be pleaded specially, and cannot be given in evidence on *ne unques receiver*. 3. Nothing can be pleaded before the auditors, (h) contrary to what has been previously pleaded and found by verdict, because the consequences would be either two contradictory verdicts, which would perplex the court, or two similar verdicts, which would be nugatory. 4. If the defendant plead before the auditors, (i) any matter in discharge, which is denied by the plaintiff, so that the parties are at issue, the auditors must certify the record to the court, who, thereupon, will award a *venire facias* to try it; (2) and if on the trial the plaintiff make default, he shall be nonsuited; but, notwithstanding the nonsuit, he may bring a *scire facias* upon the first judgment.

2. The final judgment is, (k) that the plaintiff do recover against the defendant so much as he, the defendant, is found in arrear. (3) A writ of error lies upon this last judgment only; but, although it be found erroneous, and reversed, the first judgment shall stand in force; for the two judgments are distinct and perfect. (4)

Execution.—It is not unworthy of remark, that this action is the first of a civil nature in which process of execution against the person was given. This process is given by stat. Westm. 3, 13 Ed. I. c. 11; but, under this act, the guardian in socage cannot be committed to prison, for he is *in loco parentis*, and the words of the statute are *de serviensibus balivis, &c.*

(f) 3 Wils. 113, 114.

(h) 3 Wils. 114.

(k) *Metcalf's case*, 11 Rep. 40, a.

(g) 1 Brownl. 24, 25.

(i) Bull. N. P. 128.

(1) But a general verdict for the plaintiff and judgment of *quod computet* do not conclude the defendant as to the dates and sums mentioned in the declaration. *Newbold v. Sims*, 2 S. & R. 317.

(2) On the trial of such issues the plaintiff cannot give evidence of moneys received by the defendant, before the time laid in the declaration. *Sweigart v. Lowmarter*, 14 S. & R. 200.

(3) The form of this judgment for the plaintiff upon demurrer to plea before the auditors, in *Godfrey v. Saunders*, 3 Wils. 94, was as follows:—"Therefore it is considered, that the plaintiff do recover against the defendant the aforesaid 12,000*l.* (the sum laid in the declaration), for the value of the goods and merchandizes aforesaid, and also 278*l.* 7*s.* 9*d.* for his damages, as well by reason of the interpleading aforesaid, as for his costs and charges by the plaintiff in and about his suit in that behalf expended, to the said plaintiff by the court here adjudged with his assent; and that the said defendant be in mercy," &c. Forms of the pleadings may be found in Pull. on Acc. p. 122; 5 Penn. Law Jour. 49, and 2 Greenl. on Evid. § 36 in note.

(4) The reader who is desirous of further information concerning the nature of this action, is referred to the record and proceedings in the case of *Godfrey v. Saunders*, 3 Wils. 73, which is said by Ch. Just. Tilghman, 5 Binn. 568, to throw more light on the subject than any case of modern times. See also, 2 Leigh's N. P. 1546. Appendix, by Am. editor.

*CHAPTER II.

OF ADULTERY.(1)

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I. Of the remedy for this Injury, and in what Cases an Action may be maintained.

IN ancient times adultery was inquirable in tourns and leets,(a) and punishable by fine and imprisonment; but at the present day this offence belongs to the ecclesiastical courts, and the temporal courts do not take any cognizance of it as a public wrong. Several attempts, indeed, have been made by the legislature to bring this offence within the pale of criminal jurisdiction, but they have, for the most part, been wholly ineffectual.(2) During the time of the commonwealth, in the year 1650, when the ruling powers found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals,(b) adultery was made a capital crime.(3) But at the restoration, when men, from an abhorrence *of the hypocrisy of the late [*8] times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigour; adultery, therefore, at the present day, as far as respects the temporal courts, is considered merely as a civil injury; and the only remedy, which the law affords, is an action, whereby the husband may recover, against the adulterer, a compensation in damages for the loss of the society, comfort, and assistance of his wife, in consequence of the adultery.

Although there are not wanting authorities(c) to show that the action for adultery is, for some purposes at least, to be considered as an

(a) 3 Inst. 206.

(b) 4 Bl. Com. p. 64.

(c) *Cooke v. Sayer*, 2 Kenyon, 371; 6 East. 388, 389; *Batchelor v. Bigg*, 3 Wils. 319; 2 Bl. R. 854; per *Grose, J.*, in *Wheeldon v. Timbrell*, 5 T. R. 361; and 6 East, 391.

(1) See Bishop on Marriage and Divorce, 415-453, 2nd ed.; Morgan's Treatise on the Law of Marriage, Adultery, and Divorce, 2 vols., 8vo., Oxford, 1826; 2 Greenleaf's Evid. h. t.; Nicolas on the Law of Adulterine Bastardy, 8vo., London, 1836; Tebb's Essay on the Scripture doctrines of Adultery and Divorce, 8 vo., London, 1822; Lewis' Criminal Law, 8vo., Philadelphia, 1847.

(2) In the year 1604, (2 Ja. I.) a bill was brought into parliament "For the better Repressing the detestable Crime of Adultery." This bill was committed, but when the report was made by the committee, the Earl of Hertford said, that they found the bill rather concerned some particular persons than the public good, whereupon the bill was dropped. See 5th vol. of Parl. Hist. p. 88. Another attempt was made in the year 1800, but failed; the bill passed the Lords, but was negatived in the Commons. Parl. Hist. vol. 35, p. 225 to 325.

(3) The provisions of this act will be found in Scobell's Acts, part 2, p. 121, fo. ed.

action on the case, yet it may also be considered as the subject of an action of trespass.^(d) (1) In a modern case,^(e) where in the analogous action for the seduction of the plaintiff's sister and servant, the action was brought in *case*, and the defendant demurred generally, on the ground that the action was misconceived, and should have been *trespass*, and not *case*, the court overruled the demurrer: Lord Abinger, C. B., observing, that the question is not, whether trespass will lie, but whether *case* will not lie also; in actions of crim. con., it has always been the practice to bring trespass or case indiscriminately.⁽²⁾

To maintain this action, it is essentially necessary, that the husband should present himself in court, as has been said, with clean hands, that is, without any imputation of having courted his own dishonour, or having been instrumental to his own disgrace; for it is now settled,^(f)

(d) *Woodward v. Walton*, 2 N. R. 476; *Ditcham v. Bond*, 2 M. & S. 436, S. P. recognizing *Woodward v. Walton*. (e) *Chamberlain v. Hazlewood*, 5 M. & W. 517.

(f) Per de Grey, C. J., in *Howard v. Burtonwood*, C. B. Middx. Sitt. after Trin. T. 16 Geo. II. Agreed by the court in *Duberley v. Gunning*, 4 T. R. 651, and there said by Buller, J., to be settled law.

(1) In *Woodward v. Walton*, 2 B. & P. N. R. 476, where it was holden, that an action for debauching the plaintiff's daughter *per quod servitium amisit* is an action for trespass, and that consequently a count for that purpose might be joined with a count for breaking and entering the plaintiff's house. Sir J. Mansfield, delivering the opinion of the court, introduced the following remarks: "A little confusion has arisen in some of the cases from the insertion of the words *vi et armis* in declarations in actions on the case, these words being generally applicable to actions of trespass only; and I certainly do not recollect to have seen them used in actions upon the case. In actions like the present, as far as my recollection goes, the form of the declaration has always been in trespass *vi et armis et contra pacem*. I cannot distinguish between this action and an action for criminal conversation. If that be the subject of trespass, this must be so too. In the action for criminal conversation, the violence is not the ground of action; both in that case and in this, if the injury were committed with violence, it would amount to a rape. I do not see, therefore, any good reason why either of them should be the subject of an action of trespass. But it seems, from the cases which we have looked into, that the action for criminal conversation has been considered for years as the subject of an action of trespass. In actions by a master for an assault upon his servant, *per quod servitium amisit*, there is no trespass against the plaintiff; the sole foundation of the action is the loss of service; yet this also has been considered as an action of trespass. Accord. *Haney v. Townsend*, 1 M'Cord, 207; *Moran v. Dawes*, 4 Cow. 412; *Parker v. Elliott*, Gilmer, 33; *Wilt v. Vickers*, 8 Watts, 233; *Ream v. Rank*, 3 S. & R. 215.

(2) *Case*, and not *trespass*, is the proper form of action, where, at the time of the seduction, the daughter resided in the house of another. *Clough v. Denney*, 5 Greenl. 446. In *Moran v. Dawes*, 4 Cowen, 412, it was said by the court, that "*case* is, without exception, the proper remedy;" but see post, 1113, note 1. In *Ream v. Rank*, 3 S. & R. 215, the Supreme Court of Pennsylvania maintained that *case* was the most proper form of action, although trespass might lie. In *Virginia*, it is held that the action may be either *trespass* or *case*. *Parker v. Elliott*, Gilmer, 33; 6 Munf. 587. In *Jones v. Tevis*, 4 Littell, 25, it was held by the Court of Appeals of Kentucky, that an action would lie in behalf of the father while living, and in behalf of the mother after his death, for enticing away an infant daughter, by which the parent lost her services, which action must be *case*, not *trespass*; but that no action would lie on behalf of the parent for procuring the marriage of such infant without the parents' consent. The wife cannot give consent to defendant's entering the dwelling of the husband with a view to the commission of the offence. *Forsythe v. The State*, 6 Ohio R. 23. The gist, in either form of action, is the injury done to the husband in alienating his wife's affections, destroying the comfort he had from her company, and raising children for him to support and provide for; in fact, it is a civil action brought to recover a pecuniary compensation for a civil injury, and not to punish the defendant for having violated the laws of morality and infringed the rules of decency. 1 Steph. N. P. 6; Reeves, Dom. Rel. 63.

that if the husband has consented to, or provided means for, the adulterous intercourse of his wife with the defendant, the ground of the action is removed, and the defendant will be entitled to a verdict; for *volenti non fit injuria*.(1) So if *the husband, after [*9] marriage, transgresses those rules of conduct which decency requires(*g*) and affection demands from him, and in an open, notorious, and undisguised manner, carries on a criminal correspondence with other women, he cannot maintain this action.(3) So if a wife be suffered to live as a prostitute(*h*) with the privity of the husband, and the defendant has thereby been drawn in to *com- [*10] mit the act of which the husband complains, the action cannot be maintained.(4) But if the husband has been guilty of negligence

(*g*) *Wyndham v. Lord Wycombe*, 4 Esp. N. P. C. 16; and *Sturt v. Marquis of Blandford*. there cited, both ruled by *Kenyon*, C. J. (2).

(*h*) Per Lord *Mansfield*, C. J., in *Smith v. Allison*, Bull. N. P. 27; *Hodges v. Wyndham*, Peake, N. P. C. 39.

(1) From Lord *Kenyon's* account of *Cibber v. Sloper*, in 4 T. R. 655, it would appear as if the verdict in that case had been given in conformity with this position. But, in fact, the jury in *Cibber v. Sloper*, found a verdict for the plaintiff, with 10*l.* damages. The cause was tried before *Lee*, C. J., at the Middlesex sittings after Michaelmas Term, 5th of December, 1738. The case is truly stated in Buller's N. P. 27, as follows:—In *Cibber v. Sloper*, it was holden, that the action lay, though the privity and consent of the husband to the defendant's connexion with the wife were clearly proved. The clear proof here alluded to was this—that the plaintiff and defendant lived in the same house; that their bed-chambers were adjoining to each other; and that there was a communication between them by a door. Mrs. Cibber used to undress herself in her husband's room, and leave her clothes there, and putting on a bed-gown, retired to Mr. Sloper's room with one of the pillows taken from her husband's bed, Mr. Cibber shutting the door after her and wishing her good night. It was proved also, that Mr. Cibber sometimes called Mr. Sloper and Mrs. Cibber up to breakfast. Lord *Kenyon*, at a time subsequent to that above-mentioned, viz. on the first trial of *Hoare v. Allen*, Middlesex sittings after Mich. Term, 41 Geo. III. MSS., stated “that in *Cibber v. Sloper*, the chief justice thought the conduct of the husband so gross, that it was a case for small damages, but that it did not go to the ground of the action; since that time, however, it had been thought, that where the husband furnished means for the criminal intercourse, the action would not lie.” It has been repeatedly determined, that if the act complained of be with the husband's privity, the action will not lie. This doctrine was recognized by Lord *Mansfield*, C. J., in the case of *Worsley v. Bissett*, Middlesex sittings after Hil. 1782, and *Foley v. Lord Peterborough*, B. R. E. 25 Geo. III., said arg. in *Bennett v. Allcott*, 2 T. R. 166. Another action was brought by *Cibber* against *Sloper*, for detaining the plaintiff's wife, which was tried on the 4th of December, 1739, and a verdict found for the plaintiff, damages 500*l.*, Mrs. Cibber having been prevented by the detention from performing on the stage, where she used to receive a large salary.

(2) Although the opinion of Lord *Kenyon*, C. J., as delivered in *Sturt v. Marquis of Blandford*, coincided with the position in the text, yet the jury in that case found a verdict for the plaintiff, with 100*l.* damages.

(3) Lord *Alvanley*, C. J., differed in opinion with Lord *Kenyon* on this point: Lord *A.* thought that the infidelity or misconduct of the husband could not be set up as a legal defence to the adultery of the wife; that circumstance alone which struck him as furnishing any defence was, where the husband was accessory to his own dishonour; in that case, he could not complain of an injury which he had brought on himself, and had consented to; but that the wife had been injured by the husband's misconduct, could not warrant her in injuring him in that way, which was the keenest of all injuries. In a case of this kind, therefore, (*Bromley v. Wallace*, 4 Esp. N. P. C. 237,) Lord *Alvanley* directed the jury to consider evidence of infidelity in the husband, as going in mitigation of damages only, and not as furnishing an answer to the action, or as entitling the defendant to a verdict.

(4) “If the wife is a prostitute, and the husband is not privy to it, it goes only in mitigation of damages; but if he is consenting to it, or otherwise connives at it, it takes

merely, or inattention to the behaviour and conduct of his wife with the defendant,⁽ⁱ⁾ not amounting to a consent, such circumstance will go in mitigation of damages only. In *Winter v. Henn*, 4 C. & P. 498, *Alderson*, J., in summing up said, "I apprehend the law to be, that the plaintiff will be entitled to recover, unless he has, in some degree, been a party to his own dishonour, either by giving a general license to his wife to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with this defendant, or by having totally and permanently given up all the advantage to be derived from her society. If you should be of opinion that the plaintiff has done any of these three things, then the defendant will be entitled to your verdict."⁽¹⁾

In an action for adultery with the plaintiff's wife,^(k) it appeared that the plaintiff and his wife had agreed to live separately: the plaintiff proved several acts of adultery committed by the defendant after the separation of the plaintiff and his wife, but there was not any direct proof of adultery *before* the separation. Lord *Kenyon*, C. J., being of opinion that the gist of the action was the loss of the comfort and society of the wife, which was alleged in the declaration in the usual manner, but was not supported by the evidence, nonsuited the plaintiff. On a motion for a new trial, the court concurred in opinion with the chief justice.⁽²⁾

In a case,^(l) where the husband and wife had entered into a deed of separation with trustees, and the wife was living separate from the husband, though not in pursuance of the terms of the deed, at the time of the adulterous intercourse, Lord *Ellenborough*, C. J., said that he did

⁽ⁱ⁾ Agreed by the court in *Duberley v. Gunning*, 4 T. R. 651.

^(k) *Weedon v. Timbrell*, 5 T. R. 357.

^(l) *Chambers v. Caulfield*, 6 East, 244. See also *Wilton v. Webster*, 7 C. & P. 198, *Coleridge*, J. [See also *Handy v. Watson*, 8 Scott, N. C. 579, *Law Review*, No. 5, Nov. 1845, p. 496.]

away the ground of the action. If an illicit conversation be had, and he is not privy to it at the time, but knows of it afterwards and then receives her back, yet he may support an action, and the subsequent reconciliation goes only in mitigation of damages." Per *de Gray*, C. J., in *Howard v. Burtonwood*. In *Calcraft v. Earl of Harborough*, the plaintiff obtained a verdict, damages 100*l.*; although it was proved that the marriage had been concealed from the mother of the wife, and the husband very seldom saw his wife, and suffered her to remain with her mother, as if she were single, and to continue to perform at the theatre in her maiden name. 4 C. & P. 499, *Tindal*, C. J. A divorce *a vinculo matrimonii* under the act of Assembly of *Pennsylvania*, has been held not to debar the husband from an action for adultery committed previous to the divorce. *Ealer v. Flomerfelt*, *Wharton's Digest*, 404, 2nd ed.

(1) In action for criminal conversation with the plaintiff's wife, evidence that the character of the wife for chastity was bad before she was married to him; that the plaintiff had lived with her after he had notice of her improper intercourse with the defendant; that he had connived at her intimacy with other men; or that the plaintiff had been improperly intimate with other women; is no answer to the action, but goes only in mitigation of the damages. *Sanborn v. Wilson*, 4 N. Hamp. 501. But if a husband suffers his wife to live openly and publicly as a prostitute, and a man is thereby drawn into criminal conversation with her, no action lies. *Ib.* And in such a case the jury may be properly instructed to look, not only to the character and conduct of the husband and wife, to determine why such a husband ought to recover for criminal conversation with such a wife, but to the conduct of the defendant, to determine what he ought to pay. *Ib.*

(2) 2 Greenl. on Evid. § 55.

not consider the question, "whether the mere fact of separation between husband and wife by deed, was such an absolute renunciation of his marital rights, as prevented the husband from maintaining an action for the seduction of his wife," as *concluded by the [*11] preceding decision in *Weedon v. Timbrell*. But in the case then before the court, the court being of opinion that, taking the whole deed into consideration, it was evident that the only separation in the contemplation of the parties, was a separation *with the approbation of the trustees*; and that, as the wife had left the husband without such approbation, she was not at the time of the adulterous intercourse living separate from the husband *by his consent*, and consequently the event and situation provided for in the deed had not happened; and in that view of the case, there could not be any question, but that the plaintiff's right to recover was not affected by the deed; and further, if the wife had left the husband with the approbation of the trustees, yet as the deed had provided "that the wife might have the care of the younger children of the marriage, and visit the others, more especially when they should be ill, so as to require the attention of a mother," the husband had not in this case (as it was holden that he had done in the case of *Weedon v. Timbrell*,) given up all claim to the benefit to be derived from the society and assistance of his wife; consequently, that the case of *Weedon v. Timbrell*, allowing it the fullest effect according to the terms of it, could not be considered as an authority against the plaintiff in this action. Where several defendants have carried on an adulterous intercourse with the plaintiff's wife, the plaintiff may maintain separate actions, although the cause of action has accrued during the same period.(m)(1)

II. Of the Venue—Declaration—Plea.

THIS is a transitory action; and, consequently, the venue may be laid in any county, subject, however, to being changed, upon the usual affidavit, that the whole cause of action arose in another county, and not elsewhere out of such other county. Although the marriage be a material inducement to the right of the plaintiff to maintain the action in respect to the trespass on the wife, yet it forms no part of the cause of action: the trespass committed on the wife constitutes the whole cause of action.(n)

The common declaration in this action is very concise; in substance it is as follows: *viz.* that the defendant *with force and arms*, made an assault on the wife of the plaintiff, and debauched and carnally knew

(m) *Gregson v. M'Taggart*, 1 Campb. 415.

(n) *Guard v. Hodge*, 10 East, 32.

(1) The plaintiff's general character is not in issue. Evidence that he was in the habit of intoxication, or that he kept a beer or grog-shop, which at all times, day and night, was the resort of the vile and dissipated, is inadmissible to affect his character or show his rank and condition in life. But plaintiff's character as a husband is in issue, and evidence of unkind treatment by him of his wife, produced by drunkenness or otherwise, is admissible. *Norton v. Warner*, 9 Conn. Rep. 172; 2 Greenl. on Evid. § 55.

her, whereby the plaintiff wholly lost and was deprived of the comfort, society, and fellowship of his wife, and of her aid and assistance in his domestic affairs, and other lawful business.

The general issue in this action is, not guilty.

The statute of limitations(1) may be pleaded in bar of this [*12] action: *but the gist of the action being the injury sustained by the husband in consequence of the adultery, the proper plea under that statute is, not guilty within *six* years.(o) In a case(p) where the plaintiff complained "of a plea of trespass, that the defendant, with force and arms, assaulted and seduced the plaintiff's wife, *per quod consortium amisit, &c. contra pacem, &c.*," and the defendant pleaded, not guilty within six years; on general demurrer, a question arose, whether the action was trespass or case. *Cooke v. Sayer* was cited. Lord *Ellenborough*, C. J., said, it might be material to consider that point, if the question were, whether the limitation of six or four years *only* applied to this case; but the defendant having taken the longer period, and pleaded not guilty within six years, that of course must include not guilty within four years, and the plea not having been specially demurred to, was therefore good in either way of considering it.

Money cannot be paid into court in this action. Stat. 3 & 4 Will. IV. c. 42, s. 21.

III. *Of the Evidence, and herein of the Statutes relating to Marriage—Proof of Adultery.* p. 23.

IN *other actions*, evidence of cohabitation, general reputation, acknowledgment of the parties and reception by their friends, is sufficient to establish the relation of husband and wife. But in *this* action, in order that it may not be converted to bad purposes, by persons giving the name and character of wife to women to whom they are not married, it has been holden to be indispensably necessary for the plaintiff to prove the marriage ceremony having been performed, either by the testimony of some person who was present at the marriage, or by the production of the register, or of an examined copy thereof,(q)(2) and

(o) *Cooke v. Sayer*, 2 Kenyon, 371; 2 Burr. 753; Bull. N. P. 28, cited in *Macfadzen v. Olivant*, 6 East, 388. See *ante*, p. 8.

(p) *Macfadzen v. Olivant*, 6 East, 387. But see *Woodward v. Walton*, *ante*, p. 8; and *Ditcham v. Bond*, 2 M. & S. 436.

(q) *Morris v. Miller*, 4 Burr. 2057; 1 Bl. R. 632, S. C.; and Bull. N. P. 27; and per Lord Mansfield, C. J., in *Birt v. Barlow*, Doug. 174; *Hemmings v. Smith*, 4 Doug. 35, S. P.

(1) By stat. 21 Jac. I. c. 16, s. 3, all actions on the case, (other than for slander,) must be commenced and sued within *six* years next after the cause of such action; and actions of trespass, of assault, battery, wounding, and imprisonment, within *four* years. It appears, from the language of the court in *Cooke v. Sayer*, 6 East, 388, that they considered the action on the case for adultery as falling within the former description of actions, and consequently that the limitation of time was six years.

(2) "Upon every charge of adultery, whether in an indictment or a civil action, the case for the prosecution is not made out without evidence of the marriage. And it must be proof of an actual marriage, in opposition to proof by cohabitation, reputation, and other circumstances, from which a marriage may be inferred, and which, in these cases, are held insufficient; for otherwise persons might be charged upon pretended marriages,

proof of cohabitation and reputation is insufficient;(1) but "if it were proved that the defendant had seriously or solemnly recognized that he knew that the woman he had laid with was the plaintiff's wife, it would be evidence proper to be left to a jury without proving the marriage." (r)(2) In cases where the marriage is *to be prov- [*13]

(r) Per Cur. *Rigg v. Curgenvin*, 2 Wils. 399.

set up for bad purposes. Whether the defendant's admission of the marriage may be given in evidence against him, has been doubted; but no good reason has been given to distinguish this from other cases of admission, where the evidence may be received, though it may not amount to sufficient proof of the fact. Thus, in a civil action for adultery, where the defendant being asked where the plaintiff's wife was, replied that she was in the next room; this was held insufficient to prove a marriage, for it amounted only to an admission that she was reputed to be his wife. But any recognition of a person standing in a given relation to others, is *prima facie* evidence against the person making such recognition, that such relation exists; and if the defendant has seriously and solemnly admitted the marriage, it will be received as sufficient proof of the fact. Thus, where the defendant deliberately declared that he knew that the female was married to the plaintiff, and that, with full knowledge of that fact, he had seduced and debauched her, this was held sufficient proof the marriage." 2 Greenl. on Evid. § 49: *Williams v. Williams*, 3 Greenl. Rep. 135; *Forney v. Hallacher*, 8 Serg. & Rawle, 159.

(1) The plaintiff, in an action of *crim. con.*, must prove a marriage valid in all respects. It is not sufficient evidence of marriage to prove that the ceremony was performed, and that cohabitation for a long period followed, without showing also that the person by whom it was performed was clothed with the requisite authority for that purpose. *The State v. Hodgskin*, 1 App. 155. Evidence of mere cohabitation and reputation, is insufficient to prove a marriage. *Com. v. Norcross*, 9 Mass. 492; *Williams v. Williams*, 3 Greenl. 135. But if it were proved that the defendant had seriously or solemnly declared that he knew that the woman he laid with was the plaintiff's wife, it would be evidence proper to be left to a jury, without proving the marriage. *Forney v. Hallacher*, *supra*. And upon an indictment for adultery, the prisoner's deliberate declaration that he was married to the alleged wife, is admissible as sufficient evidence of the marriage; especially if it was in another country. *Cayford's case*, 7 Greenl. 57.

Where a statute requires that only certain persons shall solemnize marriage, still, if the statute is not complied with in this particular, and the marriage is not in contravention to the common law, it will be valid. 2 Kent, 90.

A marriage certificate, by a person duly authorized to marry, or a properly certified copy of the same, may be read as collateral proof of the fact stated in it. Hubback's Evid. 258; *Jackson v. The People*, 2 Scam. 232. A license, under which marriage has been solemnized, and in which one of the parties is described by a name different from his own, is not void for the misdescription, but the court expressed an opinion that it would be void if the name of one person had been inserted with a fraudulent intention that the license should be used by another. *Lane v. Goodwin*, 4 Q. B. 361. The fact of a marriage may also be proved by witnesses who were present at the marriage ceremony. *Kelby v. Buckman*, 1 Marsh. 391. But declarations of the defendant that he knew the parties were married, and that with full knowledge of the fact he had debauched the wife, have been held to be sufficient without actual proof of the celebration of the marriage. *Forney v. Hallacher*, *supra*. And it was intimated by *Gibson, J.*, in that case, pages 161, 162, that the same strict rules as to proof of marriage ought not to be required in this country as in England.

(2) For civil purposes, cohabitation and reputation are sufficient evidence of marriage. Per *Gibson, C. J.*, *Senser v. Brown*, 1 Penn. Rep. 452. And in prosecutions for bigamy, the confession of defendant, is sufficient evidence of marriage. *Commonwealth v. Murtagh*, 1 Ashmead, 272. So also for lewd cohabitation or adultery, whether the marriage was in the same state or elsewhere. *Ham's case*, 2 Fairf. 391. *Cayford's case*, 7 Greenl. 57.

A marriage is complete if there be full, free, and mutual consent between parties capable of contracting, though not followed up by cohabitation; and in deciding on the question of assent, the court will look principally to the facts which transpired at the time of the marriage. The circumstance of a party being under arrest as the putative father of a bastard, is not such duress as will avoid the marriage. *Jackson v. Winne*, 7 Wend. 47.

ed by the production of the register or copy, proof must also be adduced of the identity of the parties. But the minister and subscribing witnesses are not the only competent witnesses to prove the identity. In *Birt v. Barlow*, Doug. 170, *Buller*, J., observed, that it was not necessary to produce the original register, and that it was only where that was required, that subscribing witnesses must be called: that in this case the wife's maiden name was Harriet Champneys; and supposing a maid servant had proved that she always went by that name till the day of the marriage, that she went out that day, and on her return and ever since had been called Mrs. Birt, that would have been evidence of the identity. An omission in the parish register of the signatures of the minister, parties, and witnesses, has been holden(s) not to affect the validity of a marriage, *quoad* a parish settlement, where it was clearly proved *aliunde* that a marriage had actually taken place.

The books of the Fleet are not evidence of a marriage. Per *Kenyon*, C. J., in *Reed v. Passer*, Peake's N. P. C. 231; 1 Esp. N. P. C. 213, S. C.; S. P. per *de Grey*, C. J., in *Howard v. Burtonwood*, Middx. sittings after Trin. Term, 16 Geo. III.; and previously by Lord *Hardwicke*, and since by *Le Blanc*, J., in *Cooke v. Lloyd*, Peake's Evidence, App. xxxvi. But in *Doe d. Passingham v. Lloyd*, Salop Sum. Ass. 1794, *Heath*, J., admitted these books in evidence. See, however, *Lloyd v. Passingham*, 16 Ves. 59.

By a stat. 3 & 4 Vict. c. 92, intituled "An Act for enabling Courts of Justice to admit non-parochial Registers as Evidence of Births or Baptisms, Deaths or Burials, and Marriages," certain registers are to be deposited(t) in the custody of the registrar-general, after being certified(u) and identified(x) by the commissioners therein mentioned, and are then to be deemed to be in legal custody,(y) and to be receivable in evidence in all courts of justice, subject to the provisions contained in the act; and by sect. 20, the registers of the Fleet and King's Bench prisons, Mayfair, and Mint, are to be transferred to the custody of the registrar-general; but none of the provisions respecting the registers made receivable in evidence by virtue of this act are to extend to the registers so transferred.

Great strictness being required as to the proof of marriage in this action, it will be necessary to make some remarks touching marriage in general, in order that the reader may be apprised of the solemnities which the law deems essential to constitute a valid marriage.(1)

At the common law,(z) any contract made *per verba de præsenti*, or in words of the present, or in case of cohabitation, *per verba de*
 [*14] **futuro* also, between persons able to contract, was deemed a valid marriage to many purposes, and the parties might have been

(s) *R. v. St. Devereux*, Burr. S. C. 506; 1 Bl. R. 467, S. C.

(t) Sect. 1.

(u) Sect. 2.

(x) Sect. 4.

(y) Sect. 6.

(z) *R. v. Inhabitants of Brompton*, 10 East, 283.

A justice of the peace may solemnize a marriage out of the county for which he is commissioned as a justice. *Pearson v. Howey*, 6 Halst. 12.

(1) See 2 Greenl. on Evid. § 461; Bishop on Marr. & Div. § 315.

compelled in the spiritual courts to celebrate it *in facie ecclesiæ*. In order to constitute a valid marriage, at common law, it appears to have been wholly immaterial whether the ceremony was performed by a Protestant or Roman Catholic priest, in a private lodging or a public chapel. Hence, where the marriage ceremony was performed in a private lodging by a Roman Catholic priest, in the year 1705; and upon evidence that the prisoner, in answer to the question whether he would have the woman for his wedded wife, said that he would; and that the woman answered affirmatively to the question put to her, whether she would have Mr. Fielding for her husband; (a) Mr. Justice *Powel*, upon a question of felony, considered it as a marriage contracted *per verba de præsenti*. It appears doubtful, whether, at the common law, it was necessary that the ceremony should have been performed by a person in holy orders (see the argument in *R. v. Luffington*, 1 Burr. S. C. 232, and some remarks on this point, 1 Bl. Com. 439; see also the preamble to stat. 57 Geo. III. c. 51:) certainly the ecclesiastical law required it, and if a husband demanded a right in the ecclesiastical court which was only due to him by the ecclesiastical law, it was necessary for him to prove in that court, that he had been married by a person in holy orders. *Haydon v. Gould*, Salk. 119. See Jacob's note to Roper's Law of Property arising from the Relation between Husband and Wife, vol. 2, Addenda No. I. p. 445, cited in a note to *R. v. Bathwick*, 2 B. & Ad. 641.

During a long period, Lord Hardwicke's act, 26 Geo. II. c. 33, was the only statute relating to marriage, but, lately, several statutes have been made with a view to amend the provisions of that act, and finally it has been altogether repealed.(1)

(a) *R. v. Fielding*, 5 St. Tr. 644; *Jesson v. Collins*, Salk. 437; 6 Mod. 155.

(1) In most of the states of the Union, the contract of marriage, it is believed, is governed by the rules of the common law; and although statute provisions exist prescribing certain formalities, yet it has been held in several states that the marriage is valid as between the parties, although these forms have not been complied with. See *Ligonis v. Buxton*, 2 Greenleaf, 102; *Milford v. Worcester*, 7 Mass. Rep. 48. Reeves's Domestic Relations, 196, &c.; *Wycoff v. Boggs*, 2 Halsted, 138; *Hantz v. Sealy*, 6 Binn. 405; *Dumaresly v. Fishly*, 3 Marshall, 370; 2 Kent's Comm. 77; *Williamson v. Williamson*, 1 Johns. Ch. 488; Story on Confl. Laws, § 109-112; Addison on Contr. 687, 2d Am. ed. 1857. "Marriage, in law writings, is generally denominated a contract, yet it is said to be more than a contract, and to differ from all other contracts. The principal division of opinion has been whether it shall be regarded as a civil contract or as a religious one. In the Roman Catholic Church it is a sacrament; and though protestants do not generally so esteem it, they reckon it as of divine origin, and invest it with the sanctions of religion. It has been therefore said, that, 'according to juster notions of the nature of the marriage contract, it is not merely a civil or a religious contract,' and at the present time it is not to be considered as originally and simply one or the other. Yet all the decisions attest, that however deeply the religious nature of marriage may enter into the affections of the community, the law leaves its religious nature solely to the care of religion, and regards it only in the light of a civil institution. To distinguish, therefore, it is presumed, marriage as the law views it, from marriage as a religious rite, the courts and text writers almost uniformly describe it as a 'contract,' a 'civil contract.' Thus Shelford, says: 'Marriage is considered in every country as a contract, and may be defined to be a contract, according to the form prescribed by the law, by which a man and woman capable of entering into such a contract, mutually engage with each other to live their whole lives together—the state of union which ought to exist between a husband and his wife.' Again, it is said, that 'Marriage is a contract, having its origin in

The first of these, viz. 3 Geo. IV. c. 75,(1) after repealing the 11th sect. of the 26th Geo. II. c. 33, relating to marriages, by license, of minors, without consent of proper parties, by sect. 2, enacts that marriages solemnized by license before the passing of this act, that is before 22nd July, 1822, without the consent required by the [*15] 11th *sect. of Lord Hardwicke's act, shall be good, (if not otherwise invalid,) where the parties shall have continued to live together as husband and wife, until the death of one of them, or until the passing of this act, or shall only have discontinued their cohabitation for the purpose or during the pending of any proceedings touching the validity of such marriage. [As to what shall not be a living together as husband and wife within this section, see *Poole v. Poole*, 2 Cr. & J. (Ex) 66, and 2 Tyrw. 76.] But this act (sect. 3,) is not to render valid any marriage which has been declared invalid, by any court of competent jurisdiction before the 22nd of July, 1822; nor any marriages, where either of the parties shall at any time afterwards have lawfully intermarried with any other person. [This 3rd section (which is not repealed by 4 Geo. IV. c. 76,)(b) has a retrospective operation only; hence it has been holden, that a marriage which would have been void by the 11th section of Lord Hardwicke's act, and had once been rendered valid by the 2nd section of the 3 Geo. IV. c. 75, cannot subsequently be rendered invalid by the marriage of either of the parties during the life of the other with a third person.](c) Nor is this act (s. 4,) to render valid any marriage, the invalidity of which has been established before the 22nd of July, 1822, upon the trial of any issue touching its validity, or touching the legitimacy of any person alleged to be the descendant of the parties to such marriage; nor (sect. 5,) any marriage, of which the validity or legitimacy of descendants has been brought in question, in law or equity, where judgments or decrees or orders have been made before the 22nd of July, 1822, in consequence of proof having been made of the invalidity of such marriage, or the illegitimacy of such descendants. The right(d) and interest in

(b) *Rose v. Blakemore*, Ryan & Moody, 382.

(c) *R. v. St. John Delpike*, 2 B. & Ad. 226.

(d) Sect. 6.

the law of nature, antecedent to all civil institutions, but adopted by political society, and charged thereby with various civil obligations. It is founded on mutual consent, which is the essence of all contracts, and is entered into by two persons of different sexes, with a view to their mutual comfort and support, and for the procreation of children. Other definitions give the idea of contract a more subordinate position. Thus, Ayliffe, says: 'Marriage is a lawful coupling and joining together of a man and woman, in one individual state or society of life, during the lifetime of one of the parties, and this society of life is contracted by the consent and mutual good will of the parties towards each other. And the authorities agree in distinguishing it from other species of contract.' " Bishop on Mar. & Div. § 31, 2d ed.

(1) This act, which received the royal assent July 22, 1822, was to take effect from the 1st September, 1822. During the interval between those periods, viz., between the 22d July and 1st September, 1822, the 11th section of the 26th Geo. II. c. 33, stood repealed, and the new provisions of this act, the 3 Geo. IV. c. 75, had not come into operation; the marriage, therefore, of an infant by license, without the consent of parent or guardian, solemnized on the 30th August, 1822, was holden to be valid. *R. v. Maria Wantley*, Moody's Crown Cases, 163. See *post*, p. 17, sect. 16 of 4 Geo. IV. c. 76; and *R. v. Birmingham*, 8 B. & C. 29, there cited.

property and titles of honour, which have been enjoyed upon the ground of the invalidity of any marriage, by reason that it was solemnized without such consent, shall not be affected by this act, although no sentence or judgment has been pronounced in any court against the validity of such. This statute shall not affect any act done before the 22nd of July, 1822, under the authority of any court, or in the administration of any personal estate, or the execution of any will, or performance of any trust.^(e) The remaining sections of this statute, from the 8th to the 26th, were repealed by the 4 Geo. IV. c. 17, 26th March, 1823, which was also repealed by stat. 4 Geo. IV. c. 76, except as to any act done under its provisions, and also except as to its repealing the clauses contained under any former act.^(f)

This statute, viz. 4 Geo. IV. c. 76, which passed on the 13th of July, 1823, repealed so much of Lord Hardwicke's act as was then in force, from the 1st Nov. 1823. The principal provisions are as follow:—The 2nd section relates entirely to the mode in which banns *shall be published. The 3rd section empowers bishops to [*16] authorize publication of banns in chapels.⁽¹⁾

By sect. 7, no minister is obliged to publish banns, unless the persons to be married shall seven days before first publication deliver to such minister notice in writing, dated on day of delivery, of their *true* Christian names and surnames, and of the houses of their respective abodes within the parish or chapelry, and of the time during which they have dwelt therein.

A person, whose baptismal and surname was Abraham Langley, was married by banns by the name of George Smith, having been known in the parish where he resided and was married by that name only, from the time of his first coming into the parish till his marriage, which was about three years; it was holden that the marriage was valid.^(g) So where a person had gone by an assumed name for sixteen weeks, in order more effectually to conceal himself, having deserted from the army, and then was married by his assumed name by license; the marriage was holden good, no fraud being intended in respect of the marriage.^(h) But if there be a total variation of a name or names, that is, if the banns are published in a name or names totally different from those which the parties or one of them ever used, or by which they were ever known, the marriage in pursuance of that publication is invalid; and it is immaterial, in such cases, whether the misdescription has arisen from accident or design, or whether such design be fraudulent or not.⁽ⁱ⁾

(e) Sect. 7.

(f) See *Rose v. Blakemore*, Ry. & Mo. 382.

(g) *R. v. Billingshurst*, 3 M. & S. 250.

(h) *R. v. Burton on Trent*, 3 M. & S. 537.

(i) Per Lord Tenterden, C. J., delivering the judgment of the court in *R. v. Tibshelf*, 1 B. & Ad. 194, recognized in *Allen v. Wood*, 1 Bingh. N. C. 8. But the case of *R. v. Tibshelf* was decided as the law stood, under the 26 Geo. II. c. 23, s. 8. See therefore the language of the 4 Geo. IV. c. 76, s. 22, and the decision of *R. v. Wroxton*, 4 B. & Ad. 640, thereon, *post*, p. 18. But a license under which marriage has been solemnized,

(1) See further on this subject stat. 6 & 7 Will. IV. c. 85, s. 26, and 7 Will. IV. and 1 Vict. c. 22, ss. 33, 34.

"The marriage, except in case of a license, is to be performed by proclamation of banns, which is to designate the individual in order to awaken the vigilance of parents and guardians, and to give them an opportunity of protecting their rights; it therefore requires that the true name should be given them, evidently considering that a name assumed for the occasion is a name that will not answer the purposes of these provisions; accordingly, this court has conceived itself to be carrying the intention of the law into effect, when it has annulled marriages where a false name has been inserted in the banns, though no fraud were intended; upon the ground that such proclamation was no proclamation referring to that marriage, but to another transaction; the marriage, therefore, was without proclamation of banns, and
 [*17] consequently illegal." Per Sir W. Scott, *delivering judgment in *Wakefield v. Machay*, 1 Phill. Ecc. Rep. p. 139, 140, n., in which an illegitimate child was baptized in the name of her mother; and though in the course of her life she had used a variety of names, still, as the banns had been published in the name of her mother, and as it was not upon the evidence demonstrated to be other than the true name, the court sustained the marriage.

By stat. 4 Geo. IV. c. 76, sect. 9, marriages not had within three months after the complete publication of banns, cannot be solemnized without republication of banns on three several Sundays in the form prescribed, unless by license.

By sect. 16, the father, if living, of any party under twenty-one years of age, such parties not being a widower or widow; or if the father shall be dead, the guardian of the person of the party so under age, lawfully appointed; and in case there shall be no such guardian, then the mother of such party, if unmarried; and if there shall be no mother unmarried, then the guardian of the person appointed by the Court of Chancery, if any, shall have authority to give consent to the marriage of such party, and such consent is hereby *required* for the marriage of such party so under age, unless there shall be no person authorized to give such consent. N. The language of the foregoing section is merely directory; it does not proceed to make the marriage void, if solemnized without consent. Hence, where a marriage was solemnized by license, the man being a minor, whose father was living, and who did not consent to the marriage; it was holden, that the marriage was nevertheless valid.(k)

In case(l) the father or fathers of the parties to be married, or one of them, so under age, shall be *non compos mentis*, or the guardian, mother, or any of them, whose consent is necessary to the marriage of such party, shall be *non compos mentis*, or in parts beyond the seas, or shall unreasonably or from undue motives, refuse their consent to a

and in which one of the parties is described by a name wholly different from his own, is not void by the misdescription.(1)

(k) *R. v. Birmingham*, 8 B. & C. 29.

(l) Sect. 17.

(1) In this case, *Patterson, J.*, expressed an opinion that it would be void if the name of one person had been inserted with a fraudulent intention that the license should be used by another. *Lane v. Goodwin*, 4 Q. B. 361.

proper marriage, then any person desirous of marrying, in any of the before-mentioned cases, may apply, by petition, to the lord chancellor, master of the rolls, or vice-chancellor, who are respectively empowered to proceed upon such petition in a summary way; and in case the marriage proposed shall upon examination appear to be proper, the said lord chancellor, &c., shall judicially declare the same to be so; and such declaration shall be as effectual, as if the father, or guardian, or mother of the person so petitioning, had consented to such marriage.

Whenever(*m*) a marriage shall not be had within three months after the grant of a license by any person having authority to grant such license, no minister shall proceed to the solemnization of such marriage until a new license shall have been obtained, unless by banns duly published.

*If any person(*n*) shall *knowingly* and wilfully intermarry [**18*] in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special license, or shall *knowingly* and wilfully intermarry without due publication of banns, or license from a person having authority to grant the same, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void.

In order to render a marriage void under this enactment, it must have been contracted by *both* parties with a knowledge that a due publication of banns had not taken place. Therefore, where the intended husband procured the banns to be published in a Christian and surname which the woman had never borne, but she did not know that *fact* until after the solemnization of the marriage; it was holden, that the marriage was valid.(*o*) But in *Wiltshire v. Wiltshire*, 3 Hagg. (E. R.) 333, marriage by banns under a false publication, by the suppression of one of the husband's Christian names by which he was known, *with the knowledge and consent of both parties*, was holden void under this 22nd section. The marriage of parties under a license from a person not having authority to grant the same, is not void(*p*) under this section, unless both parties knowingly and wilfully intermarry by virtue of such license.

If any valid marriage,(*q*) solemnized by license, shall be procured by a party to such marriage to be solemnized between persons, one or both of whom shall be under the age of twenty-one years, contrary to the provisions of this act, by means of such party falsely swearing to any matter to which such party is hereinbefore required personally to swear, such party shall forfeit all property accruing from the marriage.

In order to preserve(*r*) the evidence of marriages, and to make the proof thereof more certain and easy, and for the direction of ministers in the celebration of marriages and registering thereof, all marriages shall be solemnized in the presence of two credible witnesses, besides

(*m*) Sect. 19.

(*n*) Sect. 22. But see *post*, p. 19, 6 & 7 Will. IV. c. 85.

(*o*) *R. v. Wroxton*, 4 B. & Ad. 640, and 3 Nev. & M. 712. See *Wright v. Elwood*, 1 Curt. Ecc. R. 662.

(*p*) *Dormer v. Williams*, 1 Curt. Ecc. R. 870.

(*q*) Sect. 23.

(*r*) Sect. 28.

the minister who shall celebrate the same; and immediately after the celebration, an entry thereof shall be made in the register-book kept for that purpose, in which it shall be expressed that the marriage was celebrated by banns or license, and if both or either of the parties married by license be under age, not being a widower or widow, with consent of the parents or guardians, as the case shall be; and such entry shall be signed by the minister with his proper addition, and also by the parties married, and attested by such two witnesses; which entry shall be made in the form therein set forth.

[*19] *This act does not extend(s) to the marriages of any of the royal family; nor to any marriages(t) amongst the people called *Quakers*, or amongst the persons professing the *Jewish* religion, where both the parties to any such marriage are of the people called *Quakers*, or persons professing the *Jewish* religion respectively; and, lastly, this statute is confined to England.

In consequence of a decision (*R. v. Northfield*, Doug. 658,) which took place, confining the construction of Lord Hardwicke's act, 26 Geo. II. c. 33, s. 1, to chapels existing at the time of passing the act, several statutes have been made from time to time, to give validity to marriages solemnized in chapels erected since Lord Hardwicke's act, and to make the registers of such marriages evidence. See stat. 21 Geo. III. c. 53; 44 Geo. III. c. 77; 48 Geo. III. c. 127; 6 Geo. IV. c. 92. Stat. 5 Geo. IV. c. 32; 11 Geo. IV. and 1 Will. IV. c. 18, relate to the solemnization of marriages where churches are rebuilding or under repair. See stat. 7 & 8 Vict. c. 56, concerning banns and marriages in district churches or chapels.

By stat. 5 & 6 Will. IV. c. 54, after reciting, that marriages between persons within the prohibited degrees are voidable only by sentence of the ecclesiastical court pronounced during the lifetime of both the parties thereto, it is enacted, that all marriages celebrated before the 31st August, 1835, between persons within the prohibited degrees of affinity, shall not be annulled for that cause by any sentence of the ecclesiastical court, except in suits depending at that time; provided that nothing thereinbefore enacted shall affect marriages between persons within the prohibited degrees of consanguinity; and by sect 2, all marriages celebrated after that time between persons within the prohibited degrees of consanguinity or affinity, are made absolutely void. This act, however, does not extend to Scotland.(u)

Heretofore marriages could have been solemnized, except by special license, only in parish churches or chapels, according to the rites of the church of England: but now, by stat. 6 & 7 Will. IV. c. 85, which took effect on 1st July, 1837, and was explained and amended by stat. 7 Will. IV. and 1 Vict. c. 22, marriages may be solemnized in any certified place of religious worship duly registered, or at the office of the superintendent registrar, according to any form and ceremony the parties may see fit to adopt; provided they pay strict attention in conforming to the regulations prescribed by the act; of which the following are most deserving of remark:—1st, The notice(x) of marriage to the

(s) Sect. 30.

(u) Sect. 3.

(t) Sect. 31.

(x) 6 & 7 Will. IV. c. 87, s. 4.

superintendent registrar. As this notice is to be read at the meeting of guardians, (y) or suspended in the superintendent registrar's office, (z) it has (a) an effect similar to the *publication of banns. [*20] 2ndly, The certificate, (b) which S. R. is empowered to issue, if there be no lawful impediment shown. By stat. 3 & 4 Vict. c. 72, s. 1, no certificate can be granted for a marriage out of the district in which one of the parties dwells, unless the party make, by indorsement on the notice, the declaration required by the second section, the form of which is given by the schedule to this act. 3rdly, Where the marriage is by license which S. R. is empowered to grant, (c) care must be taken as to the consent; for the like consent (d) is required to marriages solemnized by license under this act as before. The 12th section directs what acts are required before license can be granted. The licenses by archbishop of Canterbury, proper officers and surrogates are left untouched. (e) 4thly, Time.—Twenty-one days (f) must elapse after day of entry of notice, if no license; if license, seven days (f) before marriage can be solemnized. If three months (g) are suffered to elapse after notice, without marriage, a new notice must be given. The old hours are to be observed, during which the marriage can be solemnized, viz. between eight and twelve in the forenoon. 5thly, The marriage must be solemnized as the act directs; (h) 1, with open doors; 2, between the stated hours; 3, in presence of registrar and witnesses; if at office, presence of S. R. also is required; 4, in some part of the ceremony the declaration before the witnesses in the form prescribed; lastly, there must be no lawful impediment. If these particulars be not duly observed the marriage is made void; (i) but if they are strictly attended to, the marriage is as good (k) and cognizable in like manner as a marriage before this act, according to the rites of the church of England. In the case of a fraudulent marriage, the guilty party forfeits all property accruing from the marriage, under a provision (l) similar to that contained in the 4 Geo. IV. c. 76, s. 23. But the new law extends only to England; (m) and does not extend to the marriage of any of the royal family. Quakers and Jews (n) may contract and solemnize marriages according to usage as before, provided both parties are Quakers or Jews, and the notice to registrar has been given and his certificate issued. As to the registers of marriages, the reader should be apprized that so much of the stat. 52 Geo. III. c. 146, and 4 Geo. IV. c. 76, as relates to the registration of marriages, has been repealed by stat. 6 & 7 Will. IV. c. 86, (o) which took effect on the same day as the preceding marriage act, (6 & 7 Will. IV. c. 85,) and which is to be taken as part of it, as fully as if incorporated with it. (p)

(y) 6 & 7 Will. IV. c. 85, s. 6.

(a) *Ibid.* s. 36.(c) *Ibid.* s. 11.

(e) 6 & 7 Will. IV. c. 85, s. 1.

(g) Sect. 15.

(i) Sect. 42.

(l) Sect. 43.

(n) Sect. 2.

(o) Explained and amended by stat. 7 Will. IV. & 1 Vict. c. 22.

(p) 6 & 7 Will. IV. c. 85, sect. 44.

(z) 7 Will. IV. & 1 Vict. c. 22, s. 24.

(b) 6 & 7 Will. IV. c. 85, s. 7.

(d) *Ibid.* s. 10.

(f) Sect. 14.

(h) Sect. 20.

(k) Sect. 35.

(m) Sect. 45.

It seems, that to prove a Jewish marriage, it is not sufficient
 [*21] to *produce witnesses who were present at the ceremony in the synagogue; because that is merely a ratification of a previous written contract—such contract, therefore, must be adduced and proved.(*q.*) A Jewess may give parol evidence of her own divorce in a foreign country, according to the ceremony and customs of the Jews there.(*r*) In *Moss v. Smith*, 1 Man. & Gr. 232, 3; 1 Scott's N. R. 25, to prove a Jewish divorce in England, it was holden necessary, by *Erskine*, J., that the written document of divorce delivered by the husband to the wife should be produced. According to the evidence of the high priest of the German Jews in England, this document is the operative part of the ceremony, which must, however, take place in the presence of the high priest and ten other persons. Where plaintiff and his wife were Quakers, proof of a marriage, according to the forms of that society was received without objection.(*s*)

Marriages Abroad.—A soldier on service(*t*) with the British army in St. Domingo, in 1796, being desirous of marriage with the widow of another soldier, who had died there in the service, and both parties being desirous of celebrating their marriage with effect, they went to a chapel in a town where they were, and there the ceremony was performed by a person appearing there as a priest, and officiating as such; the service being in French, but interpreted into English by one who officiated as clerk; and which the woman understood at the time to be the marriage service of the church of England. After this they cohabited together as man and wife for eleven years, until the death of the husband. On a question as to the settlement of the woman, a doubt was raised whether the marriage was valid. The court of B. R. were clearly of opinion that it was a valid marriage, whether it was to be considered as a marriage celebrated in a place where the law of England prevailed, or as a marriage according to the law of St. Domingo, whatever that might be. Upon the former ground, inasmuch as there was a contract *per verba de præsenti*, which contracts were binding on the parties before Lord Hardwicke's act, which did not affect the present case, this being a marriage beyond seas, and because the marriage was celebrated by a person who publicly assumed the office of a priest, and appeared habited as such; upon the latter ground, because, upon the facts stated, every presumption must be made in favour of its validity, according to the law of the country where it was celebrated; the marriage ceremony having been performed there in a proper place, and by a person officiating as one competent to perform that function, and more especially as it had been followed by a
 [*22] *cohabitation between the parties, as man and wife, for eleven years.

The canon law is the general law throughout Europe, as to marriages,

(*q*) *Horn v. Noel*, 1 Camb. 61. But see the elaborate judgment of Sir W. Scott, in *Lindo v. Belisario*, 1 Hagg. (C.) 227. See also *Goldsmid v. Bromer*, 1 Hagg. (C.) 324: and stat. 6 & 7 Will. IV. c. 85, ss. 2, 4, 16, 39.

(*r*) *Ganer v. Lady Lanesborough*, Peake's N. P. C. 17, Lord Kenyon, C. J.

(*s*) *Deane v. Thomas*, M. & Malk. 361, Tenterden, C. J.

(*t*) *R. v. Brampton*, 10 East, 282.

except where that has been altered by the municipal law of any particular place. Before Lord Hardwicke's act, marriages in this country were always governed by the canon law. That statute did not follow British subjects to our foreign settlements; hence, it has been holden,^(u) that a marriage between two British subjects, solemnized by a Catholic priest at Madras, according to the rites of the Catholic church, followed by cohabitation, is valid, although without the license of the governor, which it had been uniformly the practice to obtain; for that does not alter the law, which the parties carried with them. Marriages in Scotland,^(x) and beyond sea,^(y) by the law of England, remain in the same state, as if the marriage act had not been passed. So a marriage in Ireland by a clergyman of the church of England in a private house, was held^(z) valid, although no evidence was given that any license had been granted to the parties.

By stat. 4 Geo. IV. c. 91, s. 1, after reciting, that it is expedient to relieve the minds of his Majesty's subjects from any doubt concerning the validity of marriages solemnized by a minister of the church of England, in the chapel or house of any British ambassador or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines by any chaplain or officer, or other person officiating under the orders of a commanding officer of a British army serving abroad, it is declared and enacted, that all such marriages shall be deemed to be as valid in law, as if the same had been solemnized within his Majesty's dominions, with a due observance of all forms required by law.

The marriage of an officer celebrated by a chaplain of the British army within the lines of the army, when serving abroad, is valid^(a) under this statute, though such army is not serving in a country in a state of actual hostility; and though no authority for the marriage was previously obtained from the officer's superior in command.

On the claim of Sir Augustus D'Este to the Dukedom of Sussex, the following question was submitted to the judges:—"Evidence having been offered of a marriage solemnized at Rome, in the year 1793, by an English priest, according to the rites of the church of *of England, between A. B., a son of his majesty [*23] George the Third, and C. D., a British subject, without the previous consent of his said Majesty; assuming such evidence to have been sufficient to establish the validity of the marriage between A. B. to C. D., independently of the provisions of the stat. 12 Geo. III. c. 11, would it be sufficient, having regard to that statute to establish a valid marriage in a suit, in which the eldest son of A. B. claims an estate in England as the son of A. B., by virtue of such marriage?

(u) *Lauteur v. Teesdale*, 8 Taunt. 830.

(x) *Dalrymple v. Dalrymple*, 2 Hagg. Con. R. 54.

(y) *Harford v. Morris*, 2 Hagg. Con. R. 429.

(z) *Smith v. Maxwell*, Ry. & Moody, N. P. C. 80.

(a) *Waldegrave Peerage*, 4 Cl. & Fi. 649.

Answer : All the judges are unanimously of opinion that it would not ; for the effect of the act is not limited to any particular country or district, but it applies to contracts matrimonial in general and in the abstract, and declares an incapacity to contract, attaching to the person of A. B. wherever he goes. D. P. 1844. A sentence declaratory of the nullity of the marriage had been pronounced 14th July, 1794, by Sir W. Wynne, dean of the Arches. *Heseltine v. Murray*, 2 Addams, Eccles. Rep. 400, note.

For the law relating to marriages in Ireland, see stat. 7 & 8 Vict. c. 81.

Proofs of adultery must in many cases be in some degree presumptive; real and direct proof of the fact is not always to be expected; therefore the question in these cases will be, whether there is evidence of such near, such approximate acts, that there must be a legal presumption of the adultery.(b)(1) The confession of the wife is not evi-

(b) See *Wood v. Wood*, 4 Hagg. Ecc. R. 138, n.

(1) Adultery, being an act of darkness and of great secrecy, cannot always be proved by any direct means; therefore by reason of such difficulty, it may be proved by such inferences as are received and approved of either by law or nature. "It is a fundamental rule of evidence upon this subject, that it is not necessary to prove the direct fact of adultery, because, if it were otherwise, there is not one case in a hundred in which that proof could be attainable; it is very rarely, indeed, that the parties are surprised in the direct act of adultery. In every case, almost, the fact is inferred from circumstances that lead to it by fair inference, as a necessary conclusion, and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. The only general rule that can be laid down upon this subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations; neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason, and courts of justice would wander very much from their proper office, of giving protection to the rights of mankind, if they let themselves loose to subtleties, and remote and artificial reasonings upon such subjects. Upon such subjects the rational and legal interpretation must be the same." Lord Stowell, 2 Hag. Cons. R. 3; 2 Phill. Evid. 202.

Confessions, though a species of admissible evidence, are not alone sufficient to establish a charge of adultery. But where they are free from all taint of collusion, and are confirmed by circumstances and conduct, they rank amongst the highest species of evidence. 1 Greenl. Evid. §§ 214-19; 2 Id. § 45.

A *particeps criminis* is a competent witness to prove the fact of adultery, but his evidence is weak. *Forster v. Forster*, 1 Hag. Cons. R. 148, 376.

The act of adultery may be inferred from the general cohabitation of the parties, so as to exclude the necessity of particular facts, although the parties have separate beds. It may be possible that persons of peculiar and eccentric dispositions or habits, may live together in such a manner without actual criminal connexion; and it is physically possible that persons may be in the same bed together without criminal intercourse. Courts of justice, however, cannot proceed on such ground; finding persons in such a situation as presumes guilt generally, they must presume it in all cases attended with these circumstances. They cannot adopt the extravagant professions of Platonism for the principles of their decisions. *Williams v. Williams*, 1 Hag. Cons. R. 444.

"Nor," observes Shaw, C. J., in *Dunham v. Dunham*, 6 Law Reporter, 139, 141, "can this course of inquiry and process of reasoning and judging be much aided by technical and artificial rules, or by what are considered established presumptions of fact from other facts. These rules are useful and convenient in their way in suggesting general considerations, which are applicable to many cases; but after all, they are to be taken with so many exceptions, and so much allowance, that in the result each case must depend mainly upon its own peculiar circumstances. It is impossible, therefore,

dence against the defendant; but conversations between her and the defendant may be given in evidence.^(c) So letters written to her by the defendant are evidence *against* him; but the wife's letters to the defendant are not evidence *for* him. In a case where the plaintiff and his wife were servants,^(d) and necessarily living apart in different families, Lord *Kenyon*, C. J., was of opinion, that letters written by the wife to her husband, before any suspicion of the adultery, might be read as evidence of the connubial affection which subsisted between the plaintiff and his wife, observing, at the same time, that before he admitted the letters to be read, he should require strict proof when, and under what circumstances, they were written, in order to show that at this time there was not any suspicion of misconduct in the wife; and in *Willis v. Bernard*, 8 Bing. 376, the letter of the wife to a third person was admitted, to show the state of the wife's feelings at the time it was written, although it contained a statement of facts, which could not with propriety be submitted as evidence to a jury; on which, however, the judge cautioned the jury, telling them that the letter was not evidence of those facts. In *Winter v. Wroot*, 1 M. & Rob. 404, **Lyndhurst*, C. B., permitted a witness to be asked [*24] generally, whether the wife made complaints of the manner in which her husband treated her.

In *Hoare v. Allen*,^(e) a witness was called by the husband to prove the representation made by the wife to him of the place to which she was going previously to her elopement, in order to remove all suspicion of connivance on the part of the husband. The Court of King's Bench

(c) *Biker v. Morley*, M. D. London Sitings, 30 June, 1741, *Lee*, Ch. J., special jury. Verdict for defendant. Bull. N. P. 28, S. C.

(d) *Edwards v. Crock*, 4 Esp. N. P. C. 39; *Kenyon* C. J., *Trelawney v. Coleman*, 1 B. & A. 90, S. P.; and 2 Stark. 191. But in this case the husband and wife were not servants.

(e) *Hoare v. Allen*, 3 Esp. N. P. C. 276.

to lay down beforehand in the form of a rule what circumstances shall, and what circumstances shall not, constitute satisfactory proof of the fact of adultery; because the same facts may constitute such proof or not, as they are modified and influenced by different circumstances. Suppose, for instance, a married woman had been shown by undoubted proof to have been in an equivocal situation with a man not her husband, leading to a suspicion of the fact. If it were proved that she had previously shown an unwarrantable predilection for that man; if they had been detected in clandestine correspondence, had sought stolen interviews, made passionate declarations; if her affection for her husband had been alienated; if it were shown that the mind and heart were already depraved, and nothing remained wanting but an opportunity to consummate the guilty purpose—then proof that such an opportunity had occurred would lead to the satisfactory conclusion that the act had been committed. But when these circumstances are wanting; when there has been no previous unwarrantable or indirect intimacy between such parties; no clandestine correspondence or stolen and secret interviews; the fact of opportunity and equivocal appearances would hardly raise a passing cloud of suspicion over the fair fame of such a woman. But though it is easy to pronounce with confidence between cases thus distinctly and broadly marked by the circumstances, yet rules of evidence drawn from them afford little aid in complicated cases, when minute shades of difference may vary the aspect of the proofs, and more especially where there is a direct conflict of testimony; when some of the testimony must be false; and when constant caution is necessary in weighing the credit due to witnesses, and to prevent being misled by some or other of these false lights."

were of opinion that this evidence, being part of the *res gestæ*, was therefore admissible.(1)

IV. *Of the Damages. Costs.*

THE damages given by the jury in this action are, in general, proportioned to the degree of the injury. Circumstances of aggravation of the injury, and which may therefore operate as an inducement with the jury to give large damages, are, the plaintiff's having lived happily with his wife before her connection with the defendant,(f) the unblemished character and antecedent virtuous behaviour of the wife, a provision having been made for the children of the marriage by settlement or otherwise, and other similar topics, which the extraordinary circumstances of the individual case may furnish. Proof is frequently adduced of the defendant being a man of fortune, by calling his banker or producing a settlement, under which he may be entitled to any estate, real or personal. But in *James v. Biddington*, 6 C. & P. 589, *Alderson, J.*, rejected evidence of this description, observing that the amount of the defendant's property was not a question in the cause.

Circumstances of extenuation, on the part of the defendant, and which may tend to the mitigation of the damages, are the plaintiff's ill usage or unkind treatment of his wife; evidence of his intolerable ill temper, of his having turned his wife out of his house,(g) and refused to maintain her, &c., previously to the adulterous intercourse; gross negligence or inattention of the plaintiff to his wife's conduct, with respect to the defendant;(h) the wanton manners of the wife, or first advances made by her to the defendant;(i) a prior elopement of the wife and adulterous intercourse with another person, or having had a bastard before marriage;(k) because by bringing the action the husband puts the general behaviour of the wife in issue. So letters written by the wife to the defendant before his connection with her,
[*25] soliciting a criminal intercourse,(l) &c. may *be given in evidence. But the defendant will not be permitted to prove acts of misconduct of the wife subsequent to the commission of the act complained of in the action.(m)(2)

(f) Bull. N. P. 27.

(g) Bull. N. P. 27.

(h) Per Buller J., in *Duberley v. Gunning*, 4 T. R. 657.

(i) Per Lord Ellenborough, C. J., in *Gardiner v. Jadis*, March 2, 1805. London Sittings.

(k) *Roberts v. Malston*, Hereford, 1745, per Willes, C. J., Gilb. Evid. 113, ed. 1761; Bull. N. P. 296, S. C.

(l) Per Lord Kenyon, C. J., *Elsam v. Fawcett*, 2 Esp. N. P. C. 562.

(m) Ibid.

(1) Where the injury is stated to have been committed within certain days, proof of improper freedoms must be first given within the limited period, before evidence of the trespass at a different time can be received. *Gardner v. Madeira*, 2 Yeates, 466; *Torre v. Summers*, 2 Nott & McC. 267.

(2) But acts of misconduct prior to her actual adultery with the defendant, may be proved, although they were after the period in which familiarities were shown to have taken place with the defendant. *Torre v. Summers*, 2 Nott & McC. 267.

In a case⁽ⁿ⁾ (said to have been unprecedented) where the wife was dead before the trial of the action, *Coleridge, J.*, told the jury that they must award damages for the loss of the society of the wife, &c., down to the time of the death only.

It has been supposed that in this action a new trial cannot be granted for excessive damages;^(o) but if it appear to the court, from the amount of the damages given, as compared with the facts of the case laid before the jury, that the jury must have acted under the influence, either of undue motives or some gross error or misconception on the subject, the court will think it their duty to submit the question to the consideration of a second jury.^(p)(1) So if the verdict be very much against the weight of evidence, the court will grant a new trial on payment of costs.^(q) With respect to damages, however, the court never interferes,^(r) unless they are very excessive, or a strong case is made out to show that the jury have taken a perverted view of the matter.(2)

Costs.—If the damages are less than forty shillings, the plaintiff is not entitled to recover costs, unless the judge, immediately after trial, certify that the trespass or grievance was wilful and malicious. See stat. 3 & 4 Vict. c. 24, s. 2, *post*, p. 38.

(n) *Wilton v. Webster*, M. D. 7 C. & P. 198.

(o) See *Wilford v. Berkeley*, 1 Burr. 609; *Duberley v. Gunning*, 4 T. R. 651. [Accord. *Torre v. Somers*, 2 Nott & McC. 267.]

(p) *Chambers v. Caulfield*, 6 East, 256.

(q) *Mellin v. Taylor*, 3 Bingh. N. C. 109; 3 Sc. 513.

(r) Per *Tindal, C. J.*, *Edgell v. Francis*, 1 Man. & Gr. 225; 1 Scott, N. R. 118. N. The action was for false imprisonment.

(1) Even if courts have the power to grant new trials in cases of crim. con. for excessiveness of damages, still it seems *never* to have been exercised. The court refused to set aside a verdict for \$3,000, although plaintiff had reason to know of his wife's improper conduct and took no pains to prevent it. But a new trial was granted on the ground of newly discovered evidence. *Smith v. Martin*, 15 Wendell, 270.

(2) The jury, in establishing the damages, in an action for criminal conversation, may regard not only the character and conduct of the husband and wife, to determine what such a husband ought to recover for the injury, but the conduct of the defendant, in order to determine what a person who had conducted as he had ought to pay. *Sanborn v. Neilson*, 4 N. H. 501.

If, in an action for adultery, it appear that the wife has died since the commencement of the action, the jury should give damages for the loss of the society of the wife, from the time of the discovery of the adultery to the time of the wife's death, and, also, for the shock to the feelings of the husband; and this is so although it appear there was no suspicion of the wife's infidelity till she was on her death bed, and though the husband continued to treat her kindly up to the time of her death. *Wilton v. Webster*, 7 C. & P. 198.

In mitigation of damages the defendant may show that the plaintiff married an actress, concealed the marriage, and very seldom saw her; but suffered her to live as if she were single, and to continue her performances in her maiden name. *Calcraft v. Harborough*, 4 C. & P. 499; 2 Greenl. Ev. § 56; or that his means and expectations are inconsiderable, and not calculated to meet heavy damages—2 Stark. Evid. 445; or that the wife's character for chastity was bad before she was married, or that the plaintiff had been improperly intimate with other women. *Sanborn v. Neilson*, 4 N. H. 501.

But evidence that the plaintiff is ill-tempered, and that, previously to the illicit intercourse charged, he and his wife lived unhappily and occasionally came to blows, is inadmissible in mitigation of damages. *Van Vocter v. McKillip*, 7 Blackf. 578.

*CHAPTER III. OF ASSAULT AND BATTERY.

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- V. COSTS. p. 38. CERTIFICATE UNDER STAT. 3 & 4 VICT. c. 24, *ib.*

I. *Of the Nature of an Assault and Battery, and in what Cases an Action for an Assault and Battery may be maintained.*

AN *assault* is an attempt, with force or violence, to do a corporal injury to another, as by holding up a fist in a menacing manner; (a) striking at another with a cane or stick, though the party striking misses his aim; drawing a sword or bayonet; throwing a bottle or glass with intent to wound or strike; presenting a gun at a person who is within the distance to which the gun will carry; pointing a pitchfork at a person who is within reach; (b) or by any other similar act, accompanied with such circumstances as denote at the time an intention (1) (coupled with a present ability) (c) of using *actual violence, against the person of another. For an assault, which is considered as an inchoate violence, the law has provided a remedy

(a) Finch's Law, B. 3, c. 9; 1 Hawk. P. C. c. 62, s. 1.

(b) *Genner v. Sparks*, 6 Mod. 173, 4; and Salk. 79.

(c) See *Stephens v. Myers*, 4 C. & P. 349. *Tindal*, C. J.

(1) Whether the act shall amount to an assault, must in every case be collected from the intention. Trespass for assault: Plea, *son assault demesne*. Replication, *de injuriâ sua propriâ*. The defendant and another person were fighting, and the plaintiff came and took hold of the defendant by the collar, in order to separate the combatants, whereupon the defendant beat the plaintiff. The plaintiff's counsel offering to enter into this evidence, it was objected on the other side, that the plaintiff ought to have replied this matter specially; but *Legge*, Baron, overruled the objection, observing that the evidence was not offered by way of justification, but for the purpose of showing that there was not any assault, for it was the *quo animo* which constituted an assault, which was matter to be left to a jury. *Griffin v. Parsons*, Gloucester Lent Assizes, 1754. MSS. Cited arg. in *Hall v. Fearnley*, 3 Q. B. 920; 3 G. & D. 10. "No words can amount to an assault, though, perhaps, they may in some cases serve to explain a doubtful action; as if a man were to lay his hand upon his sword, and say, 'If it were not assize time, he would not take such language.' These words would prevent the action from being construed an assault, because they show he had no intent to do him any corporal hurt at that time." Bull. N. P. 15. See *State v. Benedict*, 11 Verm. 236: *State v. Crow*, 1 Iredell, 375.

by an action of trespass *vi et armis*, at the suit of the injured party,(1) for the recovery of damages commensurate to the injury sustained.(2)

A *battery*, which always includes an assault,(d) is an injury inflicted on a person by beating, either with the hand or an instrument;(3) as by throwing water(e) on a person. The form of action prescribed by law, in the case of battery, is the same as that in assault, *viz.* an action of trespass *vi et armis*. In order to maintain this action, it is immaterial whether the act of the defendant be wilful or not.(4) Hence this action lies against a soldier who hurts his comrade while they are exercising, unless the defendant can show such circumstances as will make it appear to the court that the injury done to the plaintiff was inevitable,(f) and that the defendant was not chargeable with any negligence: the merely pleading that the defendant committed the injury *casualiter et per infortunium et contra voluntatem suam* is not sufficient, for no man shall be excused of a trespass, unless it may be judged utterly without his fault. The defendant was uncocking a gun,(g) and *the plaintiff standing to see it, it went off, and wounded [*28] him: it was holden, that the plaintiff might maintain trespass.

This action lies not only against him who commits the injury, but

(d) Terms de la Ley, Battery, Com. Dig. Battery.

(e) *Pursell v. Horne*, 3 Nev. & P. 564; 8 A. & E. 602.

(f) *Weaver v. Ward*, Hob. 134.

(g) *Underwood v. Hewson*, Str. 596.

(1) Defendant raised his hand against plaintiff, within striking distance, and said, "if it were not for your gray hairs," &c.; holden no assault, because no intention to strike. *Com. v. Eyre*, 1 Ser. & Rawle, 347; *The U. S. v. Ortega*, 4 W. C. C. R. 534; *The State v. Davis*, 1 Iredell, 128; *People v. Hays*, 1 Hill, N. Y., 361; Whart. Crim. Law, 544-547, 3d ed. 1855; *Marentelle v. Oliver*, 1 Pen. 380.

(2) For the law relating to indictments for assault and battery, see 1 Hawk. P. C. ch. 62, s. 1, 2; 1 East's P. C. ch. 8, s. 1. The party injured may proceed by action and indictment for the same assault, and the court, in which the action is brought, will not compel the plaintiff to make his election, to pursue either one or the other; for the fine to the king, upon the criminal prosecution, and the damages to the party, in the civil action, are perfectly distinct in their natures. *Jones v. Clay*, 1 Bos. & Pul. 191. But see stat. 9 Geo. IV. c. 31, *post*, p. 28. Sed vide contra, *State v. Blythe*, 1 Bay, 166; and see *Read v. Kelly*, 4 Bibb, 400. *State v. Blennerhassit*, Walker 7. Where defendant gave in evidence a record or conviction in a criminal court for the same assault and battery in mitigation of damages, it was held to be no error for the court to instruct the jury "that the assault was no longer matter of doubt, and would entitle plaintiff to some damages." *Moses v. Bradley*, 3 Whart. 272. And even for a threat or menace, it seems, if any injury result therefrom to the party. *Hurst v. Carlisle*, 3 Penn. R. 176. In trespass for assault and battery, plaintiff may recover on proof of assault only, without evidence of special damage. *Lewis v. Hoover*, 3 Blackford, 407; *State v. Benedict*, 11 Verm. 236; *Hays v. People*, 1 Hill, N. Y., 351.

(3) Striking a cane in the hand of another is a battery, because any thing attached to the person partakes of its inviolability. Per Ch. J. *M'Mean*, *Respublica v. Longchamps*, 1 Dall. Rep. 114; *State v. Davis*, 1 Hill, 46. In *Hurst v. Carlisle*, 3 Penn. R. 176, *Rogers, J.*, says, "For battery, wounding or mayhem, or for an attempt to commit any of these (which in law is termed an assault), the injured party may have a remedy in damages by action of trespass. Archb. 25. Even for a threat or menace to commit any of these injuries. Reg. 104, 2 Rol. 545, Nos. 25, 41; or to pull a man's house down, (Reg. 108,) or the like: if any injury arise to the party from such threat or menace, the remedy, it seems, is also by action of trespass. Vide Com. Dig. Battery, D., and the authorities there cited."

(4) Neither does the degree of violence with which the act is done make any difference. Per *Le Blanc, J.*, 3 East, 602. [*Taylor v. Rainbow*, 2 Hen. & Munf. 423; *Bullock v. Babcock*, 3 Wend. 391.]

against him also at whose command it is done :^(h)(1) hence if A. command B. to beat another person, and B. does it accordingly, A. is guilty of the trespass as well as B.⁽²⁾ Although the plaintiff declares for an assault and battery, yet he may recover for the assault only.⁽ⁱ⁾ Although a plaintiff has been indicted for a felonious assault, by stabbing, and *acquitted*, the party injured may, notwithstanding, sue him for damages in a civil action, if there has not been any collusion in procuring the acquittal ;^(j) and the same rule holds after indictment and *conviction*.^(k)

But by stat. 9 Geo. IV. c. 31, s. 27, persons convicted of unlawfully assaulting or beating, may be compelled by two justices of the peace, to pay a fine and costs, not exceeding 5*l.*; but if the justices shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall *forthwith*^(l) make out a

^(h) 1 Roll. Abrid. 555 (V.), pl. 2.

⁽ⁱ⁾ Lib. Ass. Anno. 22, fol. 99, pl. 60; Bro. Trespass. pl. 40.

^(j) *Crosby v. Leng*, 12 East, 409.

^(k) Adm. per Cur. S. C.

^(l) See *Reg. v. Robinson*, 12 A. & E. 672.

(1) Trespass *vi et armis* will not lie against a railroad corporation for an injury done to the plaintiff by their locomotive steam engine, whether such injury be wilful or accidental on the part of the servants of the company, when it does not appear that the particular injury was done by the command or with the assent of the defendants. *Germanatown Railroad v. Viet*, 4 Whart. 143; *Vandgrift v. Rediker*, 2 Amer. Law Journal, 116, S. C. Zab. R. 185, per *Carpenter, J.*; *Erie Railway v. Skinner*, 1 Amer. Law Reg. 97, 103, note.

The master of a ship when present, is responsible for the conduct of his officers towards the crew. If he is present when the officers commit an assault and battery on one of the crew, and does not interfere to prevent it, he is presumed to assent to and encourage it, and is jointly liable for the tort. *Thomas v. Lane*, 2 Sumner, 1; *U. S. v. Taylor*, Ib. 587-8. It cannot be maintained against a corporation, solely or jointly with other defendants; and if others are joined, the writ is abateable as to all. *Orr v. Bank of U. States*, 1 Ohio Rep. 28. Although a captain may have a right to inflict corporeal punishment upon a seaman under his command, yet it is not an arbitrary and uncontrolled right; he is amenable to the law for the due exercise of it. He ought to be able to show not only that there was a sufficient cause for chastisement, but that the chastisement itself was reasonable and moderate. The rule on this subject is well laid down by Abbott on Shipping, 125: "By the common law," says he, "the master has authority over all the mariners on board the ship, and it is their duty to obey his commands in all lawful matters relative to the navigation of the ship and the preservation of good order; and in case of disobedience or disorderly conduct he may lawfully correct them in a reasonable manner. His authority in this respect being analogous to that of a parent over a child, or a master over his apprentice or scholar. Such an authority is absolutely necessary to the safety of the ship, and of the lives of the persons on board; but it behoves the master to be very careful in the exercise of it." Approved per *Thompson, C. J.*, in *Brown v. Howard*, 14 Johns. 119. *Michaelson v. Dennison*, 3 Day's Rep. 294. Judge *Peters*, in *Thorne v. White*, 1 Adm. Dec. 173, says: "I have generally thought myself warranted to give a latitude of construction to the words 'moderate correction,' where chastisement was salutary and merited, and in this I have never been over nice. The safety of a ship sometimes depends on promptly checking disobedience and stimulating exertion. Subordination is peculiarly essential to be enforced among a class of men whose manners and habits partake of the attributes of the element on which they are employed. I have never bound over a master for correcting a sailor, unless cruelty was exercised, or improper weapons used." See also *Forbes v. Parsons*, Crabbe, 283, per *Hopkinson, J.*, and 1 Conkling's Admiralty, 312.

(2) It has been held that where two fight by consent, and one is beaten, he may recover damages for the injury. See *Stout v. Wren*, 1 Hawks, 420.

certificate under their hands, stating the fact of such dismissal; and by sect. 28, such certificate, or in case of conviction, payment of the whole amount adjudged, or suffering imprisonment in lieu thereof, shall be a bar to any other proceeding, *civil* or criminal, for the same cause. Application for this certificate ought to be made whilst the facts are fresh in the recollection of the justices, and it ought to be heard in the presence of the prosecutor: *(m)* and in a plea to an action the grounds of the dismissal must be stated, so as to show that it is a bar. *(n)*

This action must be commenced within four years next after the cause of action. *(o)*

II. Declaration.

THIS is a transitory action, *(p)* and consequently the venue may be laid in any county, *(q)* ⁽¹⁾ except where it is otherwise directed by statute; as where the action is brought against justices of the peace, mayors, or bailiffs of cities, or towns corporate, head-boroughs, port-reeves, constables, tithing-men, churchwardens, overseers of the poor, &c., or *other* persons acting in their aid and assistance, or by their command, for any thing done in their official capacity; in these cases, the venue, by stat. 21 Jac. I. c. 12, s. 5, *must be laid in the county [*29] where the facts were committed, otherwise the jury, who try the cause, shall find the defendant not guilty, without any regard to any evidence given by the plaintiff touching the trespass, battery, &c.

The provisions of the preceding statute being found to be salutary, they were by stat. 42 Geo. III. c. 85, s. 6, extended to all persons holding a public employment, or any office, station, or capacity, civil or military, either in or out of the kingdom, and who, by virtue of such employment, had power to commit persons to safe custody; provided that, where any action shall be brought against such persons in this kingdom for any thing done out of this kingdom, the plaintiff may lay the act to have been done in Westminster, or in any county where the defendant shall reside. Actions brought against any persons for any thing done by any officer of the customs *(r)* or excise, *(s)* or others acting under the direction of commissioners of customs, in execution or by reason of their office, must be laid and tried in the county where the facts were committed. The day is not material, *(t)* neither is the plaintiff obliged to prove that the fact was committed on the day laid in the declaration. ⁽²⁾ Proof of the trespass at any time before the com-

(m) Coleridge, J. in *Reg. v. Robinson*, 12 A. & E. 683.

(n) *Skuse v. Davis*, 2 P. & D. 550; 10 A. & E. 635.

(o) 21 Jac. I. c. 16, s. 3.

(p) Litt. Sect. 485.

(q) *Corbett v. Barnes*, Cro. Car. 444.

(r) 3 & 4 Will. IV. c. 53, s. 107.

(s) Ibid.

(t) Litt. Sect. 485; 1 Inst. 283, a.

(1) And the action may be brought in one state for an injury committed in another. *Watts v. Thomas*, 2 Bibb, 458; *Redgrave v. Jones*, 1 Har. & M'Hen. 195, and *Miller v. M'Kee*, 3 Har. & M'Hen. 593, and the venue is transitory; *Hurley v. Marsh*, 1 Scam. 329; *Sturgeneger v. Taylor*, 3 Brevard, 7.

(2) The time and damages were both left blank in the declaration; after the verdict

mencement of the action is sufficient.(1) An assault; being one entire individual act, cannot be committed at different times, and consequently ought not to be stated in the declaration to have been so committed. In trespass and assault, it was alleged in the declaration,(u) that the defendant on such a day, and on divers other days and times between that day and the day of exhibiting the bill, made an *assault* on the plaintiff; the declaration was holden bad on special demurrer. But where the declaration stated that the defendant *assaulted* the plaintiff on divers days and times(x) it was adjudged good on special demurrer.(2) The declaration ought to allege the fact to have been committed *vi et armis* and *contra pacem*. Doubts seem to have been entertained, whether the omission of these words was matter of form or substance [*30] at the common *law. But now, by stat. 16 & 17 Car. II. c. 8, s. 1, the omission is aided after verdict; and by stat. 4 Ann. c. 16, s. 1, it is enacted, that no exception shall be taken in any court of record of the omission of *vi et armis* and *contra pacem*, except the same shall be especially shown for cause of demurrer. The declaration ought to allege the commission of the fact positively, and not by way of recital, *e. g.* for *that* on such a day the defendant made an assault upon the plaintiff, and not for that, *whereas*, &c.(3) If the declaration contain only one count,(y) the plaintiff, after proving one assault, cannot waive that, and proceed to give evidence of another.(4)

III. Pleadings.

General Issue.—The general issue to an action of assault and bat-

(u) *English v. Purser*, 6 East, 395, recognizing *Michell v. Neale*, Cowp. 828.

(x) *Burgess v. Freelove*, 2 Bos. & Pul. 425.

(y) *Stante v. Pricket*, 1 Campb. 473.

on the pleas of not guilty and *son assault demesne*, the court denied a motion in arrest of judgment, and supplied the damages from the writ. *Digges v. Norris*, 3 Hen. & Mun. 268.

(1) But where the defendant pleads *son assault demesne*, the plaintiff can give no evidence of an assault except on the day laid in the declaration, and this whether the defendant gives evidence in support of his plea or not. *Gibson v. Fleming*, 1 Har. & J. 483.

(2) From the report of this case of *Burgess v. Freelove*, it appears that the Court of Common Pleas did not consider *Michell v. Neale*, Cowp. 828, as a sound authority. But Lord *Ellenborough*, C. J., in *English v. Purser*, took a distinction between the words "made an assault," in *Michell v. Neale*, and the word "assaulted," in *Burgess v. Freelove*, on the ground that the latter might mean that the defendant committed so many different assaults on the different days, admitting, however, that the distinction was very nice. This distinction certainly was not adverted to by the court in *Burgess v. Freelove*.

(3) A declaration beginning, "for that whereas," &c., by way of recital, is good after verdict or on a general demurrer, but it would be bad on a special demurrer. It has however, been holden by the Supreme Court of Appeals in Virginia that *quod cum* in trespass was fatal even after verdict, and many judgments have been reversed on that ground. *How's Executrix v. Dishman*, 2 Hen. & Mun. 559. *Moore's Administrator v. Downey and another*, 3 Hen. & Mun. 127. *Lomax v. Hord*, 3 Hen. & Mun. 271. See *Coffin v. Coffin*, 2 Mass. Rep. 358. *Collier v. Moulton*, 7 Johns. Rep. 109.

(4) In the declaration in this action, the plaintiff may allege many things by way of aggravation, which would not of themselves form a cause of action. *Horton v. Monk*, 1 Browne, 68; *Jacoby v. Guier*, 6 S. & R. 399.

tery is not guilty, which constitutes a proper issue in case the defendant has not committed the injury complained of.(1) So unavoidable accident arising from superior agency, is a defence admissible under the general issue; but a defence, admitting the trespass complained of to be the act of the defendant, must be pleaded specially.(z)

On the general issue, not guilty, matter of justification cannot be given in evidence in mitigation of damages. But where an action was brought against the captain of a ship, who pleaded not guilty, the defendant cross-examined the plaintiff's witness as to expressions used by the plaintiff, which would have justified the imprisonment, they tending to raise mutiny and disobedience; and though it was objected to by the plaintiff, the evidence of what was said by him *at the time* of the imprisonment was received(a) in mitigation of damages; for every thing that passed *at that time* is part of the transaction on which the plaintiff's action is founded, and he could not be surprised by this evidence.

By stat. 7 Jac. I. c. 5, "In any action upon the case, trespass, battery, or false imprisonment, against any J. P., mayor, bailiff, constable, &c., for any thing done by virtue of their offices, and against all others acting in their aid or assistance, or by their command concerning their offices, they may plead the general issue, and give the special matter in evidence." This statute was made perpetual by stat. 21 Jac. I. c. 12, and extended to churchwardens,(b) overseers of the poor, and others acting in their aid or by their command. See similar provisions as to officers of customs and excise, 3 & 4 Will. IV. c. 53, s. 107. Although the new rules of pleading do not disable any person from pleading the general issue, *and giving the special matter in [*31] evidence, where by statute he may do so, yet it is required by R. G.(c) 1 Vict. Trin. Term, that in the margin of the plea the words "by statute" shall be inserted, otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament; and such memorandum shall be inserted in the margin of the issue, and of the nisi prius record. But the plea of the general issue "by statute" cannot(d) be pleaded together with special pleas.

Money cannot be paid into court in this action.(e)

(z) *Hall v. Fearnley*, 3 Q. B. 919, 3 G. & D. 10.

(a) *Bingham v. Gamault*, London Sitings, 5th April, 1788, coram Buller, J., Buller's N. P. 5th ed. 17.

(b) See *Burton v. Henson*, 10 M. & W. 105.

(c) 4 Bing. N. C. 816; 4 Mee. & Wels. 3; 3 Nev. & P. 381; 8 A. & E. 279.

(d) *Legge v. Boyd*, 1 M. & Gr. 898; 2 Scott, N. R. 1.

(e) Stat. 3 & 4 Will. IV. c. 42, s. 21.

(1) A former recovery is not admissible under the general issue in this action. *Coles v. Carter*, 6 Cowen, 691. But under it the defendant may give in evidence his state of mind, caused by excitement or provocation, so recent as not to allow the blood to cool, but only in mitigation of damages. If such provocation is a severe punishment by plaintiff, a schoolmaster, of defendant's son, evidence of the nature of that transaction is not admissible. But defendant may give in evidence the appearance of his son, and of his representations to his father. *Cushman v. Waddell*, 1 Bald. 66. He cannot give in evidence in mitigation of damages, that plaintiff had slandered him, if there had since been sufficient time for deliberate reflection. *Fullerton v. Warwick*, 3 Blackford, 219. Nor the improper conduct of plaintiff in his business prior to the assault. *Matthews v. Terry*, 10 Conn. 455.

Justification in Defence of Person.—If the plaintiff was the aggressor, and the injury of which he complains was occasioned by his own assault on the defendant, so that the act of the defendant became necessary for the defence of his person, the action cannot be maintained ;(f)(1) because the law will permit any degree of violence to be justified, if it be necessary for the safety of the person.(2) This defence or justification, which is the most usual in this action, and which is technically termed *son assault demesne*, must be pleaded specially.(g) In like manner a defendant may justify an assault and battery in the defence of his wife,(h) child,(3) or servant.(i)(4) So a wife may justify in defence of her husband,(k) a child of a parent, and a servant in defence of the person of his master.(l) Where a servant justifies in defence of his master, it ought to be alleged in the plea that the plaintiff would have beat the master, if the servant had not interposed. In trespass,(m) assault, and battery, against A. and B., A. pleaded *son assault*, and B. pleaded that he was servant to A., and that the plaintiff having assaulted his master in his presence, he in defence of his master struck the plaintiff. On demurrer, the plea was holden ill ; for the assault on the master might be over, and the servant cannot strike by way of revenge, but in order to prevent an injury : and the right way of pleading is, that the plaintiff would have beat the master if the servant had not interposed *prout ei bene licuit*. Judgment for the plaintiff.

[*32] “If a person comes up to attack me and I put myself in a *fighting attitude, this is not an assault on my part, and will not make out for that person a plea of *son assault demesne*.”(n)

Justification in Defence of Possession.—So a defendant may justify in defence of his possession ;(o) as if A. enter the close of B. unlawfully, B. having first requested(5) A. to depart, may, on his refusal,

(f) *Cockcroft v. Smith*, Salk. 642.

(g) 1 Inst. 282, b, 283, a.

(h) 2 Roll. Ab. 546, (D.) pl. 18 ; Bro Trespass, pl. 128.

(i) 2 Roll. Abr. 546, (D.) pl. 2.

(k) *Leward v. Basely*, Ld. Raym. 62.

(l) 2 Roll. Abr. 546, (D.) pl. 3. Adm. per Cur. in Ld. Raym. 62, and Salk. 407.

(m) *Barfoot v. Reynolds and another*, Str. 953.

(n) Per *Lyndhurst*, C. B., *Moriarty v. Brookes*, 6 C. & P. 685.

(o) 2 Roll. Abr. 548, (G.) pl. 2.

(1) If the party first attacked use such violence as he could not justify under a plea of *son assault demesne*, were he the defendant, he cannot maintain an action for assault and battery. *Elliott v. Brown*, 2 Wend. 497. If two persons having fought, separate, and afterwards meet again and renew the combat, the assailant in the second fight cannot justify by showing that his adversary was the assailant in the first ; but it would go in mitigation of damages. *Chrisman v. Hunter*, 3 Dana, 83.

(2) But as to all violence beyond what is necessary for self defence, the defendant is liable as the aggressor. *Elliott v. Brown*, 2 Wend. 297 ; *State v. Wood*, 1 Bay, 351 ; *State v. Quin*, 2 Conn. Rep. 694 ; *Bennett v. Appleton*, 25 Wend. 371 ; Whart. Am. Crim. Law, 548, 3d ed.

(3) Clerk's Assistant, 90, 91. *Cushman v. Waddell*, 1 Baldw. 58.

(4) In *Leward v. Basilee*, Salk. 407 ; Ld. Raym. 62, it was said by the court, that a master could not justify an assault in defence of his servant, because the master might have an action *per quod servitium amisit* ; which opinion is adopted in Bull. N. P. 18.

(5) Every *impositio manuum* is an assault and battery, which cannot be justified upon account of breaking the close in law without a previous request. *Green v. Goddard*, Salk. 641.

justify laying his hand on A. in order to remove him.(p) It must be observed, that B. ought not to begin with striking, or offering violence to A.,(q) for the law in the first instance, merely allows B., in defence of his possession, to lay his hand gently on A.(1) Hence a charge of beating, wounding, and knocking the party down, cannot be justified by a plea of *molliter manus imposuit*.(r)(2) If indeed A. should forcibly resist the endeavor to remove him, it will then be lawful to oppose force to force, and any degree of violence which may be necessary in self-defence will be justifiable.(3) If the entry of the close be forcible, as by breaking down a gate, or the like, a previous request is unnecessary;(s) for acts of violence, on the part of the trespasser, may be instantly opposed by such other acts of violence on the part of the owner, as may be necessary for the immediate defence of his possession. Trespass, assault, and battery, with a stick:(t) the defendant pleaded as to the assault and battery, that he was possessed of a close, and that the plaintiff, with force and arms and with a strong hand, as much as in him lay, did attempt and endeavour forcibly to break into and enter the said close, whereupon the defendant resisted and opposed such entrance, and defended his possession as it was lawful for him to do, and that if any injury happened to the plaintiff, it was in defence of the possession of the close. Replication, *de injuriâ suâ propriâ absque tali causâ*, and issue found for the defendant. A motion was made to enter up judgment for the plaintiff, notwithstanding the justification, which was found for the defendant, on the ground that the plea could not be supported, on the authority of *Jones v. Tresilian*, 1 Mod. 86, where *Twisden*, J., said, "You cannot justify the beating of a man in defence of your possession, but you may say that you did *molliter*

(p) See the form, 2 Lutw. 1435.

(q) 2 Inst. 316.

(s) *Green v. Goddard*, Salk. 651.

(r) *Gregory and wife v. Hill*, 8 T. R. 299.

(t) *Weaver v. Bush*, 8 T. R. 78.

(1) See *M'Iroy v. Cochran*, 2 Marsh. 274.

(2) See *Ford v. Logan*, 2 Marsh. 325.

(3) In trespass for assault and battery on plaintiff in his dwelling house, defendant cannot justify by showing he was the owner, and that possession was unjustly withheld, and that he used no more force than was necessary to effect an entrance and overcome plaintiff's resistance. *Sampson v. Henry*, 11 Pick. 379. And it may be shown by plaintiff that defendant beat the plaintiff and his sons, whose wife was in travail, and that this was known to defendant before he entered the house, in order to show the malice of defendant, and the aggravated suffering of the plaintiff, although not set forth in the declaration. *Ibid.* And defendant cannot show in mitigation of damages that he entered to make an attachment, as he had no legal right to break open a dwelling house. *Ibid.* In trespass *quare clausum fregit*, and for an assault and battery, it was held that the assault and battery was not merely matter of aggravation, but a distinct charge of injury, for which plaintiff would be entitled to compensation, and therefore a defence to the forcible breaking and entering was not a defence to the whole action. *Sampson v. Henry*, 13 Pick. 36. In Pennsylvania, if a defendant justifies an assault, &c., full costs are allowed; and the justification need not appear of record; as under the general issue, with leave to give special matter in evidence, the defendant may prove everything that amounts to a justification. *Fisher v. Johnson*, 1 Browne, 197. But see as to the plea of justification, *post*, vol. 2, title Slander. If the defendant pleads *son assault demesne*, the plaintiff can give no evidence of an assault, except on the day laid in the declaration, and this whether the defendant gives evidence in support of his plea or not. *Gibson v. Fleming*, 1 Har. & J. 483. See *Com. v. Mitchell*, 2 Parsons, 456, 457; Whart. Am. Crim. Law, 704, 3d ed.

manus imponere," &c. The case having been argued, Lord *Kenyon*, C. J., said that the plaintiff could not succeed in his application, unless he could show that the words *molliter manus imposuit* were mere technical words; that a party might resist and oppose force by force, in defence of his possession, if necessary; if the resistance were

[*33] excessive, the plaintiff might show that in *a new assignment.

Lawrence, J., said, "that the general form of pleading had been by *molliter manus imposuit*, and on this ground that the defendant ought not, in the first instance, to begin with striking the plaintiff, but the law allows him either in defence of his person or possession to lay his hand on the plaintiff, and then he may say, if any further mischief ensued, it was in consequence of the plaintiff's own act; so that the battery follows from the resistance. But it does not necessarily follow from anything stated in this plea, that the defendant did more than gently lay his hands on the plaintiff in the first instance; and if not, this plea may stand consistently with the authorities." Rule discharged. In framing justifications in defence of possession, it is not necessary for the defendant to set forth the particulars of his title; it is sufficient to state that defendant was possessed, &c., for this is merely an inducement and conveyance to the substance of the plea. Trespass of assault, battery, and wounding. Plea to the wounding, not guilty,^(u) and to the assault and battery, that he was possessed of a house for years; that the plaintiff entered his house, and would have thrust him out of possession thereof, whereupon he *molliter manus imposuit*, to put him out, and the harm, if any done, was in defence of his own possession. On demurrer, it was contended, that the defendant ought to have set forth particularly, who made the lease, when it was made, and for how many years; but the court held the plea good; for the statement of the possession for years was only an inducement and conveyance to the justification, the substance of which was, that he offered to thrust him out of the possession of his house, and that the title or interest not coming in question, it was not necessary that the allegation should be as certain as where a claim was made by the defendant. The observations which have been made in respect of the defence of real property, apply also to the defence of personal property, for the protection of which the law will not permit violence to be offered in the first instance; and although it be not necessary in this case to request the person who has taken the property to restore it, yet, unless such property is seized, or attempted to be seized, *forcibly*, the owner cannot justify any thing more than gently laying his hands on the trespasser in order to recover it.⁽¹⁾

(u) *Skewill v. Avery*, Cro. Car. 138.

(1) Force was held excusable where a person, after request, had refused to leave another's premises, and where an officer attempted to seize the goods of the defendant and in his possession, upon a writ of attachment against another. Where there has been, however, a trespass in law merely, without actual force, the owner of the close, &c., must first request the trespasser to depart, before he can justify laying his hand on him for the purpose of removing him; and even if he refuse, he can only justify so much force as is necessary to remove him. But if the trespasser use force, then the owner may oppose force to force; and in such a case, if he be assaulted or beaten, he may justify even a

Justifications by Officers executing Process.—In like manner a sheriff's officer cannot justify any act more than laying his hand on another for the purpose of executing legal process, unless acts of violence become necessary by a resistance on the part of the person apprehended, or an endeavour to rescue himself.^(x)(1) A battery cannot be justified by showing an arrest merely,^(y) because an arrest may be made without touching the person, as if a bailiff *comes [*34] into a room where the defendant is, and, having locked the door, tells him that he is arrested, that is an arrest; for the defendant is in the custody of the officer. In consequence of this decision it was doubted, whether a defendant could justify a battery by stating that he gently laid his hands on the plaintiff; but this mode of pleading was adjudged to be good, in *Titley v. Foxall*, Willes, 688. And in *Tottage v. Petty*, Ca. Temp. Hardw. 358, and MSS., where to trespass for assault and battery, the defendant as to the assault and battery pleaded, that the plaintiff entered his house without his leave, and there disturbed him; whereupon the defendant requested the plaintiff to quit his house, and because the plaintiff would not, the defendant *gently laid his hands* on the plaintiff to thrust him out; on demurrer, the case of *Williams v. Jones* was cited as an authority to show that this plea was bad; but Lord *Hardwicke*, C. J., said, "It was not determined by us in *Williams v. Jones*, that a battery could not be justified by a *molliter manus imposuit*, but that it could not be justified by merely showing an arrest." The court were clearly of opinion that the plea was good, and gave judgment for the defendant.⁽²⁾ Regularly, when the defendant justifies under a writ, warrant, precept, or any other authority, he must set it forth in his plea.^(z)

(x) *Truscott v. Carpenter and Man*, Lord Raym. 229; *Williams v. Jones*, Str. 1049, and Ca. Temp. Hard. 298, more fully reported.

(y) *Williams v. Jones*, Ca. Temp. Hard. 298.

(z) 1 Inst. 283, a; *Matthews v. Cary*, 3 Mod. 137, 138; Carth. 73, S. C.

wounding or mayhem in self-defence, as above mentioned. In answer, however, to a justification in defence of his possession, the other party may prove that the battery was excessive, or justify the alleged trespass on the defendant's possession, by proving that he had a right of way over the close, or the like. But though a man may in such case put another out of his house who persists in remaining against the will of the occupant, yet he may not inflict a violent battery.

The proprietor of a public inn has a right to request a person who visits it, not as a guest or on business with a guest, to depart; and if he refuses, the innkeeper has a right to lay his hands gently upon him and lead him out, and if resistance be made, to employ sufficient force to put him out. And for so doing he can justify his conduct, on a prosecution for assault and battery. *Com. v. Mitchell*, 2 Parson's Rep. 431; Wharton's Amer. Crim. Law, 548, 3d ed., and cases there cited.

(1) See Wharton's Crim. Law, 549, 3d ed.

(2) See an excellent note on this subject, and on the manner of pleading justifications of this kind, in *Green v. Jones*, 1 Saund. 299, 5th ed. 1824. "An officer cannot justify more than the assault, by virtue of the arrest, without showing that the plaintiff resisted or endeavored to rescue himself, *unless it be by way of molliter manus imposuit, and in that manner he may justify the beating without showing any resistance or attempt to rescue.*" Bull. N. P. 19, cites *Titley v. Foxall*. In this case, however, as well as in the case of a plea of resistance, or an attempt to rescue, it is competent to the plaintiff to reply an unjustifiable or subsequent battery, as suggested by *Kingsmil*, J., in a case in 28 Henry VII. "Que puis cel matter de ces mains le defendant batit le plaintiff." See Durnford's note, Willes's Reports, 17, n. (b).

Other Justifications.—The law looks with an indulgent eye on such acts of discipline as are necessary for the preservation of social order. Hence a master may moderately correct his servant,(1) a parent chastise his child, and a schoolmaster his scholar.(a)(2) In like manner an officer may justify the moderate and reasonable correction of those who are placed under his command, if they disobey his orders;(3) and under particular circumstances a person may(b) lay hands on another, in order to serve him with process. The defendant may justify even a [*35] mayhem,(c) if done by him as an *officer in the army for disobeying orders; and he may give in evidence the sentence of the council of war upon a petition against him by the plaintiff; and if by the sentence the petition is dismissed, it will be conclusive evidence in favour of the defendant. The several preceding instances of justifications must, as has been observed with respect to the justification of *son assault demesne*, be pleaded specially.(d) In framing these pleas care must be taken that the battery be admitted and confessed; otherwise, on demurrer, the plaintiff will be entitled to judgment; for it is a rule of pleading that the party justifying must show and admit the fact. The fact admitted must also amount in law to a battery *by the defendant*, otherwise it will not be tantamount to an admission, and the plea will be bad, as being in violation of the preceding rule; although the defendant might have succeeded, if he had pleaded the general issue. The following case will illustrate this position:—Trespass, assault, and battery. The defendant pleaded that he was riding on a horse in the king's highway,(e) and that his horse being frightened, ran away with him, and that the plaintiff was desired to go out of the way, and did not, and the horse ran upon the plaintiff against the defendant's will. On demurrer, the plaintiff had judgment, because the defendant had justified the battery, and yet had not confessed that which amounted to a battery by himself; for if the horse ran away against the will of the rider, it could not be said, with any colour of reason, to be a battery in the rider:(4) it was admitted, however, by the court, that if the

(a) Rastal's Entr. 613, pl. 18, Ed. 2nd.

(b) *Harrison v. Hodgson*, 10 B. & C. 445.

(c) *Lane and Degberg*, H. 11 Will. III., per Treby, C. J., London Sittings, Salk. MS.; Gilb. Ev. 37, Ed. 1761; Bull. N. P. 19, S. C.

(d) 1 Inst. 282, b.

(e) *Gibbons v. Pepper*, Salk. 637, and Lord Raym. 38.

(1) In Pennsylvania, a master has no right to inflict corporal punishment on his hired servant. *Com. v. Baird*, 1 Ashmead, 267. And the law is the same in Connecticut, whether a minor or of full age. *Matthews v. Terry*, 10 Conn. R. 455. There is no doubt but that for a just cause, a parent may reasonably correct his child, a master his apprentice, and a schoolmaster his pupil. Yet that power cannot be lawfully exercised by a master over his hired servant, whether that servant be employed in husbandry, in manufacturing business, or in any other manner, except in the case of sailors. *Ib.*

(2) *Cushman v. Waddell*, 1 Baldw. 58.

(3) The master of a vessel may inflict moderate correction, for sufficient cause, such as disobedience of lawful orders given in the exercise of his authority, &c., upon his seamen; but he must not exceed the bounds of moderation, and be guilty of cruelty or unnecessary severity. *Brown v. Howard*, 14 Johns. Rep. 119; *Abbott on Ship*. 125; *Fleming v. Ball*, 1 Bay, 3; *Sampson v. Smith*, 15 Mass. 365; *Aertson v. Brady*, Bee, 161. And see note 1, *ante*, 28, and cases cited.

(4) If A. beats the horse of B., whereby he runs against C., A. is the trespasser, and

defendant had pleaded not guilty, this matter might have acquitted him upon evidence.(1) "The authorities show that if the accident had resulted entirely from a superior agency, that would have been a defence, and might have been proved under the general issue; but a defence admitting that the accident resulted from an act of the defendant, would not have been so proveable."(*f*)

Of local and transitory Justifications.—If the cause of the justification be local,(*g*) as if a constable of a town in another county arrests a man that breaks the peace, the constable may traverse the county in which the declaration is laid; but he must not only traverse that but all other places, saving in the town whereof he is constable.(*h*) So if the declaration charge the defendant with an assault and battery in London, if the defendant justify in defence of his possession at Waltham, in Essex, he ought to traverse every other place except Waltham.(*i*) To traverse the parish and not *the county will be [*36] bad on demurrer.(*k*) If the matter of the justification be transitory, it ought to follow the place laid in the declaration.(*l*) An action was brought for a battery at D.,(*m*) the defendant justified under the command of certain bailiffs executing legal process at S. in the same county. The plea was holden to be bad; for as the bailiffs have authority throughout the whole county, the cause of justification was not local, so that the defendant ought to have justified in the same place in which the plaintiff had declared. A battery in his own defence is not local,(*n*) but may be justified in every place; consequently, such a justification, according to the preceding rule, must follow the place laid in the declaration. If a justification be at the same time and place, it is needless to aver that it is the same trespass.(*o*) Where the defendant pleads a local justification,(*p*) the plaintiff may vary in his replication, either in time or place, from the time or place laid in the declaration, and it will not be a departure. To an action for an assault and battery, the defendant may plead not guilty within four years next after the cause of action;(q) but if he mistakes the

(*f*) Per Lord Denman, C. J., in *Hall v. Fearnley*, 3 Q. B. 921, 3 G. & D. 10.

(*g*) 1 Inst. 282, a. b.

(*h*) *Peacock v. Peacock*, Cro. Eliz. 705.

(*i*) *Bridgewater v. Bythway*, 3 Lev. 113.

(*k*) *Johnson v. Burton*, Cro. Eliz. 860.

(*l*) 1 Inst. 282, a. b.

(*m*) *Bridgewater v. Bythway*, 3 Lev. 113.

(*n*) *Purset v. Hutchings*, Cro. Eliz. 842.

(*o*) *King and ux. v. Phippard*, Carth. 281.

(*p*) *Serle v. Darford*, Ld. Raym. 120, and Lutw. 1435.

(*q*) 21 Jac. I. c. 16, s. 3.

not B. So if A. takes the hand of B. and with it strikes C., A. is the trespasser, and not B. Per Cur. Salk. 638, and Ld. Raym. 39.

(1) In assault and battery, defendant may give in evidence, in mitigation of damages, provocations, which occurred at the time of the assault, but not such as occurred previously. *Avery v. Ray*, 1 Mass. Rep. 12; *S. P. Lee v. Wolsey*, 19 Johns. 319; *Barry v. Inglis*, Taylor 121; *S. C. 2 Hayw. 102*; and see *Waters v. Brown*, 3 Marsh. 559. Evidence of a judgment given on an indictment for the same battery is not admissible in mitigation of damages. *Read v. Kelly*, 4 Bibb, 400. And the plaintiff in this action cannot give evidence of his general character. *Givens v. Bradley*, 3 Bibb, 195; *Jacaway v. Dula*, 7 Yerg. 82; *Fullerton v. Warwick*, 3 Blackf. 219; *Elsworth v. Thompson*, 13 Wend. 658.

limitation of time, and pleads not guilty within six years, the plea will be bad on demurrer.(r) This demurrer must be special.(s)

Of the Replication.—The usual replication to the preceding justifications, where they consist merely of matter of fact, triable by the country, as *son assault demesne*, is that the defendant committed the trespass of his own wrong, and without the cause alleged by him in his plea. This is termed a replication *de injuriâ suâ propria absque tali causâ*.(1) If the defendant pleads *son assault demesne*,(t) and the plaintiff can justify it, such justification ought to be pleaded specially; for it cannot be given in evidence under the general replication of *de injuriâ suâ propria*.(2) On the general replication of *de injuriâ suâ propria* to *son assault demesne*,(u) the plaintiff cannot give in evidence a battery at a day and place different from that laid in the declaration. Hence if there were two assaults, one of which the defendant can justify, and the other not,(x) the plaintiff must new assign the assault for which he brought his action,(3) otherwise the defendant will be entitled [*37] to a verdict on his justification.(4) Where the plaintiff declares on a single act of assault and battery,(y) to which the defendant pleads *son assault demesne*, the plaintiff cannot reply *de injuriâ suâ propria*, and also new assign that the defendant beat the plaintiff in a more violent manner than was necessary for the defence of himself; because such replication *and* new assignment constitute in effect a double replication, which is not allowed by the rules of pleading.(5) Where the defendant pleaded(z) that the plaintiff was defendant's apprentice, and conducted himself improperly, *wherefore* defendant moderately chastised him; the replication *de injuriâ* was holden to put

(r) *Blackmore v. Tedderly*, Salk. 423, and Lord Raym. 1099.

(s) *Macfadzen v. Olivant*, 6 East, 388.

(t) *King and ux. v. Phippard*, Carth. 281; *Webber v. Liversuch*, 1 Peake, Add. C. 51.

(u) *Downs v. Skrymsher*, 1 Brownl. R. 233.

(x) 2 Roll. Abr. 680, (C.) pl. 3; *Walsby v. Oakley*, London Sittings after M. T. 40 Geo. III. MSS. S. P. per *Kenyon*, C. J.

(y) *Franks v. Morris*, 10 East, 81, n.

(z) *Penn v. Ward*, 2 Cr. M. & R. 338.

(1) If defendant pleads that the assault, &c., were committed in defence of a dwelling-house, of which he was seised and possessed; *de injuria*, &c., is a good replication. *Sampson v. Henry*, 11 Pick. 379; *M'Dermott v. Kennedy*, 1 Harring. 143.

(2) See *Brown v. Bennett*, 5 Cowen, 185. If under the stat. of N. Y., defendant gives notice that he will give in evidence, under the general issue, *son assault demesne*, plaintiff having no opportunity to reply, may give *molliter manus* in evidence, and defendant will be allowed to rebut it by other evidence. *Collier v. Moulton*, 7 Johns. Rep. 109.

(3) "If there were two batteries on one day, and the one were on the plaintiff's own assault, and the other not, if the defendant will justify one *de son assault demesne*, the plaintiff may make a new assignment of the other battery," per Cur. in *Elwis v. Lombe*, 6 Mod. 120. A new assignment, however, in these cases, is only necessary where there is but one count in the declaration; for if the declaration contain as many counts as there were assaults, &c., and some of them cannot be justified, the plaintiff may prove those without a new assignment. Bull. N. P. 17.

(4) See *Chrisman v. Hunter*, 3 Dana, 83.

(5) A loss which is not part of the original injury, but arises consequently and in part from circumstances unconnected with the battery, is waived if not specially laid: and therefore plaintiff was not allowed to prove a consequential injury in his business of glass blower. *Robinson v. Hokely*, 3 Watts, 270. *Sledge v. Pope*, 2 Hayw. 402. Where an actual battery is proved, the jury cannot find for the defendant. *Dinkins v. Debrahl*, 2 Nott & M'C. 85. See *Gates v. Lounsbury*, 20 Johns. Rep. 427.

in issue only the cause alleged in the plea, (that is, whether the plaintiff misconducted himself as an apprentice,) and not the moderation of the punishment.

IV. *Verdict and Judgment.*

DAMAGES may be given in this action not merely for the corporal injury, which in many cases may be very small, but also for the degrading insult with which it is accompanied.(1) A libel written by the plaintiff against the defendant may be given in evidence(a) by the defendant in mitigation of damages, although a cross action be pending for the libel. Against joint trespassers there can be but one satisfaction,(b) and therefore, if they are sued in one action, although they sever in pleas and issues, yet one jury shall assess damages for all; and if all the issues are found for the plaintiff, the jurors ought not to sever the damages; for, if they do, the verdict will be vicious.(2) And if, in such case, judgment be entered for the separate damages, such judgment will be erroneous.(c)(3) But *before [*38] judgment, the defect of the verdict may be cured, by the entry of a *nolle prosequi* against all the defendants, except one, and taking judgment against that one only.(d) So, if joint defendants suffer judgment by default, and the plaintiff execute separate writs of inquiry against them, whereupon several damages are given, it is irregular: and if final judgment be entered for those damages, such judgment will be erroneous.(e) But before final judgment, the court will permit the plaintiff, in order to cure the error, to set aside his own proceedings, upon payment of costs, and to issue a new writ of inquiry.(4)

(a) *Fraser v. Hon. G. Berkeley*, 7 C. & P. 621, *Abinger*, C. B.

(b) Hob. 66; *Heydon's case*, 5th Resol. 11 Rep. 7.

(c) *Crane v. Hummerstone*, Cro. Jac. 118; *Hill v. Goodchild*, 5 Burr. 2791.

(d) *Rodney v. Strode*, Carth. 19.

(e) *Mitchell v. Milbank*, 6 T. R. 199.

(1) See 2 Greenl. Evid. § 89.

(2) On the trial of an action against two defendants, A. and B., it was proved that the assault by A. was more violent than that by B. Lord *Ellenborough*, C. J., told the jury that the damages could not be severed, so as to give more damages against A. than against B., but that they might give their verdict against both, to the amount which they thought the most culpable ought to pay. *Brown v. Allen and Oliver*, 4 Esp. N. P. C. 158. See *Lowfield v. Bancroft*, Str. 910, and Bull. N. P. 15, to the same effect. Release to one of two defendants in assault and battery discharges both, although the one released had suffered judgment to go by default, and was released in order to be made a witness against the other. *Allen v. Wheatly*, 3 Blackford, 332. *Weakly v. Royer*, 3 Watts, 460. Plaintiff may take judgment against both *de melioribus damnis*. *Halsey v. Woodruff*, 9 Pick. 555. See *Ammonett v. Harris*, 1 Hen. & Munf. 488; *Palmer v. Crosby*, 1 Blackf. 139; *Livingston v. Bishop*, 1 Johns. 290; *Ruble v. Turner*, 2 Hen. & Munf. 38; *Wilkes v. Jackson*, Ibid. 355; *Halsey v. Woodruff*, 9 Pick. 555; *Schultz v. Hunter*, 2 Browne, 337; *Cridland v. Floyd*, 6 S. & R. 413.

(3) *Allen v. Wheatley*, 3 Blackford, 332.

(4) If defendant suffers judgment by default without pleading, he admits the assault and battery, but not on any particular day nor any circumstances of aggravation. Without proof that the injury complained of was committed by defendant, the damages are only nominal. *Bates v. Loomis*, 5 Wend. 134.

V. *Of the costs ; Certificate under stat. 3 & 4 Vict. c. 24.*

By stat. 3 & 4 Vict. c. 24, (3 July, 1840,) reciting the passing of the stat. 43 Eliz. c. 6, and 22 & 23 Car. II. c. 9, and that the evil arising from frivolous and vexatious suits still prevails and increases, and that it is expedient to make further provisions for the prevention thereof, it is enacted, (by sect. 1,) "That the said recited act of the forty-third of Elizabeth, so far as it relates to costs in actions of trespass, or trespass on the case, and so much of the twenty-second and twenty-third of Charles the Second as relates to costs in personal actions, be repealed." And by sect. 2, "If the plaintiff in any action of trespass, or of trespass on the case, brought, or to be brought in any of her Majesty's courts at Westminster, or in the Court of Common Pleas at Lancaster, or Durham, shall recover by verdict less damages than forty shillings, such plaintiff shall not be entitled to recover in respect of such verdict, any costs, whether it shall be given upon any issue tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained shall *immediately* afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious." By sect. 3, it is provided, "That nothing herein contained shall extend to deprive any plaintiffs of costs in any action brought for a trespass over any lands, commons, wastes, closes, woods, plantations, or enclosures, or for entering into any dwellings, outbuildings, or premises in respect of which any notice not to trespass thereon or therein shall have been previously served, by or on behalf of the owner or occupier of the land trespassed over, upon or left at the last reputed or known place of abode of the defendant or defendants in such action or actions."

[*39] Unless it appear from the declaration that the action could not *really have been brought to try a right beyond the mere question of damages, the case is within the act, and the judge has the power of certifying; and the granting the certificate is entirely a matter for the discretion of the judge presiding at the trial.^(f) "What the judge is called upon to do is to consider the object and design of the plaintiff in instituting the action, and if he is satisfied that the plaintiff conceived he had a right which might come in issue, the judge has a discretion vested in him to grant a certificate."^(g) In this case a certificate was granted in an action for imitating the wrappers of a medicine invented by the plaintiff. In an action for libel, the judge may certify under this act, that the grievance for which the action was brought was wilful and malicious.^(h) An action on the case for the in-

^(f) *Shuttleworth v. Cocker*, 2 Scott, N. R. 47; 1 M. & Gr. 829; *Barker v. Hollier*, 8 M. & W. 513.

^(g) Per Tindal, C. J., in *Morrison v. Salmon*, 2 M. & Gr. 392; S. C. 2 Scott's N. R. 449, 454.

^(h) *Foster v. Pointer*, 8 M. & W. 395.

fringement of a patent, is within the operation of this act; and notwithstanding the provisions of the stat. 5 & 6 Will. IV. c. 83, s. 3, the plaintiff, recovering only nominal damages, cannot have his full costs, without a certificate under the 3 & 4 Vict. c. 24.⁽ⁱ⁾ The operation of this statute is not limited to cases in which the judge has power to certify. Hence in an action on the case for negligently exposing ploughshares on a highway, whereby the plaintiff received severe injury; the jury having given a verdict for 1s. damages, and the judge having refused to certify, on the ground that it was not a case in which he had power to do so under the statute; it was holden that, although the action was not one in which the judge could grant a certificate, it was still within the statute, and the plaintiff was not entitled to his costs.^(k) The discretion exercised by the judge at *Nisi Prius*, cannot be reviewed by the court above.^(l)

After the trial of an action on the case for nuisance, and no application made in court under this statute for a certificate, that it was brought to try a right, but within a quarter of an hour after delivery of the verdict, such certificate was obtained from the judge, it was holden to be well given. *Thompson v. Gibson*, 8 M. & W. 281, recognized in *Page v. Pearce*, *ibid.* 677, in which case Lord Abinger, C. B., seems to have been of opinion, that the certificate need not necessarily be given on the same day as the trial, but that the object of the legislature was merely that the certificate should be the result of the judge's impression at the time. If the certificate is informally drawn up at the trial, it may be amended^(m) afterwards, and even after a rule nisi has been granted for setting it aside.

By stat. 58 Geo. III. c. 80, reciting that it is desirable to prevent as much as may be, frivolous and vexatious actions of assault and *battery, and for slanderous words, in inferior courts, it [*40] is enacted, (sect. 1,) that in all actions or suits of trespass for assault and battery commenced in any court having, or which by his Majesty's writ of justices may have, jurisdiction to hold pleas to the amount of forty shillings, (other than his Majesty's courts at Westminster, the Court of Common Pleas at Lancaster, or the Court of Pleas at Durham,) if damages, upon trial of issue, or inquiry, are under forty shillings, the plaintiff shall recover only so much costs as damages. And by sect 2, in courts not holding pleas to the amount of forty shillings, if damages under thirty shillings, the same law.

By stat. 8 & 9 Will. III. c. 11, s. 1, "Where several persons are made defendants to any action or plaint of trespass, assault, or false imprisonment, and any one or more of them shall be upon the trial thereof acquitted by verdict, every person so acquitted shall have his costs in like manner as if a verdict had been given against the plaintiff and acquitted all the defendants, unless the judge, before whom such case shall be tried, shall *immediately after the trial thereof in open*

(i) *Gillett v. Green*, 7 M. & W. 347.

(k) *Marriott v. Stanley*, 1 M. & Gr. 853; 2 Scott's N. R. 60.

(l) *Barker v. Hollier*, 8 M. & W. 513.

(m) *Shuttleworth v. Cocker*, 2 Scott, N. R. 47; 1 M. & Gr. 829.

court, certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant to such action.”(n)

In assault and battery against several defendants, one let judgment go by default, and the others pleaded not guilty.(o) On the trial, the jury gave damages against him who had suffered judgment by default, and found the other defendants not guilty: *Wilmot, J.*, being desired to certify that there was a reasonable cause to make the others defendants, said, he thought the stat. 8 & 9 Will. III. c. 11, s. 1, did not extend to this case, but only to cases where some of the defendants are convicted by verdict, and others acquitted. In this case it is as if they had severed in pleading, and as if the action was against the others only: and on these grounds he refused to certify.

By stat. 3 & 4 Will. IV. c. 42, s. 32, “Where several persons shall be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, or upon the trial shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless, in the case of a trial, the judge before whom the cause shall be tried, shall certify upon the record under his hand, that there was a reasonable cause for making such person a defendant in such action.”

Where a previous statute had provided for the protection of officers acting in the execution of it, that a defendant acquitted should have full costs, &c., it was holden that a certificate under the 3 & 4 Will. IV. c. 42, s. 32, would not deprive him of such costs.(p)

[*41]

* CHAPTER IV.

OF THE ACTION OF ASSUMPSIT.

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I. *Of the Action of Assumpsit, and of the Agreement for the Non-performance of which this Action may be maintained.*

THE action of assumpsit is an action of trespass on the case, whereby a compensation, in damages, may be recovered for an *injury sustained by the non-performance of a parol [*42] agreement. Agreements are distinguished into agreements by specialty and agreements by parol. The law of England does not recognize any other distinction. If agreements are merely written, and not specialties, they are parol agreements.(a) The action of assumpsit is confined to agreements by parol, the action of covenant(b) or debt being the proper remedy for the non-performance of agreements by specialty; for it is a general rule(c) that assumpsit will not lie where there is a remedy of a higher nature. The essential parts of every parol agreement are, the promise or undertaking of one party, and the consideration on which such promise or undertaking is founded, proceeding from the other party. Sometimes the promise is expressed by the party, and sometimes it is raised by implication of law. In the former case it is termed an express, in the latter, an implied promise. In parol agreements, the law will not imply a consideration; consequently, in actions of assumpsit, a consideration must be stated and proved.(1)

(a) Per *Skinner*, C. B., delivering the opinion of the judges in *Rahn v. Hughes*, D. P. 7 T. R. 351, n.

(b) *Bennet v. Guyldey*, Cro. Jac. 505.

(c) *Bulstrode v. Gilburn*, 2 Str. 1027; *Schlenker v. Mozsy*, 3 B. & C. 789; *Baber v. Harris*, 9 A. & E. 532; 1 P. & D. 360.

(1) Bills of exchange and promissory notes form an exception to this rule.

Of the Consideration.—Every promise, for the non-performance of which an action of assumpsit may be maintained, must be founded on a sufficient consideration, (1) that is, a consideration, either of benefit to the defendant(*d*) or of benefit to a stranger, (*e*) or of damage, or of loss(*f*) sustained by the plaintiff, *at the request* of the defendant; (2) and herein the law of England adopts *and recognizes the rule of the civil law, *ex nudo pacto non oritur actio*. (*g*) Any act of the plaintiff, from which the defendant derives a benefit or advantage, or any labour, detriment, (*h*) (3) or inconvenience sustained by the plaintiff, however small (*i*) the benefit or inconvenience may be, is a sufficient consideration, if such act is performed, or such inconvenience suffered by the plaintiff, with the consent, (*k*) either express or implied, of the defendant, or in the language of pleading, “at the special instance and request of the defendant.” (4) It is, however, clearly established, that the consideration must be of *some* value, in contemplation of law; (5) for where A. in consideration that B. would

(*d*) Per *Buller*, J., in *Nerot v. Wallace*, 3 T. R. 24, and *Cooke v. Oxley*, 3 T. R. 653.

(*e*) Per *Gawdy* and *Fenner*, Js., in *Greenleaf v. Barker*, Cro. Eliz. 194.

(*f*) Per *Ellenborough*, C. J. in *Bunn v. Guy*, 4 East, 194. See *Bainbridge v. Firmstone*, 8 A. & E. 743; 1 P. & D. 2.

(*g*) 17 Ed. IV. 4 b.; Plowd. 305, a, 308, b.

(*h*) *Williamson v. Clements*, 1 Taunt. 523.

(*i*) *Sturlyn v. Albany*, Cro. Eliz. 67; *March v. Culpepper*, Cro. Car. 70. See *Bailey v. Croft*, 4 Taunt. 611, and *post*, p. 45; *Jones v. Waite*, 5 Bingh. N. C. 341.

(*k*) *Stokes v. Lewis*, 1 T. R. 21; *Child v. Morley*, 8 T. R. 610.

(1) It is worthy of observation that Blackstone, in that part of the third volume of his Commentaries, wherein he treats of the action of assumpsit, has not either named, described, or even alluded to the consideration requisite to support an assumpsit; and, what is more remarkable, the example put by him in order to illustrate the nature of the action is, in the terms in which it is there stated, a case of *nudum pactum*: “If a builder promises, undertakes, or assumes to Caius, that he will build and cover his house within a time limited, *and fails to do it*, Caius has an action on the case against the builder for this breach of his express promise, undertaking or assumpsit.” See 1 Roll. Abr. 9, line 41; Doct. and Stud. Dial. 2, ch. 24; and *Else v. Gatward*, 5 T. R. 143, that an action will not lie for a mere nonfeasance, unless the promise is founded on a consideration. This remark ought not, neither was it intended, to derogate from the merit of a justly celebrated writer, who, for comprehensive design, luminous arrangement, and elegance of diction, is unrivalled. It is possible, that the learned commentator might have selected his example from Bro. Abr. tit. “Action sur le case,” 72, without adverting to the omission to the consideration. See the remarks of Mr. Justice Coleridge, in his excellent edition of the commentaries.

(2) See 1 Leigh’s N. P. 1, and notes to American ed.; 1 Archb. N. P. 58, and notes by Judge Findlay; 1 Steph. N. P. 229, and notes by Judge Sharswood.

(3) See *Miller v. Drake*, 1 Caines’ Rep. 45; *Powell v. Brown*, 3 Johns. Rep. 100; *Religious Society in Whitestown v. Stone*, 7 Johns. Rep. 112.

(4) See *Hamaker v. Eberle*, 2 Binn. 509.

(5) The case of *Wheatley v. Low*, Cro. Jac. 667, (recognized by *Holt*, C. J., in *Coggs v. Bernard*, Lord. Raym. 920, and considered in the case of *Shillibeer v. Glyn*, 2 M. & W. 143) in which it was adjudged, that the acceptance of a sum of money by the defendant from the plaintiff, for the purpose of paying it over to a creditor of the plaintiff, was a sufficient consideration to support a promise by the defendant to perform the trust, may appear an exception to this rule. The exception, however, is only apparent; for, from the report of the same case, in Palm. 281, under the name of *Loe’s case*, it is evident, that the Chief Justice considered the detention of the money as a damage to the plaintiff. Whether the application of the rule was just in that case, is another question. It is clear, however, that the rule itself was recognized by the court. The compromise of a doubtful claim is a good consideration. *Brown v. Sloan*, 6 Watts, 421. Withdrawal of

make an estate at will to him, as his counsel should devise, promised, &c., it was holden a void promise, for want of a sufficient consideration, because B. might immediately determine his will.^(l) So where the testator had committed to the care of the defendant his children,^(m) and the disposition of his goods, during their minority, *for their education*, and thereupon the defendant promised the testator to procure the assurance of certain lands to one of the testator's children, the consideration was holden insufficient; for the law would not intend that the defendant had made any private gain to himself, but that he had disposed of the goods for the benefit of the children, according to the trust reposed in him.^(l) The mere performance of an act, which the party was by

^(l) 1 Roll. Abr. 23, pl. 29. See *Bunett v. Biscoe*, 4 Johns. 235; *Doolin v. Ward*, 6 Id. 194; *Wibur v. Hone*, 8 Id. 444; *Tryon v. Mooney*, 9 Id. 358.

^(m) *Smith v. Smith*, 3 Leon. 88.

a caveat by heir at law. *Seaman v. Seaman*, 12 Wend. 381. Delivery of an article on which plaintiff claims a lien, although unfounded. *Gardiner v. Hopkins*, 5 Wend. 23. Transfer of mere possession of land. *Parker v. Crane*, 6 Wend. 647. Delivery of a pledge to one not authorized to receive it. *Saunders v. Pope*, 1 Ohio, 226. Sale of an invention, if in good faith, however worthless. *Marshall v. Peck*, 1 Dana, 615. Sale of timber cut without license on land of third person, when defendant had full notice. *Baker v. Page*, 2 Fairf. 381. An expectation on the part of promisee that promisor would marry her is not a sufficient consideration. *Raymond v. Sellick*, 10 Conn. 480. An improvement by a squatter on United States land is no consideration for a promise by patentee. *Boston v. Dodge*, 1 Blackf. 19.

⁽¹⁾ A promise by a father to make good to his daughter money of hers entrusted to him and lent, and lost by failure of borrower, is without consideration, if there was no evidence to show the character of the bailment. *Sodowsky v. M'Farland*, 3 Dana, 205. A request in writing to plaintiff to pay a debt due from defendant's son, and to reimburse himself out of defendant's property in plaintiff's hands, creates no personal liability. *Hart v. Hart*, 5 Watts, 106.

Plaintiff, W. B., and another, were joint owners of a vessel at sea, of which W. B. was master. During the voyage W. B. died, and after his death it was agreed between plaintiff and defendant that plaintiff should deliver and pay the defendant the effects of W. B. in the vessel, and so much of her earnings as W. B. would have been entitled to, and should account to defendant, as he would have been bound to account to W. B., and that defendant should pay plaintiff whatever W. B. owed him, as well on account of W. B.'s share in the vessel as otherwise. Plaintiff did not aver that there had been any liquidation of the accounts, or that any profit had been made by the voyage. The court held on demurrer that as it did not appear that plaintiff had sustained any injury, or that defendant had been benefited by plaintiff's promise, plaintiff could not sustain the action against defendant for a debt due to him from W. B. *Powell v. Brown*, 3 Johns. Rep. 100.

And even though special damage has been sustained by the non-performance of a promise for which there was no consideration, assumpsit will not lie.

As where the plaintiffs were joint owners of a moiety of a vessel, and the defendant was owner of the other moiety, and voluntarily promised the plaintiffs to effect an insurance on the vessel, but neglected to do it, and the vessel was subsequently lost; it was holden that the defendant was not liable to the plaintiffs for their moiety of the vessel, his promise having been gratuitous and without consideration. *Thorne v. Deas*, 4 Johns. Rep. 84. Chief Justice *Kent*, in his opinion in this case, has gone into a very full investigation of the English cases, with a view to show that the doctrine of *Mandatum* in the civil law, notwithstanding the opinion of Sir Wm. Jones, in his Essay on the Law of Bailments, has never been adopted by the common law of England. The authorities cited by him are 2 Hen. 4, 36; 11 Hen. 4, 33, a; 3 Hen. 6, 36, b; 14 Hen. 6, 186, pl. 58; 19 Hen. 6, 49, a. pl. 5; 20 Hen. 6, 34, a, pl. 4; 2 Hen. 7, 11, pl. 9; 21 Hen. 7, 41, a, pl. 66; Keilway, 78 pl. 5; *Wilkinson v. Coverdale*, 1 Esp. Rep. 75; *Smith v. Lancelles*, 2 Term. Rep. 188; *Webster v. De Tastet*, 7 Term, 157.

But where one gratuitously undertakes to do a thing, and enters upon the performance

law bound to perform, is not a sufficient consideration. Hence a promise made by the master, when a ship was in distress, to pay an extra sum to a mariner as an inducement to extraordinary exertion on his part, has been holden to be void; because a seaman is bound to exert himself to the utmost in the service of the ship.⁽ⁿ⁾(1) So [*44] where, in the course of a voyage, some *of the seamen deserted, and the captain, not being able to find others to supply their place, promised to divide the wages, which would have become due to them, among the remainder of the crew, it was holden,^(o) that this promise was void for want of a consideration; for the desertion of a part of the crew was to be considered as an emergency of the voyage as much as their death, and the remainder of the crew were bound, by the terms of their original contract, to exert themselves to the utmost to bring the ship in safety to her destined port. But where the defendant offered a reward to any person who would give such information as would lead to the conviction of a felon, the plaintiff, who was a constable and peace officer of the district where the felony was committed, was holden entitled to the reward on giving the requisite information, this being considered a good consideration for a promise by the defendant to pay the reward.^(p) So, where the plaintiff agreed to enter as captain's cook on board of a brig of war, upon an undertaking by the defendant, the commander of the vessel, to pay him wages (12*l.* per annum,) beyond the government pay, which he would be entitled to on his rating as an able seaman; it was holden, that there was a sufficient consideration for the agreement to entitle the plaintiff, on the services being performed, to maintain an action against the defendant for the extra wages.^(q) Natural affection, although sufficient to raise an use, is not a sufficient consideration, whereon an assumpsit may be found-

(n) *Harris v. Watson*, Peake, N. P. C. 72, Lord Kenyon, C. J.

(o) *Stilk v. Hyrick*, 2 Camb. 317.

(p) *England v. Davidson*, 11 A. & E. 856; 3 P. & D. 594.

(q) *Clutterbuck v. Coffin*, 3 M. & Gr. 842; 4 Scott's N. R. 509.

of it, the consideration is sufficient to bind him to perform it according to the terms of the agreement, and with diligence and good faith. *Rogers v. Lunt*, 2 Johns. Cas. 92.

A promise to pay damages, for the detention of a sum of money beyond the amount detained, is a *nudum pactum*. *Phettiplace v. Steere*, 2 Johns. Rep. 442.

Although, generally, an assignee of a *chose in action* cannot maintain an action in his own name, yet, if the party indebted recognize the transfer, and promise to pay the assignee, there is a sufficient consideration for the promise, and the assignee may sue on it in his own name. *Crocker v. Whiting*, 10 Mass. Rep. 316; *Mowry v. Todd*, 12 Mass. Rep. 281.

If A. make a proposition to B. with a promise that it shall be binding on him until a certain day, but B. does not accede to it at the time, the promise of A. is without consideration; and although B. afterwards, and before the day, offers to comply with the terms of the proposition, and to perform them on his part, still A. is at liberty to retract and refuse to perform. *Tucker v. Woods*, 12 Johns. Rep. 190; *Keep v. Goodrich*, 12 Johns. Rep. 397; *Livingston v. Rogers*, 1 Caines' Rep. 583; *Newall v. Mayberry*, 3 Leigh, 250; *Conch v. Hooper*, 2 Id. 557. When the promise of one party is the consideration for the promise of the other, the promises must be concurrent, and obligatory on both at the same time.

Payment of part of a debt is not a sufficient consideration for a promise to forbear to sue for the residue. *Pabodie v. King*, 12 Johns. Rep. 426.

(1) Extra services by a constable at defendant's request are a good consideration. *Hatch v. Mann*, 9 Wend. 262.

ed.(r)(1) Where A. is indebted to B. in one sum, and B. indebted to C. in a less sum, if B. promises A. to discharge him of so much of his debt, as amounts to B.'s debt to C., this will be a good consideration for a promise by A. to pay C. the debt due to him from B.(s)(2)

*The defendant being indebted to the testator in a sum of [*45] money upon simple contract,(t) the plaintiff, his executor, agreed to take a less sum, payable by instalments, in lieu of the original debt, in consideration whereof, the defendant promised the executor to pay him the lesser sum. On assumpsit brought, an exception was taken, in arrest of judgment, that the consideration was insufficient, because it did not appear that the plaintiff had discharged the defendant of the original debt. But the objection was overruled, because the original debt being due to the plaintiff, as executor, the action to recover that must have been in the detinet; but by the agreement on the part of the plaintiff to take a less sum, and the promise by the defendant to pay that sum, it became the proper debt of the plaintiff, and the action for it maintainable in his own name, without being named executor. And (by *Yelverton*, Justice, (although the less sum is not any satisfaction of the greater, because they are both of one nature, yet in respect that the nature of the action was changed, it was, therefore, a good consideration.

In order to facilitate the making of an agreement, for which there was sufficient consideration, between the plaintiff and a third person, the defendant, who received no benefit to himself by the agreement, became party thereto; it was holden, that as the agreement was such as the plaintiff would not have made unless the defendant had acceded, there was a sufficient consideration for the defendant's promise.(u)(3)

(r) Agreed by the court, in *Bret v. J. S. and wife*, Cro. Eliz. 755; See also *Thomas v. Thomas*, 2 Q. B. 851.

(s) *Goldsborough*, 49; and see *Fairlie v. Denton*, 8 B. & C. 395.

(t) *Goring v. Goring*, Yelv. 10, 11.

(u) *Bailey v. Croft*, 4 Taunt. 611.

(1) A release of an equity of redemption is a good consideration, and the common law will take notice, that the mortgagor has an equity to be relieved in Chancery. *Thorpe v. Thorpe*, Lord Raym. 663; and so of the assignment of a chose in action, per *Buller, J.*, *Master v. Miller*, 4 T. R. 341; and see also per Lord *Ellenborough*, in *Surtees v. Hubbard*, 4 Esp. N. P. C. 203. But see *Preston v. Christmas*, 2 Wils. 87, where it was holden, that the release of an equity of redemption was not of any value in contemplation of law. In *Wells v. Wells*, 1 Lev. 273, a release of an equitable interest was holden to be a good consideration. How far a moral obligation is a sufficient consideration, and what must be understood by that term, see an elaborate note by the learned reporters of the cases adjudged in the Court of Common Pleas, in *Wennall v. Adney*, 3 Bos. & Pul. 249, cited by Lord *Denman*, C. J., delivering the judgment of the court in *Eastwood v. Kenyon*, 3 P. & D. 282; 11 A. & E. 438; *post*, 53.

(2) See Addison on Contracts, 16-26; 2d Am. ed. text, and notes by Ingersoll.

(3) Where A. applied to plaintiff for goods on credit, and plaintiff refused to let him have them without security, on which A. drew a promissory note for the amount, under which defendant wrote, "I guaranty the above;" and the goods were thereupon delivered. This was holden to be a collateral undertaking of defendant; but that there was no necessity for any distinct consideration passing directly between plaintiff and defendant; for being all an entire transaction, the delivery of the goods to A. supported the promise of defendant as well as the promise of A. *Leonard v. Vredenburg*, 8 Johns. Rep. 29.

D. promised M. to make a conveyance of certain land for the benefit of a third person, and M. promised to meet D. at a place agreed on, and receive it. The promise of D. was a sufficient consideration to support an action by D. against M. for the non-performance of his undertaking. *Miller v. Drake*, 1 Caines' Rep. 45.

Forbearance of Suit—in what Cases a sufficient Consideration.(1)—If a creditor, at the request of his debtor, forbear to sue him for a certain time, that is a sufficient consideration for a new promise by the debtor, for the non-performance of which an action of assumpsit may be maintained. So if a creditor at the request of J. S., forbear to sue his debtor for a certain time,(x) that is a sufficient consideration to support a promise by J. S. to pay the debt. But by Stat. of Frauds, 29 Car. II. c. 3, s. 4, this agreement must be in writing.(y) Forbearance to sue an executor (having assets) for a certain time upon a simple contract debt of his testator, is a good consideration to found a promise by the executor to pay the debt.(z) So forbearance to sue an executor for a reasonable time for the debt of his testator, although the executor have no assets;(a) but the agreement by the executor to pay the debt must be in writing,(b) otherwise it will be void by Stat. of Frauds, 29 Car. II. c. 3, s. 4. That a forbearance to sue may be a good considera-

(x) 1 Roll. Abr. 27, pl. 49.

(y) *King v. Wilson*, per Raym. C. J., Str. 873.

(z) *Fish v. Richardson*, Cro. Jac. 47, and Yelv. 55. Confirmed in *Bond v. Payne*, Cro. Jac. 273.

(a) *Johnson v. Whitchcott*, 1 Roll. Abr. 24, pl. 33.

(b) *Grindall v. Davies*, 1 Freem. 532.

A sufficient consideration arises from the act of subscribing for shares in the stock of an incorporated company to support an action against the subscriber. *Union Turnpike Co. v. Jenkins*, 1 Caines' Rep. 381. Assumpsit lies for money subscribed by defendant with others for a common object at their suit after accomplishing the object. *George v. Harris*, 4 N. H. R. 533. Promise by subscription to pay a sum to a college on conditions which were complied with, is on a good consideration. *Williams College v. Danforth*, 12 Pick. 541. And where plaintiff had subscribed with others for the establishment of a seminary, and no precise time was fixed for its erection, and a reasonable time had elapsed without any thing being done, it was held each might recover back the amount paid by himself to defendant, under that subscription, in separate actions. *Carter v. Carter*, 14 Pick. 424. Where one subscribed for shares in an incorporated company, and agreed "to take and fill" a certain number set opposite his name, assumpsit lies to compel payment of instalments. But if he merely agree "to take," he is not liable to an action. The remedy is by sale of his shares. *Bangor Co. v. McMahon*, 1 Fairf. 479. A party who subscribes with others a contract of indemnity is liable jointly with them, although his name is not in the body of the instrument. *Crawford v. Jarrett*, 2 Leigh, 634. A committee appointed at a public meeting to carry its object into effect are responsible to workmen for labor performed by them. *McCarte v. Chambers*, 6 Wend. 649.

(1) See 1 Parsons' on Cont. 365. Any suspension or forbearance of a man's legal or equitable rights also will form a foundation for an undertaking, and will make it binding, though no actual benefit accrue to the party undertaking. *Farmer v. Stewart*, 2 N. Hamp. 97; *Nicholson v. May*, Wright, 660; *King v. Upton*, 4 Greenl. 387; *Etting v. Vanderlin*, 4 Johns. 237; *Zane v. Zane*, 6 Munf. 406; *Taylor v. Patrick*, 1 Bibb, 168; *Mill v. Lee*, 6 Monr. 97; *Moore v. Fitzwater*, 2 Rand. 442; *Downing v. Funk*, 5 Rawle, 69; *Keen v. McKinsey*, 2 Penn. State R. 30; *Sairs v. Ely*, 3 Watts & Serg. 420; *Caldwell v. Heitshu*, 9 Watts & Serg. 53. A promise to forbear in general, without adding any particular time, is understood to be a total forbearance. *Hamaker v. Eberle*, 2 Binn. 510; *Sidwell v. Evans*, 1 Penn. 385. "Further forbearance," as the consideration of a guaranty, is construed to mean forbearance for a convenient or reasonable time, taking into view in its computation as one element the period which had theretofore been permitted to elapse without enforcing payment; and what is a reasonable or convenient time the court must determine. *Caldwell v. Heitshu*, *supra*; *Hamaker v. Eberle*, 2 Binn. 509. But a promise by a surety to forbear a suit against his principal when his cause of action should arise, is sufficient, though at the time of the promise the surety had no cause of action. *Hamaker v. Eberle*, *supra*. Payment of part of a debt is not a sufficient consideration for a promise to forbear to sue for the residue. *Pabodie v. King*, 12 Johns. R. 426; *Barron v. Vandvert*, 13 Ala. 232.

tion, such forbearance must either be absolute, (c) or for a definite portion of time, (d) *or a reasonable time; (e) forbear- [* 46] ance for a little, (f) or some time, (g) is not sufficient. (1) A forbearance for a given time on the part of the assignee of a bond to sue the obligor, is a good (h) consideration for a promise by the obligor to pay the assignee at the expiration of that time, or to give him a warrant of attorney for the amount. In cases where an action is brought against a defendant, on a promise made, in consideration of forbearance of suit, an objection will not be allowed, after verdict, that the declaration does not state how the original debt accrued; for this is only inducement to the action. (i) But it must appear that there is a debt actually due. (k) If the declaration omit to state to whom the plaintiff forbore and gave day of payment, the omission will be cured by verdict. (l) But, upon special demurrer, it has been holden not sufficient to state a consideration to forbear generally, unless it be also shown, that there was some person to be forborne. Plaintiff declared that B., since deceased, was, at his death, indebted to the plaintiff in a sum of money for goods sold and delivered, (m) whereof defendant Nancy had notice, and thereupon, after the death of B., defendant Nancy, before her marriage with other defendant A., in consideration of the premises, and also in consideration that plaintiff would forbear and give day of payment of said sum of money, as after mentioned, by note in writing, signed by her according to the statute, &c., on 20th March, 1801, promised plaintiff to discharge the debt in a reasonable time: That plaintiff had forborne from the time of the promise hitherto, yet

(c) *Maples v. Sidney*, Cro. Jac. 683.

(d) *Fish v. Richardson*, Cro. Jac. 47.

(e) *Johnson v. Whitchcott*, 1 Roll. Abr. 24, pl. 33.

(f) 1 Roll. Abr. 23, pl. 25.

(g) *Ib.* pl. 26.

(h) *Morton v. Burn*, 7 A. & E. 19, denying the authority of *Potter v. Turner*, Palm. 185; *Winch*, 7 S. C.

(i) *Austin v. Bewley*, Cro. Jac. 548; *Therne v. Fuller*, Cro. Jac. 396.

(k) *Edwards v. Baugh*, 11 M. & W. 641.

(l) *Marshall v. Birkenshaw*, 1 Bos. & Pul. N. R. 172.

(m) *Jones v. Ashburnham and Nancy*, ux. 4 East, 455, cited in *Serle v. Waterworth*, 4 M. & W. 12; S. C. in error in Exch. Cr. 4 M. & W. 795.

(1) "We take the rule to be, that if the promise be to forbear for a convenient or reasonable time, either in general or specific terms, or indefinitely, it is sufficient to maintain assumpsit." Per *Washington, J.*, *Lonsdale v. Brown*, 4 Wash. C. C. R. 151. Thus defendant promised the intestate, in his lifetime, and his administrators, who were the plaintiffs, to pay certain sums of money due from the ancestor to the intestate, in consideration that the intestate would forbear to prosecute the heirs, of which defendant, in right of his wife, was one. There was an actual forbearance for more than two years. Per Cur. "The consideration and forbearance generally is sufficient, without setting forth a specific time. There was, in fact, a total forbearance for a long time, which brings the case within that of *Mapes v. Sidney*, Cro. Jac. 683, N. *Elting et al. v. Vanderlyn*, 4 Johns. Rep. 237. Heirs under the statute of New York, are liable for the simple contract debts of their ancestor.

Assumpsit by the payee against the maker of a promissory note for \$200, given under the following circumstances: The defendant, while under arrest at the suit of the plaintiff, made the note in question, to be delivered into the hands of certain persons, who were to decide upon the subject of controversy between them, and in consequence of his arrangement, was instantly discharged from custody, after which the arbitrators returned the note to the plaintiff, endorsed \$100. The court were of opinion that the consideration of the note was sufficient. *Shepherd v. Watrous*, 3 Caines, 166.

defendant refused to pay: special demurrer, assigning for causes, that it was not alleged, from whom said sum of money was due at time of promise, or that any person was then liable to pay the plaintiff that sum, or to whom plaintiff had forborne, and given day of payment of said sum, and in general, that declaration did not disclose any legal and sufficient consideration for the supposed promise, or any good cause of action. The court were of opinion, that the declaration was bad, observing, that "it is a known rule of law, that to sustain a promise, or to render it obligatory, there must be either a benefit to the party making the promise or some loss or disadvantage to the party to whom such promise is made; otherwise it is considered as *nudum pactum*, and cannot be enforced. It is improperly termed a *forbearance to sue*, when it is not shown that there was any person liable to be sued, from whom satisfac-

[*47] tion might have been obtained, and in respect to whom plaintiff may have *been said to have forborne suit, at the time when the promise was made. There might not have been any administrator, or if administration granted, any assets of the deceased; or the deceased might have been a bastard, and have had no legal representatives entitled to take out administration of his effects." The consideration of forbearance is not confined to forbearance from suing by *action*; for forbearance to sue, though the party is liable in equity only, *(n)* or desisting from a suit in Chancery, *(o)* or the giving up a suit instituted in the Admiralty Court, to try a question respecting which the law is doubtful, *(p)* has been holden to be a good consideration. So desisting from further complaint before a justice of the peace; *(q)* so forbearing to proceed upon a *capias utlagatum*; *(r)* so staying the trial of a cause after issue joined, *(s)* is a good consideration for a promise to pay the costs incurred. Neither is it necessary to show a consideration equally extensive with the promise; for forbearance by plaintiff, *(t)* at defendant's request, to enforce a *fi. fa.* against the goods of a third person for 60*l.* is a valid consideration for defendant's promise to pay plaintiff 107*l.* in seven days. *(1)*

In what Cases Forbearance of Suit is not a Consideration.—Forbearance of suit against a defendant, where originally there was not any cause of action, is not a consideration to support an assumpsit. *(2)* A. and B. were bound jointly and severally in a bond *(u)* to C. who released to A.; afterwards B., in consideration that C. would forbear to sue him for the payment of the money due on the bond, promised to pay it. On assumpsit brought, and a special verdict, the court were clearly of

(n) *Scott v. Stephenson*, 1 Lev. 71.

(o) *Dowdenay v. Oland*, Cro. Eliz. 768. See also *Coulston v. Carr*, Cro. Eliz. 847.

(p) *Longridge v. Dorville*, 5 B. & A. 117, cited in *Haigh v. Brooks*, 10 A. & E. 313.

(q) *Rippon v. Norton*, Cro. Eliz. 881.

(r) *Jennings v. Harley*, Cro. Eliz. 909, and Yelv. 19.

(s) *Dell v. Fereby*, Cro. Eliz. 868.

(t) *Smith v. Algar*, 1 B. & Ad. 603.

(u) *Hammon v. Roll*, March, 202.

(1) The fact that a note is payable at a future day, where it appeared it was made to close an account for which the maker was not responsible, independent of the note, does not furnish the slightest presumption that forbearance was purchased by it. *Rogers v. Waters*, 2 Gill & J. 64.

(2) See *Hamaker v. Eberle*, 2 Binn. 509.

opinion, that the debt having been entirely discharged by the release, (x) made by the obligee to A., there was not any consideration whereon an assumpsit might be grounded. So, where in assumpsit, (y) it was stated, that there were controversies between the plaintiff and defendant, concerning the profits of certain lands, which the father of the defendant had taken in his life-time, and that the plaintiff had purchased a writ out of Chancery to the intent to exhibit a bill against the defendant for the said profits; the defendant, in consideration that the plaintiff would surcease his suit, promised the plaintiff that if he could prove, that the father of the defendant had taken the profits, or had the possession of the lands, under the title of the father of the plaintiff, he, defendant, would pay the plaintiff for the said profits. After verdict for the plaintiff upon non assumpsit, the court were of opinion, that there was not any *good consideration: for it was not [*48] alleged that the defendant was heir or executor; and even if it had been so alleged, yet there was not any cause to charge him for a personal tort. Judgment for defendant. So where the declaration stated that disputes and controversies were pending between the plaintiff and defendant as to whether or not the defendant was indebted to the plaintiff in the sum of 173*l.* 2*s.* 3*d.*, for money lent, &c., and thereupon in consideration that the plaintiff would then promise the defendant not to sue him for the said sum, and would accept from the defendant the sum of 100*l.* in full satisfaction and discharge of the same; the defendant promised the plaintiff to pay him the said sum of money within a reasonable time. Breach, the non-payment of the said sum of 100*l.* It was holden that the declaration was bad, as not showing a sufficient consideration for the promise: (z) it was not alleged that any debt was due to the plaintiff from the defendant, or that any suit was pending, the termination of which would be a benefit to defendant or any detriment to plaintiff. So where the declaration stated, that the father of the defendant became bound to the plaintiff by bond, (a) with a penalty, conditioned for the payment of money at a day past, and which was not paid, and afterwards the father died; and the plaintiff intending to sue the defendant as son and *heir* on the bond, the defendant, in consideration that the plaintiff would forbear his intended suit against the defendant, promised to pay the debt: After non-assumpsit pleaded, and verdict for the plaintiff, a motion was made in arrest of judgment, on the ground that there was not any consideration; for it did not appear, that the defendant's ancestor had bound himself *and his heirs*, and if the heir was not bound expressly by name, he was not bound at all. Judgment arrested. (1) So where testator was in-

(x) 1 Inst. 232, a.

(y) *Tooley v. Windham*, Cro. Eliz. 206.

(a) *Barber v. Fox*, 2 Saund. 136.

(z) *Edwards v. Baugh*, 11 M. & W. 641.

(1) See also *Hunt v. Swain*, 1 Lev. 165, to the same effect, and *Crosseing v. Honor*, 1 Vern. 180, where a bill was brought by the obligee in a bond against the heir of the obligor, alleging that he having assets by descent ought to satisfy the bond; the defendant demurred, because the plaintiff had not expressly alleged *that the heir was bound in the bond*; and the demurrer was allowed.

Where a suit is brought against an heir, on a promise to pay the ancestor's debt, he is

debted to the plaintiff for money lent, (b) and for merchandises sold and delivered, and promised to pay the plaintiff on a certain day, and died before the day; the plaintiff intending to sue the defendant, his executor, he, in consideration of forbearance for a certain time, promised to pay the debt. The defendant pleaded, that, at the time of the delivery of the goods, the testator was an infant. On demurrer, it was adjudged, that an action would not lie; for the contract of the infant was merely void, and if debt had been brought against him he might have pleaded *nil debit*. (c) So where a *feme covert*, (d) carrying on business as a *feme sole trader* in the city of London, purchased of the plaintiff articles in the way of her trade, and, after her death, her husband promised to pay for them; it was holden to be a void promise, for want of a consideration, the husband not being liable. (1)

The mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage a farm in a husbandlike manner; (e) but not to keep a messuage in good and tenantable repair. (f) But where defendants had for several years, as assignees of a void lease, occupied and paid the rent reserved, it was holden, (g) that they were liable to all the stipulations in the lease in the same way as a tenant who holds over, upon the expiration of a valid lease; and among others, to the covenant for repair. Neglect to cultivate the glebe land in a husbandlike manner is not actionable, (h) there not being any implied contract between the parson and his successor.

Consideration must move from Plaintiff.—Having endeavoured to explain the nature of the consideration, as far as respects the sufficiency of it, it will be proper in the next place to observe, that the consideration on which the promise of the defendant is founded, must move from the plaintiff. (2) Therefore where the plaintiff declared, (i) that A. being

(b) *Stone v. Wythipoll*, executor, Cro. Eliz. 136.

(c) But now the plea of *nil debet* is not allowed in any action, R. G. H. T. 4 W. 4.

(d) *Fabian v. Plant*, 1 Show. 183.

(e) *Powley v. Walker*, 5 T. R. 373.

(f) *Horsefall v. Mather*, Holt's N. P. C. 7, Gibbs, C. J.

(g) *Beale v. Sanders*, 3 Bingh. N. C. 850.

(h) *Bird v. Relph*, 4 B. & Ad. 826.

(i) *Bourne v. Mason*, 1 Ventr. 6.

not sued as heir, but on the promise, and the question of assets does not therefore arise. *Elting et al. v. Vanderlyn*, 4 Johns. Rep. 237. The acceptance by the devisee of an obligor of a bond conditioned to pay an annuity where the land is devised, on condition that devisee shall pay according to testator's contract, renders him personally liable. *Felch v. Taylor*, 13 Pick. 133. Vid. *Forsyth v. Ganson*, 5 Wend. 558.

(1) *Lloyd v. Lee*, 1 Str. 94, a married woman gave a promissory note as a *feme sole*, and after her husband's death, in consideration of forbearance, promised to pay it. It was insisted, that though the note was voidable by reason of the coverture, yet by her subsequent promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration. But Pratt, C. J., held, that the note was absolutely void; and forbearance, where originally there was not any cause of action, was not a consideration to support an assumpsit. He added, that it might be otherwise where the contract was only voidable.

(2) If one pay money to another for the use of a third person, or having money belonging to another agree with that other to pay it to a third, action lies by the person beneficially interested. But where the contract is for the benefit of the contracting party, and the third person is a stranger to the consideration, the action must lie by the

indebted to the plaintiff and defendant in two several sums of money, and B. being indebted to A. in another sum, and there being a communication between the parties, the defendant, in consideration that A. would permit the defendant to sue B. in A.'s name, for the recovery of the sum due from B. to A., promised that he the defendant would pay A.'s debt to the plaintiff, and alleged that A. permitted the defendant to sue accordingly, and that he recovered; after verdict for the plaintiff upon non-assumpsit, it was moved in arrest of judgment, that the plaintiff could not maintain this action; and of this opinion were the court, observing, that the plaintiff was a mere stranger to the consideration, having done nothing of trouble to himself, or of *benefit to the defendant.(1) So where the plaintiff declared(k) [*50] that J. S. was indebted to the plaintiff, and it was agreed between J. S. and the defendant, that the defendant should pay to the plaintiff the debt due to him from J. S., and that J. S. should make the defendant a title to a house, in consideration whereof the defendant promised to pay the plaintiff the debt due to him from J. S., and then averred that J. S. was always ready to perform his part of the agreement: on demurrer, judgment was given for the defendant, because the plaintiff was a stranger to the consideration.(2) But if A. remits money to B. to pay to C., and B. promises A. to pay it to him, C. may maintain(l) an action against B. for money had and received; for the consideration does move from C. through the instrumentality of A.

The plaintiff declared that his wife's father being seized of lands now descended to the defendant,(m) and being about to cut down 1000*l.* worth of timber to raise a portion for his daughter, the defendant, being his heir, promised the father, in consideration that he would forbear to fell the timber, the defendant would pay the daughter 1000*l.*: after verdict for the plaintiff, upon non-assumpsit, it was moved in arrest of judgment, that the action ought not to have been brought by the daughter, but by the father; or if the father were dead, by his executors; for the promise was made to the father, and the daughter was neither

(k) *Crow v. Rogers*, Str. 592, recognized and acted upon in *Price v. Easton*, 4 B. & Ad. 433.

(l) *Lilly v. Hays*, 1 Nev. & P. 26; 5 A. & E. 548.

(m) *Dutton and wife v. Poole*, 2 Lev. 210; 1 Ventr. 318-334, affirmed on error in the Exchequer Ch. T., Raym. 302, cited in *Martin v. Hynd*, Cowp. 439, 443.

promisee. *Blymire v. Boistle*, 6 Watts, 182; *Morrison v. Beckly*, 6 Id. 349. Assumpsit lies on a promise to pay assignee of a note for specific articles. *Currier v. Hodgdon*, 3 N. H. R. 82. By a creditor of a third person against defendant, who in consideration of an assignment promised to pay the debt. *Elwood v. Monk*, 5 Wend. 235. By a third person on a contract made for his benefit without his knowledge or authority, if subsequently adopted by him. *Bridge v. Niag. Co.*, 1 Hall, 247.

(1) See *Cabot v. Haskings*, 3 Pick. 83. *Owings v. Owings*, 1 Har. & M'Gill, 484, where the rule is stated with the exceptions.

(2) Where the defendant, who was a notary, received a note from the holder, to be protested, and promised the holder to protest it so as to charge the several indorsers, and notified plaintiff, who was a second indorser, but neglected to notify the first indorser of the non-payment, and the plaintiff was in consequence obliged to pay the whole amount of the note, it was holden that the defendant's special undertaking to the holder to protest the note, &c., would not enure to the benefit of the plaintiff. *Morgan v. Van Ingen*, 2 Johns. Rep. 204.

privy nor interested in the consideration, nothing being due to her; but *Scroggs*, C. J., said, that there was such apparent consideration of affection from the father to his children, for whom nature obliged him to provide, that the consideration and promise to the father might well extend to the children. Judgment for the plaintiff; for the son had the benefit by having the wood, and the daughter had lost her portion by these means.(1)

Another Requisite of the Consideration.—The consideration must be such, as the party undertaking has a power by law to perform, or cause to be performed. The plaintiff declared, that he being bailiff to J. S.,(n) the defendant, in consideration that the plaintiff would discharge the defendant of a debt due to J. S., promised, &c. After verdict and judgment for the plaintiff in the court below, it was reversed in B. R., *because the plaintiff could not discharge a debt due to his master.* The principle established by this case was recognized by *Kenyon*, C. J., in *Nerot v. Wallace*, 3 T. R. 22, where the consideration was, that the plaintiffs, who were assignees under a commission of bankrupt against J. S., would forbear to proceed to have the examination of
[*51] J. S. taken before the *commissioners, concerning certain sums with which J. S. was charged, and that the commissioners would forbear and desist accordingly. Lord *Kenyon* said, “The ground on which I found my judgment is this, that every person who, in consideration of some advantage, either to himself or another, promises a benefit, must have the power of conferring that benefit up to the extent to which he professes that benefit should go, and that not only in fact but in law. Now as to the promise made by the assignees in this case, which was the consideration of the defendant’s promise, it was not in their power to perform it, because the commissioners had nevertheless a right to examine the bankrupt. And no collusion of the assignees could deprive the creditors of the right of examination, which the commissioners would procure them. The assignees stipulated, not only for

(n) *Harvey v. Gibbons*, 2 Lev. 161.

(1) Defendant promised, in consideration that J. S. would make him an assignment of his personal property, to purchase a desk for plaintiff’s wife, who was the daughter of J. S. and sister to defendant. *Schermerhorn v. Vanderhuyden*, 1 Johns. Rep. 139. It was holden that defendant’s promise to J. S. would support an action by plaintiff for the desk.

So where the father of a minor placed him in the service of a master, who promised the father to pay to the son a certain sum for his services, when he should become of age; it was holden that the son might maintain an action on the promise. *Felson v. Dickinson*, 10 Mass. Rep. 287.

A. assigned certain securities to defendant, in trust, to dispose of part of the money to be received thereon, to certain specified purposes, and to hold the balance, subject to the order of A.: defendant accepted the trust; and A. then directed him to pay the balance to plaintiff; defendant afterwards received the money due on the securities, but refused to pay it over to plaintiff: it was holden, that the acceptance of the trust by the defendant, was equivalent to an express promise to the person to whom A. should direct the money, when received, to be paid, and that plaintiff could therefore maintain an action against defendant for money had and received. *Weston v. Barker*, 12 Johns. Rep. 276; *Fleming v. Alter*, 7 S. & R. 295; *Arnold v. Lyman*, 17 Mass. Rep. 400.

Where a promise is made to the overseers of the poor, their successors cannot maintain an action upon it, they not being a corporation. *Sheer v. Overseers of Hillsdale*, 13 Johns. Rep. 496.

their own acts, but also that the commissioners should forbear to examine the bankrupt; but clearly they had no right to tie up the hands of the commissioners by any such agreement.(1) And if any proposal of that sort had been made to the commissioners, they, as acting in a public duty, would have been guilty of a breach of that duty in acceding to it."

Consideration past or executed.(2)—It remains only to add that a consideration, past or executed, will not support a subsequent promise, unless the act was done at the request, either expressed or implied, of the party promising.(3) As, if the servant of A. be arrested for a trespass,(p) and J. S. without the request of A. bails the servant, and afterwards A. promises J. S. to indemnify him, the promise is void; because the bailing, which was the consideration, *was [*52] past and executed before. But where the act which forms the consideration is done at the request of the party promising, the circumstance of the promise being subsequent in point of time to the consideration will not affect it. As if A. requests B. to endeavour to procure a pardon for A.,(q) and after B. has made such endeavour, A. in consideration thereof, promises to pay him a certain sum of money, this is a good consideration.(4) The distinction established by these

(o) 1 Roll. Abr. 11, pl. 1. See also *Hunt v. Bate*, Dyer, 272, cited by *Tindal*, C. J., in *Thornton v. Jenyns*, 1 Man. & Gr. 188; 1 Sc. N. R. 52.

(p) Dyer, 272.

(q) 1 Roll. Abr. 11 (Q) pl. 6. [*Gillett v. Maynard*, 5 Johns. 85.]

(1) It must not be inferred from the language of Lord *Kenyon*, that a party may not stipulate for the act or forbearance of a stranger, and that such stipulation will not in any case form a good and sufficient consideration; if the act be such, as the stranger might do or abstain from doing legally, or without any breach of duty, an objection cannot be raised against such a consideration.

(2) Past consideration is not good unless founded on legal or moral obligation. *Goldsbey v. Robertson*, 1 Blacks. 247. But if part past and part executory, and the promise is entire, it is good. *Loomis v. Newhall*, 15 Pick. 159. There is an implied undertaking by the owner of lost property to indemnify the finder for his time and expenses. *Reeder v. Anderson*, 4 Dana, 193; *Amory v. Hyre*, 10 Johns. 102; *Elter v. Edwards*, 4 Watts, 63.

(3) See a note on this subject by Serjeant Williams, in *Osborne v. Rogers*, 1 Saund. 264, n. (1). See also Hob. 106, *Lampleigh v. Braithwait*, where it was agreed, that a mere voluntary courtesie will not have a consideration to uphold an assumpsit. But if that courtesie were moved by a suit or request of the party promising, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference. "Where the act of the plaintiff and the promise of the defendant take place at the same time, the law does not require, as in the case of a by-gone transaction, that in order to make the promise binding, the plaintiff should have acted at the request of the defendant." Per *Tindal*, C. J., *Tipper v. Bicknell*, 3 Bingh. N. O. 715.

(4) *Greeves v. M'Allister*, 2 Binn. 591, where the rule as to past considerations is examined; and 1 Parsons on Contr. 391; Addison on Contr. 21.

"Nothing is better settled, than that a child is not entitled to demand wages from a parent, for services rendered after attaining full age, in the absence of express contract or something equivalent to it; *Walker's Estate*, 3 Rawle, 243; *Candor v. Candor*, 5 W. & Ser. 513; a principle which embraces also the liabilities of persons whom the law regards as standing in that relation, although connected by no ties of blood. It was upon this ground that *De France v. Austin*, 9 Barr, 309, was decided; and a kindred principle ruled the cases of *Little v. Dawson*, 4 Dal. 100, and *Swires v. Parsons*, 5 W. & Ser. 357.

"In the first of these cases a minor nephew was not permitted to recover for services rendered to an uncle, who had received him as one of his own family; in the second,

cases shows the necessity of stating in declarations on executed considerations, that they were done at the request of the party promising; for although, after verdict, the court will in some cases imply a request, yet after a judgment by default, the omission has been holden fatal; as,

there was a similar denial, where the services were rendered in expectation of a legacy; and in the last, a woman who had lived in a state of concubinage, was unsuccessful in her claim to be remunerated from the estate of the man towards whom she had discharged the duties of a wife and housekeeper. Each of these determinations is based on the irresistible presumption springing from the relation of the parties, that neither of them contemplated remuneration by the payment of wages, and in the impolicy of sanctioning claims not dreamed of at the time of the transaction; this impolicy is peculiarly apparent where the relation of adult protection and infant dependence exists; the latter expecting naught beyond shelter, food, clothing and education, and the former enjoying as of course, whatever services the weaker party is able to render. Such was the relative position of these parties; the girl living in the house of a mother's husband, as a member of the family, and the husband regarding her as the child of his wife, and not as a menial or hireling. I may say that any device designed to enable the child of a widowed mother to assume towards a second husband the attitude of creditor for services rendered while living in the family as a member of it, ought to be discouraged because of the results it must inevitably produce. Men will decline to extend their protection and aid to orphan children, at the hazard of being exposed to suits at law on the suggestion of ill-natured neighbors, or exacting friends, that the step-child has been harshly treated or inadequately provided for. Every one of the least experience knows how difficult, at best, it is to escape such imputations; and should we permit cynicism to be stimulated by the chances of encouraged litigation, it will be difficult to foresee the extent of evil which may be produced." *Lantz v. Frey*, 2 Harris, 202, per Bell, J.; *Candor's Appeal*, 5 Watts & Serg. 515, per Rogers, J.

It has been held that where a young man, at the request of his uncle, came to live with him, and the uncle promised to do by him as his own child; and he lived with, and worked for him more than eleven years, and his uncle said that his nephew should be one of his heirs, and spoke of advancing a sum of money to purchase a farm for him, as a compensation for his services, but died without devising anything to the nephew, or making him any compensation; it was holden that an action on an implied assumpsit would lie against the executors, for the work and labor performed by the nephew for the testator. *Jacobson v. Executors of Le Grange*, 3 Johns. Rep. 199; see also *Roberts v. Kid's executors*, 1 Yeates's Rep. 209; *Conrad v. Conrad*, 4 Dallas's Rep. 130; *Little v. Dawson*, 4 Dallas's Rep. 111; *Patterson v. Patterson*, 18 Johns. Rep. 379; *Childs v. Craig*, 4 Dana, 544; *Coleman v. Simpson*, 2 Id. 166; *Stone v. Dennison*, 13 Pick. 1. No action lies, by a physician, for medicine administered to and attendance on a slave, without the knowledge or request of the master, in a case not requiring immediate attendance; *Barlow v. Lamberd*, 28 Ala. (N.S.) 704; *Thompson v. Alexander*, 3 Am. Law Reg. 543; although in a case of such pressing necessity as not to admit of a previous application, the master might be liable on the implied assumpsit arising from his legal obligation to make the requisite provision for his slave. *Dunbar v. Williams*, 10 Johns. Rep. 249.

There is no implied contract to pay for services of plaintiff, a negro, held under a belief that he was born a slave. *Urie v. Johnson*, 3 Penn. R. 212. Nor where he was born a slave, but the requisite certificate was informal. *Griffin v. Potter*, 14 Wend. 209. Nor for services of a slave bequeathed to defendant, when the real owner gave no notice of his claim. *Demyer v. Sowzer*, 6 Wend. 436. See 1 Parsons on Contr. 537.

In the case of *Wells v. Kennedy*, 4 M'Cord's Rep. 182, the Court of Appeals held, that the general owner was not liable for the doctor's bill, either by the rules of law or the policy of the country; for that the hirer had no more right to throw the expenses of the negro's sickness upon the general owner, than to an abatement of the hire during the period of sickness.

As early as 1823, it was decided in the state of Alabama, that the hirer of a slave is bound to pay the the physician for his services; and that the owner was not liable unless he had requested services of the physician. *Meeker v. Childress*, Minor's Rep. 109.

And this decision, made at this early history of the Supreme Court of that state, being the first year of its organization, has been acquiesced in and considered as law since that time. See *Gibson v. Andrews*, 4 Ala. Rep. 766; *Thompson v. Alexander*, *supra*.

where the declaration was for work and labour done by the plaintiff for the defendant, (r) and averred, that the plaintiff therefore deserved of the defendant so much, in consideration whereof he *afterwards* promised to pay. *After judgment by default*, and final judgment in C. B. for the plaintiff, it was objected on error in B. R. that this was a past consideration, and not being laid to be done *at the request* of the defendant, it could not be a consideration to raise an assumpsit. The court were of this opinion, and reversed the judgment in C. B., observing, that it did not appear, that the work was for the benefit of the defendant, and they must take it to be a past consideration, being laid that *afterwards* he promised to pay. They added, that, if this had been after verdict, an inference in support of the judgment might have been drawn from the words *for* the defendant and *of* the defendant, (1) but the statutes of jeofails did not protect judgments by default against objections that were cured by a verdict at common law, but such as were remedied after a verdict by the statutes. (2)

It has been decided in several cases that a moral obligation is a good consideration for a promise to pay. (3) Hence, where a feme covert, having an estate settled to her separate use, gave a bond for repayment, by her executors, of money advanced at her request, on security of that bond, to her son-in-law: after her husband's decease, she wrote, promising that her executors should settle the *bond: [*53] it was holden that assumpsit would lie against the executors on this promise of the testatrix. (s) So it has been holden, that if a person is under a moral obligation to do an act, and another person does it without his request, a subsequent promise to pay will be binding. (t) And where a pauper was suddenly taken ill, and an apothecary attended her without the previous request of the overseers, and cured her, and afterwards the overseers promised payment, it was holden good, for they were under a moral obligation to provide for the poor. (4)

(r) *Hayes v. Warren*, Str. 933.

(s) *Lee v. Muggeridge and another*, 5 Taunt. 36, cited and distinguished by *Tenterden*, C. J., *Littlefield v. Shee*, 2 B. & Ad. 812.

(t) *Watson v. Turner*, Bull. N. P. 129, 147, 281.

(1) Because the defendant having derived a benefit, and afterwards agreed to pay for it, the court would have implied that the consideration was executed at *his request*. In *Hicks v. Burhans*, the court say, that a written promise to pay, if founded on a past consideration, may be good if the past service be laid to have been done on request; and if not so laid, a request may be implied from the beneficial nature of the consideration, and the circumstances of the transaction. *Hicks v. Burhans*, 10 Johns. Rep. 243. See also *Livingston v. Rogers*, 1 Caines' Rep. 583.

(2) Sir J. Burrow says, that, according to his note of *Hayes v. Warren*, the court reversed the judgment of C. B. because it did not appear that the consideration was for the benefit, or at the request of the defendant. See *Pillans v. Mepp*, 3 Burr. 1671, where *Wilmot, J.*, is reported to have said, that the case of *Hayes v. Warren* was a strange and absurd case. So where the declaration stated that the defendant, "in consideration that the plaintiff before that time sold and conveyed a certain farm, &c., to the defendant, the defendant then and there undertook," &c., it was holden, that the count was not sufficient to support the action, the promise being founded on a past consideration, and it not being alleged that the farm was conveyed at the request of the defendant. *Cumstock v. Smith*, 7 Johns. Rep. 87.

(3) *The Inhabitants of Windham v. The Inhabitants of Rutland*, 4 Mass. Rep. 384; *Tioga v. Seneca*, 1 Johns. 380; *Clark v. Hearing*, 5 Binney's Rep. 33.

(4) "The case of *Watson v. Turner*, Bull. N. P. 147, has sometimes been cited in sup-

But the doctrine that a moral obligation is a sufficient consideration for a subsequent promise, is one which should be received with some limitation ;(u) and in *Eastwood v. Kenyon*,(x) the Court of Queen's [*54] Bench, considering the *case of *Lee v. Muggeridge*,(y) to have been impeached by the decision in *Littlefield v. Shee*,(z) held that a declaration, charging the defendant on a promise to repay the plaintiff money laid out by him in the maintenance of an infant, who afterwards became the defendant's wife, and in the improvement of her land, and alleging that the defendant, in right of his wife, had received the benefit of all the moneys so expended, "was bad in arrest of judgment after verdict; for the consideration for it was past and executed long before, and was not laid to have been at the request of the defendant, nor even of his wife while sole, (though if it had, the case of *Mitchinson v. Hewson*,(a) shows that it would not have been sufficient,) and the declaration really disclosed nothing but a benefit, voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money.(1)

(u) Per Lord Tenterden, C. J., in *Littlefield v. Shee*, 2 B. & Ad. 813. This opinion of Lord Tenterden was assented to in *Monkman v. Shepardon*, 11 A. & E. 411.

(x) 3 P. & D. 276; 11 A. & E. 438.

(y) 5 Taunt. 36.

(z) 2 B. & Ad. 812.

(a) 7 T. R. 348.

port of what has been supposed to be the general principle laid down by Lord Mansfield, (viz. that a moral obligation is a sufficient consideration for an express promise,) because in that case overseers were held bound by a mere subsequent promise to pay an apothecary's bill for care taken of a pauper; but it may be observed, that this was adjudged not to be *nudum pactum*, for the overseers are bound to provide for the poor, which obligation being a *legal* obligation, distinguishes the case. Indeed, in *Atkins v. Banwell*, 2 East, 505, that distinction does not seem to have been sufficiently adverted to; for *Watson v. Turner*, was cited to show that a mere moral obligation is sufficient to raise an *implied* assumpsit: and though the court denied that proposition, yet Lord Ellenborough observed, that the promise given in the case of *Watson v. Turner*, made all the difference between the two cases, without alluding to another distinction which might have been taken, viz. that though the parish officers were bound by law in *Watson v. Turner*, the defendants in *Atkins v. Banwell* were not so bound, because the pauper had been relieved by the plaintiffs, as overseers of another parish, though belonging to the parish of which the defendants were overseers." 3 Bos. & Pul. 250, 251. It appears that the case of *Watson v. Turner* may be supported on strict legal principles, without resorting to the doctrine of moral obligation, of which not a trace can be found in the older cases. The defendants, being bound by law to provide for the poor of their parish, derived a benefit from the act of the plaintiff, who afforded that assistance to the pauper, which it was the duty of the defendants to have provided; this was the consideration, and the subsequent promise by the defendants to pay for such assistance, was evidence from which it might be inferred that the consideration was performed by the plaintiff, with the consent of the defendants, and consequently sufficient to support a general *indebitatus assumpsit* for work and labor performed by the plaintiff for the defendants, *at their request*. In *Cook v. Bradley*, 7 Conn. Rep. 57, this subject was fully considered, and it was said by the court, that the rule is limited in its application to cases where a good and valuable consideration has once existed; and it was held that a written promise by a son to pay a certain sum for necessities for an indigent father, was without sufficient consideration and void. *Everts v. Adams*, 12 Johns. 352; *Mills v. Wyman*, 3 Pick. 207; *Loomis v. Newhall*, 15 Id. 159; *Heawley v. Farrar*, 1 Verm. 420; *Ehle v. Judson*, 24 Wend. 97; *Geer v. Archer*, 2 Barb. S. C. 420; *Nash v. Russell*, 5 Id. 556; *Watkins v. Halstead*, 2 Sandf. S. C. 311; *Deer Isle v. Eaton*, 12 Id. 428; *Garland v. Salem Bank*, 9 Id. 408; *King v. Butler*, 15 Johns. 281.

(1) Where a person has, at the request of an overseer of the poor, and on his promise that he would see him paid, boarded a pauper, and furnished him with necessities, he may maintain an action of assumpsit against the overseer, although no order had ever been

Although a moral obligation has been holden to be a good consideration for an express promise, it has never been carried further so as to raise an implied promise in law.(1) Hence, where the parish officers of A. laid out money in providing medical assistance and other necessities for a pauper,(b) who was taken suddenly ill in the parish, and could not be removed in consequence of his illness, it was holden that the law would not raise an implied promise in the parish of B. in which the pauper was legally settled, to reimburse the money laid out by the parish of A., although the parish of B. had notice of the pauper's illness. An accident happened to a driver of a wagon belonging to I. S. in the parish of A.; the man was immediately removed to the nearest public house, which was in the parish of B., where the plaintiff attended him as a surgeon: the parish officer of B. visited the place, and did not discharge the plaintiff; it was holden that he was liable to pay the plaintiff for his attendance, the removal being *bond fide*.(c) N. The plaintiff was in the habit of attending the parish poor of B.

A master is not liable upon an implied assumpsit to pay for *medical attendance on a servant,(d) who has met with an [*55] accident in his service.(2)

An action on the case does not lie for the recovery of expenses arising from a moral obligation to do a thing, which the law does not compel; as for the expenses arising from the pregnancy of a daughter debauched; to maintain an action for that injury there must be a loss of service.(e) See *post*, tit. "Master and Servant." But the maintenance of an illegitimate child by its mother is a sufficient consideration for a promise by the reputed father to pay an annuity to her; for he might have had the child affiliated on him.(f) The moral obliga-

(b) *Atkins v. Banwell*, 2 East, 505; [*Everts v. Adams*, 12 Johns. Rep. 352; *Overseers of Tioga v. Overseers of Seneca*, 13 Johns. Rep. 380.]

(c) *Lamb v. Bunce*, 4 M. & S. 275. See *Tomlinson v. Bentall*, 5 B. & C. 738; *Wing v. Mill*, 1 B. & A. 104.

(d) *Wennall v. Adney*, 3 Bos. & Pul. 247.

(e) *Satterthwaite v. Dewhurst*, B. R. E. 25 Geo. III. A. P. B. No. 85; *Dampier*, M. S. S. L. I. L.

(f) *Jennings v. Brown*, 9 M. & W. 496.

made for the relief of the pauper. *King v. Butler*, 15 Johns. Rep. 281; *Parsons on Cont.* 358.

(1) The cases in which it has been held that under certain circumstances a consideration insufficient to raise an implied promise, will, nevertheless, support an express one, will be found collected and reviewed in the note (a) to *Wennall v. Adney*, 3 Bos. & Pul. 249; and in *Eastwood v. Kenyon*, 11 A. & E. 438. They are cases of voidable contracts subsequently revived, of debts barred by operation of law, subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise, per *Ld. Denman*, C. J., in *Roscorla v. Thomas*, 3 Q. B. 237; 2 G. & D. 508. See *Kaye v. Dutton*, 13 Law Journal (N. S.) C. P. 183. A question was submitted to the Supreme Court of Mass. whether the law would imply a promise by a pauper to reimburse a town for her support after she had become able to pay: and it was decided that it would not. But the court intimated that a sufficient consideration *might* arise out of the circumstances of the case to support an express promise. *The Inhabitants of Deer Isle v. Eaton*, 12 Mass. Rep. 428.

(2) Medical attendance on a son of full age, though at father's request, raises no implied promise in the latter. *Boyd v. Sappington*, 4 Watts, 247. As to medical attendance to slaves, consult *Fairchild v. Bell*, 2 Brev. 129; *Horee v. Haines*, 2 Harrison, 385, and note 1, *ante*, 52.

tion(*g*) which a father is under to provide for his child, imposes on him no liability to pay the debts incurred by the child; and he is not so liable unless he has given the child authority to incur them, or has contracted to pay them.

In cases where, though a debt or duty remains uncanceled, yet the liability of the party to be sued is *suspended*, either by the intervention of a rule of law, or the provisions of a statute, a subsequent express promise will remove the suspension and restore the liability so as to give a right of action; for it is in the power of any party to waive an advantage which the law gives him.(1) Hence, where the holder of a bill of exchange(*h*) had failed in giving due notice of the dishonour of the bill to the drawer, it was adjudged, that a subsequent promise by the drawer, that he would see the bill paid, would support an assumpsit.(2) In like manner it has been holden, that a promise to pay a debt barred by the statute of limitations,(*i*) a positive and precise promise(*k*) by a bankrupt after his certificate to pay an antecedent debt,(*l*) and a promise by a person of full age to pay a debt contracted during his infancy, are binding.(*m*)(3)

Motion to set aside an execution against the goods on a
[*56] note(*n*) *given by a debtor discharged under the insolvent act of 21 Geo. III. c. 63, for 120*l*. (100*l*. of which he had been discharged from by the act, but in consideration of the loan of 20*l*. more he had given a note for the whole,) and to restore the goods taken under the *fiери facias*; Lord *Mansfield*, C. J., after the case had been considered, said, that there was a difference between the cases, where the debt was destroyed, and where it remains, but the remedy only taken away by the statute: in cases on the statute of limitations, there is not required any consideration for reviving the promise: nor is there

(*g*) *Mortimore v. Wright*, 6 M. & W. 482.

(*h*) *Hopes v. Alder*, 6 East, 16 n.; *Rogers v. Stevens*, 2 T. R. 713; *Lundie v. Robertson*, 7 East, 231; *Haddock v. Bury*, Middx. Sittings, T. 3 Geo. II. per *Raymond*, C. J., S. P.

(*i*) *Hyleing v. Hastings*, Lord Raym. 389. If in writing, signed, 9 Geo. IV. c. 14, s. 1.

(*k*) See *Linbuy v. Weightman*, 5 Esp. N. P. C. 198. The promise must be distinct and unequivocal, per Lord *Ellenborough*, C. J., in *Fleming v. Haynes*, 1 Stark. N. P. C. 370; [*Scouton v. Eislord*, 7 John. 36.]

(*l*) *Trueman v. Fenton*, Cowp. 544. But see stat. 6 Geo. IV. c. 16, s. 131; *post*, tit. "Bankrupt."

(*m*) *Southerton v. Whitlock*, 1 Str. 690, per *Raymond*, C. J. If in writing, signed, 9 Geo. IV. c. 14, s. 5.

(*n*) *Best v. Barber*, B. R. M. 23 Geo. III. MSS. Doug. 101, n.; S. C. 3 Doug. 188. See *Wilson v. Kemp*, 3 M. & S. 595, that party cannot be arrested on fresh promise.

(1) This rule, expressed in the language of Lord *Mansfield*, is the same as the former, *viz.* that a moral obligation is a good consideration for an express promise.

(2) And if a person, for whose benefit a note has been made, but who, however, is not a party to it, promises to pay the amount to the holder, the prior equitable obligation is a good consideration to support the assumpsit. *Stewart v. Eden*, 2 Caines' Rep. 150. But *quære*, whether such a promise made under such circumstances by an *indorser* would bind him. *May v. Coffin*, 4 Mass. Rep. 341; *Garland v. President, &c., of the Salem Bank*, 9 Mass. Rep. 408.

(3) In *Lonsdale v. Brown*, 4 Wash. C. C. R. 150, Judge *Washington*, said, "We take the rule to be, that a promise to pay a sum of money on a consideration executed, if it was induced by the request of the defendant, or by some previous duty; or if the debt be continuing at the time, or is barred by a rule of law, or provision of some statute, as the act of limitations, bankruptcy, or the like, is good to maintain an assumpsit."

in this case, except the conscientious obligation, which is a good consideration. There is not any difference between cases of insolvency and bankruptcy. *Buller, J.*, mentioned a case of this nature before Lord *Hardwicke*, chancellor, 1 Atk. 255.(1) Rule discharged. But see stat. 7 Geo. IV. c. 57, s. 61, *Sheerman v. Thompson*, 11 A. & E. 1027, 3 P. & D. 656; *Philpott v. Aslett*, 4 Tyr. 729, stat. 1 & 2 Vict. c. 110, s 91.

A subsequent promise will not operate so as to revive a *void* security.(o) If the subsequent promise be conditional,(p) it is incumbent on the plaintiff to show the condition performed:(2) as, if a bankrupt, after obtaining his certificate, promise to pay a prior debt when he is able, the plaintiff must prove the ability of the defendant to pay at the time of the action brought on the subsequent promise.(3)

The Agreement must be legal.—In order to maintain an assumpsit, the agreement must be legal; that is, 1st. It must not contravene any rule of the common law, the express provisions of any statute,(q) or the general policy of the law. The two essential parts in every parol agreement, are the consideration and the promise. If either of these

(o) *Cockshott v. Bennett*, 2 T. R. 763.

(p) *Beasford v. Saunders*, 2 H. Bl. 116, per *Gould & Heath, Js.*, dissent. Lord *Loughborough*, C. J.

(q) *Featherstone & Hutchings*, 3 Leon. 222; Cro. Eliz. 199.

(1) A., formerly a trader in Holland, failed there, upon which there was a *cessio bonorum*. He came to England, and having procured an appointment as governor of a settlement abroad, belonging to the African Company, applied to the petitioner to be his security to the company, and advance him a sum of money, who agreed to it, provided A. would give him a bond comprising the remainder of an old debt, due before the *cessio bonorum*, as well as the further sum advanced, which was done accordingly. A. becomes a bankrupt, and the commissioners doubting whether the petitioner ought to be admitted a creditor for the whole money, he made an application to the chancellor, for that purpose; Lord *Hardwicke*, chancellor, was of opinion, that he was entitled to be admitted a creditor for the *whole* money upon his bond. *Ex parte Burton*, 1 Atk. 255.

(2) A promise by defendant, for value received, to pay, if and when defendant shall collect his demands against a third person, implies that he will use *due diligence* to do so, and no request is necessary. *White v. Shell*, 9 Pick. 16.

(3) And where an insolvent promised to pay a debt from which he had been discharged under the insolvent law, "provided he could pay it without distressing his family," the promise was holden to be conditional, and that it was incumbent on plaintiff to show that defendant was able to pay, &c. *Scouton v. Eislord*, 7 Johns. Rep. 36.

There is neither a legal nor moral obligation on the owner of land to pay for the work and labor done upon it by one who has entered without his consent, or any color of right, and held the possession against him.

Assumpsit for clearing land and erecting buildings thereon at the request of the defendant, in consideration whereof he afterwards promised to pay, &c. Plaintiff had illegally entered on defendant's land, and made valuable improvements, for which defendant subsequently promised to pay him. Defendant, however, brought an action of ejectment, and plaintiff held out in defence of the possession against the action. It was holden that the promise was a *nudum pactum*, the consideration being wholly past and executed, and there being no moral or equitable duty on the part of the plaintiff to pay for the improvements. "The improvements were made by defendant at his peril. To consider these meritorious would be to encourage depredations on private property." *Frear v. Hardenburgh*, 5 Johns. Rep. 272. Vide also *Boston v. Dodge*, 1 Blackf. 19, and *Welsh v. Welsh*, 5 Ohio, 427. But assumpsit lies on a promise by grantor to grantee to refund the consideration money on surrender of possession to a claimant, notwithstanding a covenant of warranty. *Miller v. Watson*, 4 Wend. 267.

be illegal, or if part of the entire consideration be illegal,^(r)(1) or if the promise be to do two or more acts, one of which is illegal,^(s) an action cannot be maintained for a breach of the agreement. Hence,
 [*57] where the *consideration* was, that the plaintiff would *procure the defendant to be presented and instituted to a chapel,^(t) which was a donative in the king's gift, it was adjudged illegal, on the ground of its being simony, and therefore incapable of supporting an assumpsit. So where defendant,^(u) an under-sheriff, having seized the goods of J. S. under an *elegit*, sued out by the plaintiff, in consideration that the plaintiff, at the request of the defendant, would sue out another writ of *elegit*, and authorize some person to receive the goods, promised to procure the goods to be found by an inquisition, and to deliver them to the person authorized; the court were of opinion that the promise was illegal: 1. Because the seizing the goods under the first

(r) Cro. Jac. 103; [*Helm v. Miller*, 17 Johns. Rep. 296.]

(s) T. Jones, 24.

(t) *Mackaller v. Todderick*, Cro. Car. 337, 353, 361.

(u) *Morris v. Chapman*, T. Jones, 24; Carter, 223, S. C.

(1) The test whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. *Swan v. Scott*, 11 S. & R. 164; *Scott v. Duffy*, 14 Penn. State R. 26; *Tivay v. Nicholls*, 2 C. B. 501. Where a contract grows immediately out of, and is connected with an immoral or an illegal act, a court of justice will not lend its aid to enforce it; and if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it. But if the promise be connected with the illegal act, and is founded on a new consideration, it is not tainted by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act. *Toler v. Armstrong*, 4 Wash. C. C. R. 299; S. C. 11 Wheat. 258. Thus, where A. during a war contrived a plan for importing goods on his own account from the enemy's country; and goods were sent to B. by the same vessel, and A., at the request of B., became surety for the payment of the duties on B.'s goods, and became responsible for the expenses on a prosecution for the importation of the goods, and was compelled to pay them; it was held that A. might maintain an action against B. on his promise to refund the money. *Ib.* *Milne v. Huber*, 3 M'Lean, 212; *Wroten v. Miller*, 7 S. & M. 380; *Smith v. Barstow*, 2 Dougl. 55; *Leavitt v. Blatchford*, 5 Barb. Sup. Ct. R. 9; *Hook v. Grary*, 6 Barb. Sup. R. 398. Where a contract is made about a matter or thing which is prohibited and made unlawful by statute, it is void, though the statute itself does not mention it shall be so, but only inflicts a penalty on the offender. *Cundell v. Dawson*, 4 C. B. 396; *Columbia Bank v. Haldeman*, 7 Watts & Serg. 235; *Bell v. Quin*, 2 Sandf. Sup. C. R. 146; *Mitchell v. Smith*, 1 Binn. 118; *Jeritt v. Bartlett*, 21 Verm. 184; *Bancroft v. Dumas*, 21 Verm. 456. An action cannot be sustained in the courts of a state on an agreement entered into in violation of the laws of the United States or of the law of the particular state. *Malin v. Coulon*, 4 Dall. 298; *Biddis v. James*, 6 Binn. 321; *Seidenbender v. Charles*, 4 Serg. & R. 159. There is no distinction between *malo prohibita* and *mala in se* in the construction of contracts. *Columbia Bank v. Haldeman*, 1 Watts & Serg. 235; *Eberman v. Reitzel*, *Ib.* 181. A contract founded on a promise to obtain signatures to a petition to the Governor for the pardon of one convicted of a criminal offence is void. *Hatzfield v. Guldon*, 7 Watts, 152. And so a contract to procure or endeavor to procure the passage of an act of the legislature by any sinister means, or by using personal influence even with the members, is void, as against public policy. *Clippinger v. Hepbaugh*, 5 Watts & Serg. 315. See *Hunt v. Test*, 8 Ala. 113. A promise to pay a witness \$1.50 for her attendance as a witness, which was to be reduced one-half if the party promising did not succeed in the cause, is against sound policy and cannot be enforced. *Dawkins v. Gill*, 10 Ala. 206; Archbold's N. P. 153, 3 Amer. ed., note. A contract for the purchase of the office of constable is void. *Groton v. Waldboro*, 2 Fair. 306. An act forbidden by the constitution of the United States, is a void consideration. *Craig v. Missouri*, 4 Peters, 431.

elegit was ill, for want of an inquisition, and it differed from a *fi. fa.* so that the defendant was a trespasser *ab initio*, and this promise was to make good his own wrong: 2. It was the duty of the sheriff to return the jury, who ought to be impartial: but this promise bound him contrary to the duty of his office; and although one part of the promise was legal, yet that depending on the illegal part vitiated the whole. So where a person promised to indemnify a gaoler, (x) if he would permit a prisoner to escape out of execution; it was adjudged, that an action could not be maintained for a breach of the promise; because the consideration, namely, the suffering a prisoner in execution to escape, was against law. (1) So where, in consideration that the plaintiff at the request of the defendant had published a libel against a third person, and had consented to defend an action brought against the plaintiff for such publication, the defendant promised to indemnify the plaintiff against all costs and expenses incurred thereby; it was holden, (y) that the promise and the consideration were both illegal; and that if that objection could be got rid of, the contract would still be void for maintenance.

(x) *Martyn v. Blithman*, Yelv. 197. See also *Sherley v. Packer*, 1 Roll. R. 313, to the same effect.

(y) *Shackell v. Rosier*, 2 Bingh. N. C. 634.

(1) Where a master directed his servant to enter a certain meadow, which he said belonged to him, but which in fact belonged to another, and promised to save the servant harmless, the act of the servant in obeying the command was holden to be lawful, and a sufficient consideration for the promise of indemnity. *Allaire v. Ouldan*, 2 Johns. Cas. 52. *Coventry v. Barton*, 17 Johns. Rep. 142.

A promise made by an insolvent or a third person to a creditor, in consideration, that the creditor shall petition for the insolvent's discharge, or not oppose his obtaining it, is contrary to the policy of the insolvent laws, fraudulent and void, and cannot be revived by a promise made subsequent to the discharge of the insolvent; and it makes no difference though there are a sufficient number of petitioning creditors without the one to whom such promise is made. *Payne v. Eden*, 3 Caines' Rep. 213; *Waite v. Harper*, 2 Johns. Rep. 388; *Bruce v. Lee*, 4 Id. 419; *Yeomans v. Chatterton*, 9 Id. 295.

The recapture of a vessel, from a friendly power, is a hostile act, not justified by the situation of the nation to which the vessel making the recapture belongs, in relation to that from the possession of which such recaptured vessel was taken; and the act being unlawful, no right to salvage can accrue, and an action cannot be maintained for it. *Peek v. Randall*, 1 Johns. Rep. 165; *Talbot v. Seaman*, 1 Cranch's Rep. 28.

A sale of lands out of the possession of the vendor, and held by an adverse title, is an illegal consideration, and will not support an action. *Whitaker v. Cone*, 2 Johns. Cas. 58; *Woodworth v. James*, Ib. 417. And if the vendor employ an agent to sell such lands, agreeing to give him a portion of the proceeds, no action will lie by the agent to recover his proportion of the money received, on account of such sale by his employer. *Bolding v. Pithers*, 2 Caines' Rep. 147.

A disseisee of land, until he has regained seisin and possession by judgment or entry, has no such interest in the land as will give him an interest in the trees, severed and sold during the disseisin, and of course has no such interest in their proceeds as will enable him to bring assumpsit for money had and received. *Bigelow v. Jones*, 10 Pick. 161.

Forbearance to bid at a sale on execution, is an unconscientious consideration, and against public policy. *Jones v. Caswell*, 2 Johns. Cas. 29. So an agreement between two persons, that they will not bid against each other at an auction, but that one of these shall purchase certain articles and divide them with the other, is against public policy and void. *Doolin v. Ward*, 6 Johns. Rep. 194; *Wilbur v. Howe*, 8 Id. 444.

So if A. agree to give B. a certain sum, on condition that B. will forbear to offer proposals to the post master general, to carry the mail on a mail route, such agreement is against public policy, and no action can be maintained on it. *Gulick v. Ward*, 5 Halst. 87.

By stat. 24 G. II. c. 40, (passed for the purpose of restraining the retailing distilled spirituous liquors, and thereby to check the immoderate drinking of those liquors by the lower class of the community,) sect. 12, it is enacted, "that no person shall maintain any action for any debt or demand, for any spirituous liquors, unless such debt has been *bonâ fide* contracted at one time, to the amount of 20s. or upwards; nor shall any item in any account for distilled spirituous liquors be allowed, where the liquors delivered at one time, and mentioned in such item, shall not amount to 20s. at the least, without fraud; and where no part of the liquors sold or delivered shall have been returned or agreed to be returned directly or indirectly."

In assumpsit for goods sold and delivered, it appeared that the defendant had run up a score for grog, beer, and herrings, consumed by him at a public house kept by the plaintiff. It was [*58] *objected, that the demand for the grog could not be sustained, being illegal within the preceding statute. *Thompson, B.*, was of this opinion, observing, however, that the statute was confined to spirituous liquors. The plaintiff recovered for the residue of his demand.(z)

In an action for use and occupation of part of a house, and for goods sold and delivered,(a) it appeared that the plaintiff was a liquor-merchant, and the defendant took one side of the house belonging to him, the other side being occupied by one Eaton, who sold liquors on the account of the plaintiff. The defendant kept an eating-house, and the liquors consumed by the customers there, were had from Eaton as they were wanted. Many of the items in the bill for liquors were under 20s. It was objected, that the plaintiff could not recover for those items; but Lord *Kenyon* thought this case did not fall within the mischiefs intended to be remedied by this statute, the intent of which was to prohibit the sale of such small quantities to the *consumer*. This was done for the purpose of preventing the pernicious effects of dram-drinking, which had been found extremely injurious to the lower orders of society. In the present case, the liquors were not sold to the defendant for his own consumption, but for the use of the guests resorting to his house, in the way of his trade, and therefore not within the statute. But, in a later case, it was holden, that charges for spirits under 20s. supplied to guests, and forming a part of a tavern bill, cannot be recovered, although the defendant was not present at the entertainment; for the statute is not confined(b) to sales to the consumer himself. In *Proctor v. Nicholson*, 7 C. & P. 69, Lord *Abinger*, C. B., expressed an opinion, that this enactment did not apply to cases where spirits are supplied by an innkeeper to guests who are lodging in the house. But the opinion expressed by Lord *Kenyon*, in *Jackson v. Attrill*, and by Lord *Abinger*, in *Proctor v. Nicholson*, on the construction of the 12th sec. of 24

(z) *Gilpin v. Rendle*, Devonshire Lent Ass. 1809, MS. See *Spencer v. Smith*, 3 Campb. 9, that this stat. does not extend to a security, e. g. a bill of exchange given in payment of small quantities of spirituous liquors, per Lord *Ellenborough*, C. J. But see *Scott v. Gillmore*, 3 Taunt. 226, and cases cited *infra*.

(a) *Jackson v. Attrill*, Peake's N. P. C. 180. But see *Burnyeat v. Hutchinson*, *infra*.

(b) *Burnyeat v. Hutchinson*, 5 B. & A. 241.

Geo. II. c. 40, must now be considered as overruled, the Court of Queen's Bench having determined, in *Hughes v. Done*, 1 Q. B. 294, that this section contains an unqualified prohibition of the sale of spirituous liquors to a smaller amount than 20s. at a time; and that the price of spirits sold in quantities less than the required amount, by a spirit-merchant to a publican, to be consumed, not by the publican himself, but by his customers, cannot be recovered in an action. The statute is not confined to cases of a sale to the consumer himself, nor to cases where the spirits have been sold alone. In this decision the authorities of *Gilpin v. Rendle*,^(z) and *Burnyeat v. Hutchinson*,^(b) were recognized.

*Where acts have been passed, containing regulations as to [*59] articles which are the subject of sale, and the policy of the act is for the security of the buyers, and to protect them against the frauds of the seller, it has been holden, that the seller cannot recover the price.

An action was brought to recover the price of a quantity of bricks sold by the plaintiff, a brick-maker,^(c) to the defendant. It appeared that the bricks had been selected by the defendant, but upon being measured they were found to be of less dimensions than the stat. 17 Geo. III. c. 42, requires. It was holden, that the plaintiff could not recover; the policy of the statute being to protect the purchaser of this article against the fraud of the seller. N. It did not appear that the defendant bought the bricks knowing them to be under size. In these cases, although a penalty be imposed in the same clause of the act which requires the thing to be done, yet the remedy of the public is not thereby limited to a proceeding for the penalty, but the clause may be used as a defence^(d) to an action.⁽¹⁾

A promise not to use a trade in a particular place is legal.^(e)⁽²⁾ So a contract entered into by a practising attorney,^(f) that he would relinquish and make over to B. and G., two other attorneys, his business as an attorney, as far as respected his practice in the profession within London, and 150 miles from thence, and all his business as agent for any attorney, and that he would recommend his clients and permit B. and G. to use his name in the business, has been holden valid.⁽³⁾

^(z) See note (z), preceding page.

^(b) See note (b), preceding page.

^(c) *Law v. Hodson*, 11 East, 300; S. P., 9 B. & C. 192, *Little v. Poole*. Coal Act. *Forster v. Taylor*, 5 B. & Ad. 887; 3 Nev. & M. 244; Firkins of butter not legally marked. *Tyson v. Thomas*, M'Clelland & Y. 119. Hobbetts of Barley, as being an uncertain measure. But see 5 Geo. IV. c. 74; 6 Geo. IV. c. 12; 4 & 5 Will. IV. c. 49; 5 & 6 Will. IV. c. 63. See also *Langton v. Hughes*, *post*, 62.

^(d) 5 B. & Ad. 900, 901.

^(e) *Broad v. Jollyfe*, Cro. Jac. 596.

^(f) *Bunn v. Guy*, 4 East, 190.

(1) As to contracts with associations, of which spiritual persons are members, contrary to stat. 57 Geo. III. c. 99, s. 3, see *Hall v. Franklin*, 3 M. & W. 259; stat. 1 & 2 Vict. c. 10, 4 & 5 Vict. c. 14, *post*, tit. "Bills of Exchange."

(2) As to contracts illegal in respect of being in restraint of trade, see *post*, tit. "Debt—Pleadings—Illegal Consideration." See Addison on Contr. 99-102, 2nd Am. ed., and notes.

(3) Where it is made the duty of a person in a public trust to do an act, and he exacts a promise from the person, for whose benefit it is to be done, to make him a compensa-

A contract(*g*) in restraint of marriage generally, is illegal, as being against the sound policy of the law.

Of Agreements contrary to public Policy.—The defendant, in consideration that the plaintiff, who was master-joiner in one of his Majesty's dock-yards, would procure himself to be superannuated, undertook, in case he, defendant, should succeed the plaintiff as master-joiner, to allow him the extra pay from the yard-books.(*h*) This agree-
 [*60] ment having been made without the *knowledge of the navy-board to whom the appointment belonged, was holden void, on the ground that it was contrary to public policy. So where A. through the interest of B. was appointed to the office of customer of Carlisle,(*i*) having previously signed an agreement that his name was made use of *in trust for B.*, and that he would appoint such deputies as B. should nominate, and would empower B. to receive the fees of the office to his own use, this agreement was holden void; first, as being against the principles of the common law, inasmuch as the public was abused and the king deceived; and, secondly, because the agreement was in violation of the statutes (12 Ric. II. c. 2, and 5 & 6 Edw. VI. c. 16,)(*l*) which were made to guard against evils of this nature. On the same ground it was holden, that upon an agreement for the sale (by the owner) of the command of a ship in the service of the East India Company(*k*) made without the knowledge and against the by-laws of the company, an action could not be maintained. A promise was made by the defendant,(*l*) a friend of a bankrupt, when he was on his last examination, that in consideration that the assignees and commissioners would forbear to examine the bankrupt concerning certain sums of money with which he was charged, he, defendant, would pay those sums; the consideration was holden void, being contrary to the policy

(*g*) See *Hartley v. Rice*, 10 East, 22, *post*, tit. "Wager."

(*h*) *Parsons v. Thompson*, 1 H. Bl. 322.

(*i*) *Garforth v. Fearon*, 1 H. Bl. 327.

(*k*) *Blachford and another v. Preston*, 8 T. R. 89. See *Stackpole v. Earle*, 2 Wils. 133, S. P.

(*l*) *Nerot v. Wallace*, 3 T. R. 17.

tion after the service is performed; the consideration is illegal, and the agreement void. As where a pilot of New York, whose duty it is by statute to give all the aid and assistance in his power, to any vessel appearing in distress on the coast, brought an action to recover 500 dollars agreed to be paid him for bringing in a vessel driven on shore; it was holden that the agreement was contrary to the policy of the statute, and that the action could not be sustained. *Callagan v. Hallet*, 1 Caines' Rep. 104.

An agreement for the sale of tickets in a lottery not authorized by the legislature of the state of New York, although instituted under the authority of the government of another state, is contrary to the spirit and policy of the act, (sess. 6. c. 12, 2 N. R. L. 187,) and void. *Hunt v. Knickerbocker*, 5 Johns. Rep. 327.

No action can be maintained against a master and part owner of a ship engaged in the slave trade by his partners, nor against an agent who is party to the original illegal traffic, and has the proceeds in his hands. *Fales v. Mayberry*, 2 Gallis. 560. And see *Cambroso v. Maffett*, 2 Wash. C. C. R. 98. See *ante*, note (1,) page 56.

(1) This statute of Edw VI. prohibits the sale of certain offices, which are specified in the second section. With respect to offices under government not mentioned in this statute, it has been decided, that they cannot be sold. But there are some offices which may be the object of sale, if the sale takes place under the authority and with the consent of those who have the power of appointment, as commissions in the army, &c. Per *Kenyon*, C. J., and *Lawrence*, J., 8 T. R. 92, 94.

of the bankrupt laws.(1) The assignees cannot legally enter into any contract with a particular creditor, that on a certain event he shall receive out of the estate the full amount of any debt.(*m*) It is the duty of the assignees to make an equal distribution of the effects among the creditors, in proportion to all the debts of the bankrupt. An agreement by the payee of a bill of exchange to discharge a person liable upon it,(*n*) in consideration that the latter would not move the Court of King's Bench against him (the payee) for a misdemeanor, is illegal.

So where, a petition having been presented to the House of Commons against the return of a member on the ground of bribery, the petitioner entered into an agreement, in consideration of a sum of money, and upon other terms, to proceed no further with the petition; it was holden,(*o*) that this agreement was *illegal. N. In this [*61] case it was determined that the written agreement was admissible in evidence, for the purpose of insisting on the illegality of the transaction, without being stamped, and that a stamp is unnecessary where the instrument shows no contract in law, and cannot be enforced between the parties.(2)

A number of bleachers(*p*) in the county of Lancaster, finding that losses to a considerable amount had been incurred by them from their not being entitled to retain goods put into their hands for a general balance, came to an agreement that they would not receive the goods of any person, who would not consent that they should be retained for a general balance that might happen to be due them. This agreement came to the knowledge of J. S., who afterwards sent a quantity of goods to A., one of these bleachers, for the purpose of being bleached. J. S. became a bankrupt. The assignees demanded the goods, but the bleacher insisted that he had a lien on the goods for what remained due to him for his work and labour upon other works delivered to the bankrupt before the bankruptcy. It was contended, on the part of the assignees, that the object of the agreement was to create a lien in cases where

(*m*) *Staines v. Wainwright*, 6 Bingh. N. C. 174.

(*n*) *Pool v. Bousfield*, 1 Campb. 55.

(*o*) *Coppock v. Bower*, 4 M. & W. 361, recognized in *Williams v. Gerry*, 10 M. & W. 296.

(*p*) *Kirkman v. Shawcross*, 6 T. R. 14.

(1) An agreement to indemnify an officer for a breach of official duty is illegal, and cannot be enforced: As where a deputy sheriff had it in his power to arrest a debtor, in execution, but did not, in consequence of a third person promising to indemnify him if he would not, it was holden that no action could be maintained on the promise. *Denny v. Lincoln*, 5 Mass. Rep. 385. So where an officer discharged a debtor from execution, on the promise of a third person to re-deliver him or indemnify the officer; it was holden that this was a voluntary escape, and that the officer could not maintain an action on the promise of indemnity. It might have been otherwise if this promise had been absolute, to pay the debt, and not in this alternative. *Wheeler v. Bailey*, 13 Johns. Rep. 366. But a promise to indemnify a sheriff for a voluntary escape already made, is good. *Doty v. Wilson*, 14 Johns. Rep. 378; *Hodsdon v. Wilkins*, 7 Greenl. R. 115.

(2) In *Keable v. Payne*, 8 A. & E. 555, in assumpsit for goods sold and delivered, the plaintiff's case was, that defendant received them of M. who had obtained them from the plaintiff, the owner, by pretending to purchase and pay for them by a cheque drawn on a party, who, as M. knew, would dishonor the cheque; it was holden, that in support of this case the cheque was admissible in evidence, though not duly stamped.

none existed before, and though an individual might impose such terms on his customers, yet it was not competent to a class of men to do it; and that it was against public policy to permit combinations of this sort to avail. But the court were of opinion, that as the convenience of commerce and natural justice were on the side of liens, this agreement was légal, its object being merely to enforce that which the law considered as equitable; more especially as it was made by persons who had an option either to work for this or that person as they chose.

A contract(*q*) for the sale of goods, to be delivered at a future day, is not invalidated by the circumstance, that, at the time of the contract, the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them by the time appointed for delivering them, otherwise than by purchasing them after making the contract; for such

[*62] a contract does not amount to a wager, inasmuch as both the contracting parties are not cognizant *of the fact that the goods are not in the vendor's possession; and even if it were a wager, it is not illegal, because it has no necessary tendency to injure third parties.

2ndly. The agreement must not be contaminated with, or arise out of, an illegal transaction. Hence, where an agreement was made between two parties, (*r*) subjects of this country, for the sale and delivery of goods in Guernsey, for the purpose of being smuggled into England; it was holden that the vendor could not maintain an action for the value of the goods. And in a subsequent case it was decided, (*s*) that the circumstance of the vendor being an inhabitant of Guernsey would not vary the case, for he was still a subject of this country. (1) So where the vendor was concerned in giving assistance to the vendee to smuggle the goods, by packing them in the manner most suitable for, and with the intent to aid that purpose, although the vendor was a foreigner, resident abroad, and the sale and delivery of the goods were completed abroad, it was holden, (*t*) that the vendor could not resort to the laws of this country to give effect to his agreement. But the mere knowledge of the vendor (*u*) that the goods were purchased for the purpose of being smuggled, is not sufficient to prevent his recovering in an action for the price of the goods, if the vendor was a foreigner resident abroad, and the sale and delivery were completed abroad. So a person who sells goods, knowing that the purchaser intends to apply them in an illegal trade, is nevertheless entitled to recover the price, if he yields no other aid to the illegal transaction than selling the goods, and obtaining per-

(*q*) *Hibblewhite v. M' Morine*, 5 M. & W. 462, cited in *Mortimer v. M'Callan*, 6 M. & W. 76; 7 M. & W. 20, in error in Exch. Ch.; 9 M. & W. 636, *post*, 63.

(*r*) *Biggs v. Lawrence*, 3 T. R. 454.

(*s*) *Clugas v. Penaluna*, 4 T. R. 467.

(*t*) *Waymell v. Reed and another*, 5 T. R. 599, cited by *Kenyon, C. J.*, *Vandyck v. Hewitt*, 1 East's R. 98.

(*u*) *Holman v. Johnson*, Cowp. 341.

(1) "A man may be born out of the realm, viz. of England, as in Ireland, Jersey, and Guernsey, &c., and yet as he is not born out of the allegiance of the king, he is not an alien." 1 Inst. 129, b. The island of Jersey is not considered as part of the United Kingdom within stat. 7 & 8 Geo. IV. c. 29, s. 76. *Rex v. Prowes*, 1 Moody, C. C. 349.

mits for their delivery to the agent of the purchaser.(x) But where the plaintiff, a druggist, after the 42 Geo. III. c. 38, but before the 51 Geo. III. c. 87, sold and delivered drugs to the defendant, a brewer, *knowing that they were to be used in the brewery*; it was holden,(y) that he could not recover the price of them. Where a contract, which a plaintiff seeks to enforce, is expressly, or by implication, forbidden by the statute or the common law, no court will lend its assistance to give it *effect; but where the consideration and the matter to be [*63] performed are both legal, a plaintiff is not precluded from recovering by an infringement of the law,(z) not contemplated by the contract, in the performance of something to be done on his part.(1) And where an action was brought for the price of stock sold and transferred by the plaintiff to the defendant, and the defendant pleaded that the stock, &c., was transferred by virtue of an agreement with the plaintiff for the transfer of the same, and that at the time of the agreement for the sale, the plaintiff was not actually possessed of or entitled to the stock, &c., and that therefore the contract was void. The Exchequer Chamber, upholding the decision of the court below, decided that the plea was no answer to the action, for that the executed consideration declared on being legal, though the transaction in its inception might have been illegal, the plaintiff was entitled to recover.(a)

If an officer permit a prisoner to go at large,(b) in consequence of which he (the officer) is obliged to pay the creditor, the officer cannot maintain an action for money paid against the debtor; for he cannot raise a cause of action by the payment of money for another on account of his own breach of duty.(2)

(x) *Hodgson v. Temple*, 5 Taunt. 181. See also *Johnson v. Hudson*, 11 East, 180; *Bensley v. Bignold*, 5 B. & A. 335; *Brown v. Duncan*, 10 B. & C. 93; *Wetherell v. Jones*, 3 B. & Ad. 221.

(y) *Langton v. Hughes*, 1 M. & S. 593, cited by Tindal, C. J., in *DeBegnias v. Armistead*, 10 Bingh. 110, and Lord Cottenham, C., in *Ewing v. Osbaldiston*, 2 M. & Cr. 86; which were cases of unlicensed theatres. See also *Lery v. Yates*, 8 A. & E. 129.

(z) Per Lord Tenterden, C. J., delivering judgment in *Wetherill v. Jones*, 3 B. & Ad. 225, 6.

(a) *McCallan v. Mortimer*, 9 M. & W. 636.

(b) *Pitcher v. Bailey*, 8 East, 171.

(1) As soon as war is commenced, all trading, negotiation, communication or intercourse between the citizens of this country and the enemy, without the direct permission of government, is unlawful: Therefore no valid contract can exist, nor any promise arise by implication of law, from any transactions with an enemy: And if, after war has ceased an action is brought against a citizen here, upon any contract arising out of such illicit intercourse, the defendant may set up the illegality of the transaction as a defence.

And by the effect of the same principle, a commercial partnership existing between a citizen of this country and that of another, is dissolved by the breaking out of war between the two countries. *Griswold v. Waddington*, 16 Johns. Rep. 438. So, also, one citizen of the U. S. has no right to purchase of, or sell to another, a license or pass from the public enemy to be used on board a merchant vessel of this country. *Patton v. Nicholson*, 3 Wheat. Rep. 204. See also as to the general effect of war upon commercial intercourse with the enemy, the cases collected in Wheat. Dig. Dec., title Prize, VII. Wheat. Int. Law, 381, 6th ed., 1855.

(2) But where an officer discharged a prisoner, arrested on *meane process*, on payment of the sum sworn to and costs, and was afterwards obliged to pay the residue of the debt, it was holden by Buller, J., that as the officer had not been guilty of any improper conduct, and as he was by law compellable to pay the *whole* debt, he was entitled to recover

Of Fraudulent Agreements.—3rdly. The agreement must be fair and honest, and not entered into for a fraudulent purpose; for fraudulent contracts are considered in the same light as illegal contracts, and consequently an action cannot be maintained for the breach of them. The defendants, (c) being indebted to the plaintiffs and other creditors, and being insolvent, assigned all their effects in trust to pay 11s. in the pound to their creditors, to which all the creditors consented, and signed the deed of trust, except the plaintiffs, who refused to sign and to take any composition, unless the defendants would give them a note for the remaining 9s. in the pound; the defendants accordingly gave a note to that amount, whereupon the plaintiffs signed the deed. It appeared, that if the plaintiffs had not signed, the rest of the creditors would not have signed the deed. An action having been brought on [*64] the note, a *verdict was found for the defendants: on an application made to the court for a new trial, it was refused; Lord *Kenyon*, C. J., observing that the foundation of his opinion was, that the temptation to give this note was a fraud on the creditors who were parties to the contract, on which their debts were to be cancelled in consideration of receiving a composition. The note preceded the execution of the deed; all the creditors being assembled for the purpose of arranging the defendant's affairs, they all undertook and mutually contracted with each other, that the defendants should be discharged from their debts after the execution of the deed. Then the plaintiffs, in fraud of that engagement, entered into a contract with the defendants, which prevented their being put into that situation which was the inducement to the other creditors to sign the deed and to relinquish a part of their demands. The same principle was established in *Jackson v. Lomas*, 4 T. R. 166. See also *Smith v. Cuff*, 6 M. & S. 160, and *post*, "Money had and received," 6. So where A. having given B. a sum of money for goods in advancement of C., (d) a secret agreement between B. and C., that C. should pay B. a further sum for the goods, was holden to be void, on the ground that it was a fraud upon A. So where it was agreed between the vendors and vendee of goods, that the vendee should pay 10s. per ton beyond the market price, which sum was to be applied in liquidation of an old debt due to one of the vendors, and the payment of the goods was guaranteed by a third person, to whom the bargain between the parties was not communicated, it was holden (e) that this was a fraud, and rendered the guaranty void. So where a trust deed was proposed to the creditors of an insolvent, (f) whereby they all engaged to accept payment of their debts by six instalments, the second, third, and fourth of which were to be guaranteed by collateral security, and the fifth and

(c) *Cockshott v. Bennett*, 2 T. R. 763, recognized by Lord *Ellenborough* in *Steinman v. Magnus*, 11 East, 394. See *Middleton v. Lord Onslow*, 1 P. Wms. 768.

(d) *Jackson v. Duchaire*, 3 T. R. 551.

(e) *Pidcock v. Bishop*, 3 B. & C. 605.

(f) *Leicester v. Rose*, 4 East, 372, recognized by Lord *Eldon*, C., in *Exp. Sadler and another*, 15 Ves. 52; and by *Park, J.* in *Wells v. Girling*, 1 Brod. & Bingh. 453; *Knight v. Hunt*, 5 Bingh. 432; *Cullingworth v. Lloyd*, 2 Beavan, 391.

against the defendant for so much money paid to his use. *Cordron v. Lord Massarene*, Peake's N. P. C. 143.

sixth were to remain on the single security of the insolvent; several of the creditors refused to sign, unless the plaintiffs did: in order to induce the plaintiffs to sign the deed, the defendant, at the instance of the insolvent, agreed that he (the defendant) would procure the plaintiffs a collateral security for the fifth and sixth instalments within a given time, whereupon the plaintiffs signed the trust deed, and the other creditors who had before refused, signed also, but *without any knowledge* of the agreement between the plaintiffs and defendant: an action having been brought for the non-performance of this agreement, it was holden to be a void agreement, on the ground that it was a fraud against the other creditors: and although, in this case, the stipulation by the plaintiffs was for a further security, and not for more money, there was not any difference in substance, whether a creditor stipulated for that, which he thought would produce *him money more [* 65] certainly, or for a larger sum than he had agreed to take in common with the other creditors; that it was equally a fraud upon the other creditors to stipulate for either. So where the plaintiff, before signing a composition deed, by which the creditors of the defendant agreed to take the defendant's bills at long dates, for their respective debts, stipulated, without their knowledge, for a bill of exchange, to be indorsed to him by the defendant for a further sum, it was holden^(g) that the whole agreement between the plaintiff and the defendant was void, as being fraudulent upon the other creditors, and the plaintiff could not recover upon the defendant's bills for the amount of the composition money, although he had received nothing on the bill indorsed to him by the defendant.

The creditors of a bankrupt entered into a deed of composition to receive eight shillings in the pound in full discharge of their debts, and agreed to release everything beyond that, and *give up all securities to the bankrupt*, and join in a petition to the chancellor, to supersede the commission; one of the creditors, having two distinct debts due from the bankrupt, for one of which he held bills to the full amount, received his dividend of eight shillings in the pound on both debts, and then received the full value of some of the bills; it was holden,^(h) that the bankrupt was entitled to sue for the money so obtained on the bills in an action for money had and received. The principle of the foregoing case was, that if the creditor had been suffered to retain in his possession the money which he had raised on the bills given by the bankrupt, he would have got more than eight shillings in the pound out of the bankrupt's effects by the amount of those bills which, under the agreement, the creditor was to restore and to give up to the bankrupt. But where the creditors of an insolvent agreed, by an instrument, (not under seal,) that they would accept in full satisfaction of their debts twelve shillings in the pound, payable by instalments, and would release him from all demands; and one of the creditors, who signed for the whole amount of his debt, held at the time, as a security for part, a bill of exchange drawn by the debtor and accepted by a third person;

^(g) *Howden v. Haigh*, 3 P. & D. 661; 11 A. & E. 1033. See *Bradshaw v. Bradshaw*, 9 M. & W. 29.

^(h) *Stock v. Mawson*, 1 B. & P. 286.

the money due on his bill having afterwards been paid by the acceptor, it was holden,⁽ⁱ⁾ that the creditor might retain it, the agreement of composition not containing any express stipulation for giving up securities, nor anything whence such a stipulation could be implied, and the effect of it not being to extinguish the original debt. Where, however, the debt is actually released by the composition deed, the creditor has not any right to hold any collateral security which may have been deposited with him; neither can he make the giving up such [*66] security a consideration *for a promise by the debtor to pay the residue of the debt, beyond the amount of the composition received under the deed.^(k) Where defendant entered into a composition to pay his creditors 6s. 8d. in the pound, upon condition of being released, and *nearly two years afterwards* gave one of the creditors, who had agreed to sign the composition, a bond for the residue of her debt, she not having received the amount of her composition, although divers creditors had signed the deed, received their composition, and released the defendant; it was holden,^(l) that the bond was good: as it was not given or agreed to be given at the time of the composition, it was not a fraud on the other creditors.

To assumpsit for the non-performance of a written agreement to take a furnished house, the defendant pleaded that the plaintiff caused and procured the defendant to enter into the agreement by means of fraud, covin, and misrepresentation of the plaintiff, and others in collusion with him: on which issue was joined. It appeared at the trial, that the plaintiff had employed an agent to let the house in question, and the defendant, being in treaty with the agent for taking it, asked him "If there was any objection to the house?" to which he answered that there was not: the defendant signed the agreement, but afterwards discovered that the adjoining house was a brothel, and on that ground declined to fulfil the contract. It was holden,^(m) that it was not sufficient to support the plea, that the representation turned out to be untrue, but that for that purpose it ought to have been proved to have been fraudulently made; that as the representation was not embodied in the contract, the contract could not be affected by it unless it were a fraudulent representation; and that the knowledge of the plaintiff of the existence of the nuisance, and the representation of the agent that it did not exist, were not enough to constitute fraud, so as to support the plea.⁽¹⁾

(i) *Thomas v. Courtney*, 1 B. & A. 1, recognized in *Nichols v. Norris*, 3 B. & Ad. 42, n.

(k) *Cowper v. Green*, 7 M. & W. 633.

(l) *Took v. Tuck*, 4 Bingh. 224.

(m) *Cornfoot v. Fowke*, 6 M. & W. 358. Lord Abinger, C. B., diss.

(1) In *Fuller v. Wilson*, 3 Q. B. 58, (which was an action on the case for deceit,) Lord Denman, C. J., delivering the judgment of the court said, "We adopt the proposition of L. C. B. Abinger, (in *Cornfoot v. Fowke*,) namely, that whether there was moral fraud or not, if the purchaser was actually deceived in his bargain, the law will relieve him from it. We think the principal and his agent are for this purpose completely identified; and that the question is not, what was passing in the mind of either, but whether the purchaser was in fact deceived by them or either of them." The judgment in *Fuller v. Wilson* was reversed, on error, in the Exchequer Chamber; where the facts of the case being stated in a special verdict, the court decided that it did not appear that the defendant had been guilty of any actual fraudulent representation or concealment, or had authorized any: that if her agent had been guilty of fraudulent representation or concealment, the de-

Immoral Agreements.—4thly. If the agreement *be of such a nature, that the carrying it into effect, and enforcing [*67] it, will give a sanction and encouragement to immorality, an action cannot be maintained for the violation of it. This position is founded on the maxim, *ex turpi causâ non oritur actio*, or, in the elegant paraphrase of Lord *Mansfield*, justice must be drawn from pure fountains.

In an action for use and occupation of a lodging, (n) where it appeared that the lodging was let to the defendant for the purposes of prostitution, and with a knowledge on the part of the plaintiff of that fact, it was holden that the action was not maintainable. (o) So where an action was brought against the defendant for board and lodging, (p) and it appeared in evidence, that the defendant was a lady of easy virtue, that she had boarded and lodged with the plaintiff, who had kept a house of bad fame, and who, besides what she received for the board and lodging of the unfortunate women in her house, partook of the profits of their prostitution; Lord *Kenyon*, C. J., was of opinion, that such a demand could not be heard in a court of justice. On the same principle it was holden, that an assumpsit would not lie to recover the value of prints of an immoral or libellous tendency, which had been sold and delivered by the plaintiff to the defendant. (q) But in an action to recover the amount of a bill delivered for washing done by the wife of the plaintiff, (r) where it appeared in evidence, that the defendant was a prostitute, and that the articles washed consisted principally of expensive dresses, in which the defendant appeared at public places, and of gentlemen's nightcaps, which were worn by the persons who slept with the defendant; with all which circumstances the plaintiff was acquainted; it was holden, that the use to which the defendant applied the linen could not affect the contract, and that the plaintiff was entitled to recover. The same doctrine was laid down by Lord *Ellenborough*, in *Bowry v. Bennet*, 1 Campb. 348, where an action was brought against a prostitute to recover the value of some clothes which had been furnished by the plaintiff. The C. J. said, that the mere circumstance of the defendant being a prostitute, within the knowledge of the plaintiff, would not render the contract illegal. In order to defeat the action, it must be shown that the plaintiff expected to be paid out of the profits of the defendant's *prostitution, and that he had sold [*68] her the clothes in order to carry it on. (1) A similar dis-

(n) *Crisp v. Churchill*, C. B. E. 34 Geo. III. Per *Eyre*, C. J.

(o) *Girardy v. Richardson*, 1 Esp. N. P. C. 13, S. P. per *Kenyon*, C. J.

(p) *Howard v. Hodges*, Middx. Sittings, B. R., before Lord *Kenyon*, C. J., 2 Dec. 1796; *Jennings v. Throgmorton*, R. & Mo. N. P. C. 251, *Abbott*, C. J.

(q) Per *Lawrence*, J., 4 Esp. N. P. C. 97.

(r) *Lloyd v. Johnson*, 1 Bos. & Pull. 340.

defendant would have been liable; but that no such misfeasance of the agent appeared by the verdict, and therefore that the defendant was entitled to judgment. *Wilson v. Fuller*, 3 Q. B. 68, 1009; 2 G. & D. 460. See also *Gibson v. D'Este*, 2 Y. & C., N. C. in Chancery, 542; and *Ormrod v. Huth*, 14 M. & W. 631.

(1) So in *Trovinger v. M'Burney*, 5 Cowen, it was held, that to render void a contract to pay for the support of a woman and her bastard child, it must be clearly proved, that

inction was taken by Lord *Tenterden*, C. J., in *Appleton v. Campbell*, 2 C. & P. 347.(1)

the purpose was to facilitate a continuance of the cohabitation, and that such purpose was not to be inferred from previous cohabitation. See *Cusack v. White*, 2 Rep. Const. Ct. 279.

(1) If an illegal or immoral agreement be made on a consideration which is legal, and the agreement is not performed, but a legal agreement substituted in its place, assumpsit may be maintained to compel a performance of the new agreement. As where the plaintiff shipped a cargo from Charleston, S. C., to the coast of Africa to buy slaves, which were to be transferred to Charleston; and the cargo was sold to the defendant, who resided at Rio Pongos, for a certain number of slaves to be delivered by defendant; and defendant delivered only a part of the slaves, but stated and signed an account debiting plaintiff with the slaves delivered, and charging himself with a sum of money for the remainder of the cargo, and at the same time gave a promisory note, the consideration of which was the balance of account, by which he promised to pay the plaintiff a certain number of slaves, which were afterwards demanded and refused: Plaintiff declared on the note and on the *insimul computassent*.

Parsons, C. J. By the common law, upon principles of national comity, a contract made in a foreign place, and to be there executed, if valid by the law of that place, may be a legitimate ground of action in the courts of this state; although such contract may not be valid by our laws, or even may be prohibited to our citizens. Thus, in states where a greater rate of interest is allowed than by our statute, a contract securing a greater rate of interest, but agreeably to the law of the place, may be sued in our courts, where the plaintiff shall recover the stipulated interest.

This rule is subject to two exceptions. One is, when the commonwealth or its citizens may be injured by giving legal effect to the contract by a judgment in our courts. Thus, a contract for the sale and delivery of merchandise, in a state where such sale is not prohibited, may be sued in another state where such merchandise cannot be lawfully imported. But if the delivery was to be in a state where the importation was interdicted, there the contract could not be sued in the interdicting state; because the giving of legal effect to such a contract would be repugnant to its rights and interest. Another exception is, when the giving of legal effect to the contract would exhibit to the citizens of the state an example pernicious and detestable. Thus if a foreign state allows of marriages incestuous by the law of nature, as between parent and child, such marriage could not be allowed to have any validity here. But marriages not naturally unlawful, but prohibited by the law of one state and not of another, if celebrated where they are not prohibited, would be holden valid in a state where they are not allowed. As in this state a marriage between a man and his deceased wife's sister is lawful, but it is not so in some states; such a marriage celebrated here would be held valid in any other state, and the parties entitled to the benefits of the matrimonial contract. Another case may be stated as within this second exception, in an action on a contract made in a foreign state by a prostitute, to recover the wages of her prostitution. This contract, if lawful where it was made, could not be the legal ground of an action here; for the consideration is confessedly immoral, and a judgment in support of it would be pernicious from its example. And perhaps all cases may be considered as within this second exception, which are founded on moral turpitude, in respect either of the consideration or the stipulation.

Before the present case can be compared with this rule, including the exceptions to it, the merits of it must be ascertained.

In South Carolina, it was lawful to purchase slaves on the coast of Africa, and to import them as merchandise into that state. And it does not appear that this purchase and importation was unlawful at Rio Pongos. The original contract was made at Rio Pongos, for the purpose obtaining slaves to transport to Charleston. The account was stated at Rio Pongos, in which the defendant acknowledged a balance due in cash, which was assented to by the plaintiff in Charleston. Whether either of the contracts is to be governed by the law of Rio Pongos, or of South Carolina, is immaterial; for in either case it does not appear that either of them was invalid *lege loci*. Either of them, therefore, may be the ground of action in this state, unless it come within one of the exceptions to the rule, even if a contract of this nature made by the citizens of this state should be void. To maintain the action, if it be not within the exceptions, is enjoined on us by the comity we owe another state. And to entitle the defendant to retain in his

II. *Of the General Indebitatus Assumpsit.*

HAVING premised that the rules laid down in the preceding section, govern the action of assumpsit in both its forms; that is, whether the plaintiff sets forth the agreement, for the breach of which he complains, specially, and declares, as it is technically termed, on a special assumpsit; or whether, the nature of his case permitting it, he adopts the gen-

hands the debt which he justly owes, as between the parties, he ought clearly to show some principle by which he may defend himself in dishonestly retaining this property.

We do not perceive any injury that could arise to the rights or interests of this state or its citizens, if either of the contracts had been faithfully executed agreeably to the terms of it. It was made abroad, by persons not citizens of the commonwealth, and to be executed abroad, having no relation in its consequences to our laws.

The defendant, therefore, to establish his defence, must bring this case within the second exception; and show that the action, as considered by the laws of this commonwealth, is a *turpis causa*, furnishing a pernicious precedent, and so not to be countenanced. This, upon public principles, he is authorized to do, notwithstanding he is a party to all the moral turpitude of the contract.

The argument is, that the transportation of slaves from Africa, is an immoral and vicious practice, and, consequently, that any contract to purchase slaves for that purpose, is base and dishonest, and cannot be the foundation of an action here within the principles of comity adopted by the common law. This objection may apply to the counts on the note, but not to the count on the *insimul computassent*.

Laying the counts on the note out of the case, we shall consider the objection of moral turpitude, so far as it affects the count on the *insimul computassent*; and we are satisfied that the objection does not apply to the contract averred in this count, there being nothing immoral in the consideration on the plaintiff's part or in the stipulation made by the defendant. If a Charleston merchant should send a cargo of merchandise to Africa, for the purpose of there selling it, and with the proceeds to purchase slaves; and if the cargo be accordingly sold, and the purchaser agree to pay for it in slaves; and he afterwards shall refuse or neglect to deliver the slaves, but makes a new agreement with the owner to pay him a sum of money for his cargo, an action can unquestionably in our opinion be maintained on this new contract; and the illegal contract, being annulled or void, cannot affect it. So, if the purchaser had delivered a part only of the slaves to the merchant, and afterwards agrees with him to pay this balance in cash, we see no objection to an action to recover this balance in cash, if the purchaser refuse to pay it.

In the present case, the defendant having delivered a part only of the slaves, and having become a creditor of the plaintiff for supplies furnished to his use, states his account, in which, after deducting the slaves delivered, and the supplies furnished, he acknowledges a balance in cash, and the plaintiff, having assented to the account, demands the balance in this action. We see no legal objection to his recovery. The consideration of the implied promise arising from this settlement is the sale of the cargo, which involves in it no moral turpitude; neither is the performance of the promise, by paying the balance in cash, immoral. And although on the same day the defendant, in consideration of this balance due in cash, promises by his note to discharge it principally in slaves, and the small remainder in cash; yet this promise is no bar to an action by the plaintiff on this account, even if the promise by the note is here considered as legal, and *a fortiori* if it is considered as void for its immorality. It is true, if the defendant voluntarily discharged the note, the balance of the account could not afterwards be recovered, for the consideration of it was discharged by the payment of the note; nor could the payment of the note be recovered back, for *potior est conditio possidentis*.

In this case, the defendant having acknowledged a balance of cash in his hands, the property of the plaintiff; although it came into his hands from the sale of the merchandise, for which he was to pay in slaves, but did not, this balance as between the parties is justly due to the plaintiff; and unless the principles of public policy against the action upon the *insimul computassent* are manifest, we cannot decide that the defendant shall not be held to pay what he justly owes.

In this view of the case, we are satisfied that the action is maintained on the *insimul computassent*, and that the plaintiff may take his verdict on that count, and have judgment entered upon it. *Greenwood v. Curtis*, 6 Mass. 358.

eral form of an *indebitatus assumpsit* ; I shall proceed to an explanation of the latter form.

General Indebitatus Assumpsit.—The general *indebitatus assumpsit* is in the nature of an action of debt, and owed its introduction into general use to the circumstance of the defendant not having been permitted in this form of action to wage his law.^(s)(1) It may be considered as a general rule, that an *indebitatus assumpsit* will not lie in any case but where debt will lie.^(t)(2) The remedy, however, by action of debt is more extensive than the remedy by *indebitatus assumpsit* ; for debt may be brought on a record of specialty, whereas the *indebitatus assumpsit* is confined to parol agreements.⁽³⁾ Hence, although the form of the general *indebitatus assumpsit* is very concise, yet it is essentially necessary to state in the declaration *for what cause* the debt or duty became due, in order that it may appear to the court to be matter whereon an assumpsit may be founded ; and an omission in this respect may be taken advantage of by writ of error,^(u) or in arrest of judgment after verdict.^(x) A declaration merely stating that the defendant was indebted to the plaintiff in 500 quarts of wheat, as for tolls of wheat, without specifying any value, is bad^(y) upon special demurrer. But it is not necessary, in this form of action, to state the particular items constituting the debt;⁽⁴⁾ it is sufficient if the declaration state generally, that the defendant was indebted to the plaintiff for work and labour ;^(z) for the agistment^(a) of cattle in the plaintiff's ground ; for a premium^(b) upon a policy of assurance upon such a ship ; upon [*69] an account stated ;^(c)(5) on a foreign judgment ;^(d)(6) with-

(s) Wager of law is now abolished, stat. 3 & 4 Will. IV. c. 42, s. 13.

(t) *Hard's case*, Salk. 23.

(u) Cro. Jac. 206, 207.

(x) *Foster v. Smith*, Cro. Car. 31.

(y) *Mayor of Reading v. Clarke*, 4 B. & A. 268.

(z) *Hibbert v. Courthope*, Carth. 276.

(a) *Gardiner v. Bellingham*, Hob. 5.

(b) *Fowk v. Pinsack*, 2 Lev. 153.

(c) *Homes v. Savill*, Cro. Car. 116.

(d) *Plaistow v. Van Uxem*, Cam. Scacc. Doug. 5, n. An Irish judgment since the Union, *Vaughan v. Plunkett*, 3 Taunt. 85, n.; *Harris v. Saunders*, 4 B. & C. 411, S. P. See *Guinness v. Carroll*, 1 B. & Ad. 459.

(1) See note *post*, 664.

(2) If one contract, with an overseer to give him a certain sum, and furnish him with certain quantities of produce, the value of the produce, or damages for its non-delivery, cannot be recovered in this action ; but the whole may be recovered in a special action on the case. *Coursey v. Covington*, 5 Har. & J. 45.

(3) *Indebitatus assumpsit* lies for money due on owelty of partition by parol, if circumstances take it out of the statute of frauds. *Walter v. Walter*, 1 Wharton, 292.

(4) An account for goods sold is an entire demand incapable of being split up into separate suits, and if suit is brought for part it bars another for the residue. *Guernsey v. Carver*, 8 Wend. 492.

(5) In an action of *indebitatus assumpsit*, upon an account stated, it is not necessary to prove the items of the account, but only that an account was stated, for that is the cause of action. Agreed, per *Raymond*, C. J., *Page* and *Reynolds*, J., in *Bartlett v. Emery*, 1 T. R. 42, n. The accounting being the ground of the promise, is traversable. *Dalby v. Cooke*, Cro. Jac. 234. The issue is not simply whether there was an account stated, but whether the defendant was indebted on an account stated or not ; the incorrectness of the account may be shown under the general issue. *Thomas v. Hawkes*, 8 M. & W. 140. On an account stated, the plaintiff is not obliged to prove the exact sum laid in the declaration. *Thompson v. Spencer*, B. R. E. 8 Geo. III.; Bull. N. P. 129. An

(6) See note (6), next page.

out stating the cause of action on which the judgment proceeded ;(1) or for money had and received ;(e) *without [*70] stating for what cause the money was had and received. A corporation aggregate may sue and be sued(f) in *indebitatus assumpsit* on an executed parol contract ; e. g. for goods sold and delivered ; for they may contract without affixing the common seal, in cases where convenience, amounting almost to necessity, requires that they should do so ; as in hiring inferior servants, or doing acts frequently recurring, or too insignificant to be worth the trouble of affixing the common seal.(g) The appointment of an attorney to conduct important suits affecting the rights and property of the corporation cannot be considered a trifling matter ; nor is it of such frequent occurrence, or of such immediate urgency, as to render it inconvenient to postpone it until the seal of the corporation can be affixed to the retainer.(h) It makes no difference as to the right of a corporation to sue on a contract entered into by them without seal, whether the contract be executed or executory, or whether the promises be express or implied.(i) In the case of *The Fishmonger's Company v. Robertson*, 5 M. & Gr. 131, 6 Scott's

(e) *Rables v. Sikes*, B. R. M. 22 Car. II.

(f) *Beverley v. The Lincoln Gas Light and Coke Company*, 6 A. & E. 829. See the judgment of Tindal, C. J., in *Arnold v. M. of Poole*, 4 M. & Gr. 896.

(g) Per Denman, C. J., 6 A. & E. 861, cited in *M. of Ludlow v. Charlton*, 6 M. & W. 822.

(h) *Arnold v. Mayor of Poole*, 4 M. & Gr. 896 ; 5 Scott's N. R. 777.

(i) *Church v. The Imperial Gas Light and Coke Company*, 6 A. & E. 846, recognized in *Arnold v. Mayor of Poole*, 4 M. & Gr. 895.

acknowledgment by the defendant of a debt, due upon any account, is sufficient to enable the plaintiff to recover upon a count for an account stated. *Knowles v. Michel*, 13 East, 249. "I think *Knowles v. Michel*, is an authority to show, that though in form a count upon an account stated is 'of and concerning divers sums of money,' yet proof of one item is good to maintain such a count ; *divers* may be supported by evidence of one." Per Lord Ellenborough, C. J., in *Highmore v. Primrose*, 5 M. & S. 67. "It has been held, that upon a count for goods sold and delivered, the plaintiff may prove the sale of one article, and that will be well enough." The same rule applies to this count, which is "of and concerning divers sums," as to the count for goods sold. Per Holroyd, J., *S. C.* Where a note is expressed to be for value received, that imports "received from the payee ;" and is an acknowledgment of a debt from the maker to the payee. - See *Highmore v. Primrose*, 5 M. & S. 67 ; *Priddy v. Henbrey*, 1 B. & C. 674 ; *Clayton v. Gosling*, 5 B. & C. 360. Where a party examined before commissioners of bankrupt admitted that he had received a sum of money on account of the bankrupt after an act of bankruptcy, but did not go on to admit that it was a subsisting debt ; it was holden that this was not evidence sufficient to support a count on an account stated with the assignees. *Tucker and another, Assignees of Hickman, v. Barrow*, 7 B. & C. 623. In order to constitute an account stated, there must be a statement of some certain amount of money being due, which must be made either to the party himself or to some agent of his. Per Parke, B., in *Hughes v. Thorpe*, 5 M. & W. 667 : see also *Barker v. Birt*, 10 M. & W. 61. In an action by payee against acceptor of a bill of exchange, drawn by a third person, the defendant paid 10*l.* into court on the money counts. Nothing more was due on the bill, and there had not been any other account or transaction between the plaintiff and defendant ; it was holden, that the payment so made was an answer to the whole action, and that the plaintiff could not recover nominal damages on the special count on the bill. *Early v. Bowman*, 1 B. & Ad. 889.

(6) Assumpsit does not lie on a chancery decree of a sister state. The action should be debt. *M'Kim v. Odom*, 3 Fairf. 94. See tit. "Debt," *post*.

(1) A judgment of one of the superior courts of Ireland, or of any other court than one of the superior courts of this country, is not conclusive against the defendant, if it appear that he was not duly served with process in the action. *Ferguson v. Mahon*, 3 P. & D. 143 ; 11 A. & E. 179.

N. R. 56, where the contract was one which did not fall within any of the exceptions to the general rule requiring corporate contracts to be under the common seal, *Tindal*, C. J., delivering the judgment of the court, said, "whatever may be the consequences, where the agreement is entirely executory on the part of the corporation, yet if the contract instead of being executory is executed on their part,—if the persons who are parties to the contract with the corporation *have received* the benefit of the consideration moving from the corporation,—in that case the other parties are bound by the contract, and liable to be sued thereon by the corporation. Even if the contract put in suit by the corporation had been, on their part, executory only, not executed, we feel little doubt but that their suing upon the contract would amount to an admission on record by them that such contract was duly entered into on their part so as to bind themselves; and that such admission on the record would estop them from setting up as an objection, in a cross action, that it was not sealed with their common seal."

The counts in *indebitatus assumpsit* for work and labour, goods sold and delivered, money lent and advanced, money paid, money had and received, and on account stated,⁽¹⁾ being in most frequent use, are called the general or common counts, and all or some of them were usually added to every special assumpsit; but see R. G. H. T. 4 Will. IV. limiting counts, *post*, tit. "Declaration." The generality

[*71] of these counts is obviated by particulars of demand, which *plaintiff, under the new rule (R. G. T. T. 1 Will. IV. No. 6) is to deliver, a copy of which must be annexed by plaintiff's attorney to the record, at the time when it is entered with the judge's marshal. This annexation supersedes the necessity of proof^(k) of delivery at the trial; and if the plaintiff gives credit in the particulars for any sum of money paid to him, it is not necessary for the defendant to plead payment of such sum.^(l)

In addition to the causes of action already enumerated, it has been holden, that an *indebitatus assumpsit* will lie for a fee due from any person who accepts the honour of knighthood, to the gentlemen ushers and daily waiters to the king;^(m) for fees due to an usher of the black rod;⁽ⁿ⁾ for a reasonable and customary fine due to the heir of the lord from the copyholder, upon the death of the lord;^(o) for freight;^(p) for

(k) *Macarthy v. Smith*, 8 Bing. 145.

(l) R. G. T. T. 1 Vict. *post*, "Pleadings," "Payment." See *Morris v. Jones*, 1 Q. B. 397; 1 G. & D. 13.

(m) *Duppa v. Gerrard*, Carth. 95.

(n) *Saunderson v. Brignall*, Str. 747.

(o) *Shuttleworth v. Garrett*, Carth. 90, *Holt*, C. J., dissentient.⁽²⁾

(p) 1 Ventr. 100.

(1) The stating an account is in the nature of a new promise. *Holmes v. De Camp*, 1 Johns. Rep. 34.

(2) It was admitted by the court, in this case, that debt would lie for a fine upon an admittance to a copyhold. See also *Whitfield v. Hunt*, Doug. 727, n. [† 155,] where it was holden, that a general *indebitatus assumpsit* would lie by the lord against the tenant of a customary tenement for a fine due upon admission. See also 3 & 4 Will. IV. c. 42, s. 3, limiting the time for commencing and suing actions of debt for any fine due in respect of any copyhold estate to six years after the cause of action.

goods and chattels; (q)(1) for money due by the custom of London for scavage; (r) for tolls; (s)(2) *for burial fees; (t) for a penalty due by the ordinances of a company for not serving the office of steward, according to a by-law; (u) and, lastly, *indebitatus assumpsit* will lie on a foreign judgment. (x)(3) [*72]

In an action brought in England to recover the value of a given sum, Jamaica currency, upon a judgment obtained in that island; the value is that sum in sterling money which the currency would have produced according to the rate of exchange between Jamaica and England at the date of the judgment. (y) To render a foreign judgment void, on the ground that it is contrary to the law of the country where it was given, it must be shown clearly and unequivocally to be so. (z)(4)

- (q) *Earl of Falmouth v. Penrose*, 6 B. & C. 385.
 (r) *City of London v. Gorry*, 2 Lev. 174. (s) *Seward v. Baker*, 1 T. R. 618.
 (t) *Spry v. Emperor*, 6 M. & W. 639.
 (u) *Barber Surgeons v. Pelson*, 2 Lev. 252.
 (x) *Crawford v. Whittal*, Doug. 4, n. [1]; *Russell v. Smyth*, 9 M. & W. 810; [*Hubbell v. Cowdrey*, 5 Johns. Rep. 132.]
 (y) Per Cur. *Tenterden*, C. J., *hæsitante*, *Scott v. Bevan*, 2 B. & Ad. 78.
 (z) *Becquet v. Mac Carthy*, 2 B. & Ad. 951.

(1) Assumpsit does not lie for a chattel illegally detained. It should be trover. *Willet v. Willet*, 3 Watts, 277, unless converted to the use of the tortfeasor. *Hill v. Davis*, 3 N. H. R. 384, or he has sold it and received the money. *Gilman v. Wilbur*, 12 Pick. 120.

(2) Assumpsit will lie for tolls; as for passing along a way. Such toll is either toll thorough, or toll traverse; which last is the payment of a sum of money for passing over the soil of another in a way not an highway. 2 Roll. Abr. 522; *Rickards v. Bennett*, 1 B. & C. 223. Toll thorough is a payment for passing along a highway, to support which some consideration must be proved, as repairing a road or bridge. The repair of some streets in a town is not a sufficient consideration to support the claim of toll thorough in all parts of the town. *Brett v. Beales*, 10 B. & C. 508. But if the taking of the toll, as well as the right of passage, be immemorial, it may be presumed that the soil was originally granted to the public in consideration of the toll; and such original grant is a good consideration for the toll, although the soil and toll should have been severed and got into different hands. *Lord Pelham v. Pickersgill*, 1 T. R. 660; *Trueman v. Walcham*, 2 Wils. 296, confirmed by *Hill v. Smith*, 4 Taunt. 520, and recognized by Lord Tenterden, C. J., in *Brett v. Beales*, 10 B. & C. 510. Assumpsit may be maintained by the owner of a market for stallage, and that without showing any contract in fact between him and the occupier of the stall. *The Mayor A. & B. of Newport v. Saunders*, 3 B. & Ad. 411. A grant of a fair or market, with an express grant of toll, passes reasonable toll, though no amount of toll be specified. *The Corporation of Stamford v. Pawlett*, 1 Cro. & J. 57.

(3) See tit. "Debt," and *ante*, p. 69, note, 6.

(4) Where in a foreign judgment there has been a clear misconception of the English law, such judgment will not be a bar to the plaintiff's right to recover in an action brought here. *Novelli v. Rossi*, 2 B. & Ad. 757.

Assumpsit lies on an implied promise to discharge a legal obligation created by statute. *The Inhabitants of Bath v. The Inhabitants of Freeport*, 5 Mass. Rep. 325.

It will not lie when a penalty is given by statute, and an action on the case is provided for its recovery, for an action on the case for tort is intended, and not assumpsit; in such case no assumpsit is implied. *Peabody v. Hoyt*, 10 Mass. Rep. 36.

It lies on an implied promise against a corporation. *Bank of Columbia v. Patterson's Adm.*, 1 Cranch, Rep. 299; *Dunn v. St. Andrew's Church*, 14 Johns. Rep. 118; *Overseers of North Whitehall v. Overseers of South Whitehall*, 3 S. & R. 117. *Chestnut Hill Turnpike v. Rutter*, 4 S. & R. 16; *Baptist Church v. Mulford*, 3 Halst. 182. A contrary doctrine seems to have been held in one case by the Supreme Court of Pennsylvania. *Breckhill v. Turnpike Company*, 3 Dallas's Rep. 496. But it may be safely pronounced not to be law both upon principle and authority. Anciently it was held that corporations could do no act except under seal; but this strict rule has been gradually relaxed, and they are now considered as liable, like natural persons, for the acts of their agents within the

The court will give foreign judgments credit for the facts which they specifically allege; hence in an action on a foreign judgment obtained by default, stating that the defendant appeared by attorney, it is not necessary to prove that the attorney mentioned was properly constituted the attorney of defendant: or that the defendant was living within the jurisdiction of the foreign court.(a)

An *indebitatus assumpsit* will not lie upon a bill of exchange by the payee against the acceptor,(b) because the acceptance is only a collateral engagement to pay the debt of another, namely, the debt of the drawer; nor will it lie for a wager,(c) because a real consideration is wanting, and debt will not lie for a wager. Nor will *indebitatus assumpsit* lie for goods bargained, unless there has been a sale;(d)(1) the property must be changed to make the action maintainable.

It will be proper to remark here, that an *indebitatus assumpsit* will not lie on a special agreement(e)(2) until the terms of it are performed; but when that is done, it raises a duty, for which a general *indebitatus assumpsit* will lie [where the duty consists in a money payment.](3) In cases of this kind, i. e. where the terms of the special agreement have been performed, if the plaintiff, having declared [*78] on *the special agreement, and also on a general *indebitatus assumpsit*, fail in proving the special agreement, he may resort to the general count.(f)(4) See "New Rules limiting Counts."

(a) *Molony v. Gibbons*, 2 Campb. 502, *Ellenborough*, C. J.

(b) *Hard's case*, Salk, 28.

(c) *Bovey v. Castleman*, Lord Raym. 69.

(e) *Gordon v. Martin*, Fitz-Gib. 303. See *Grissell v. Robinson*, 3 Bingh. N. C. 10, 15;

(d) *Atkinson v. Bell*, 8 B. & C. 277.

Scott v. Parker, 1 Q. B. 809, 1 G. & D. 258.

(f) *Leeds v. Burrows*, 12 East, 3.

scope of the agent's authority, and contracts made by them are regarded as the express contracts of the corporation, and all duties imposed on them by law, and benefits conferred on them at their request, raise *implied* promises on which an action will lie. *S. P. Ches. and Ohio Canal Co. v. Knapp*, 9 Peters, 541, even though their agent has contracted under seal. *Cram v. Bangor House*, 3 Fairf. 357. See Angell on Corporations, § 219-239; Shelford on Railways, 79-81, 3d ed.; Hodges on Railw. 59-61, and cases cited in notes. Assumpsit does not lie on a note under seal of corporation. *Steel v. Oswego Co.*, 15 Wend. 265.

(1) In assumpsit for goods sold and delivered, proof must be made of actual sale to or delivery at request of defendant. *Clark v. Imlay*, 7 Halst. 119. It does not lie where goods have been consigned and partly sold. *Colman v. Price*, 1 Blackf. 303. Where defendant agreed to take of S. goods to be manufactured by plaintiff, and the goods were sent by plaintiff to defendant, who settled with S. without notice from plaintiff, no action for goods sold, &c., lies against defendant. *Faswell v. Smith*, 12 Pick. 83. So also, where goods are left with a third person, to be delivered to defendant and not called for. *Hart v. Tyler*, 15 Pick. 171.

(2) See *Jetton v. Dickenson*, 10 Mass. Rep. 287; *Raymond v. Bearnard*, 12 Johns. Rep. 274; *Jennings v. Camp*, 13 Id. 94; *Wilt v. Ogden*, Ib. 57; *Clark v. Smith*, 14 Id. 326; *Champlin v. Butler*, 18 Id. 169; *Kelly v. Foster*, 2 Binney, 4; *Leas v. James*, 10 S. & R. 307; *Shepherd v. Palmer*, 4 Conn. Rep. 95.

(3) When there is an express agreement for particular services for a certain time, and the plaintiff has been discharged by the defendant before the time, and prevented from performing the services, he must declare on his *special* agreement, and cannot recover on *indebitatus assumpsit*. *Algeo v. Algeo*, 10 S. & R. 235, S. P.; *Donaldson v. Fuller*, 3 Id. 505. See *Sykes v. Summerl*, 2 Browne, 225.

(4) "If A. declare upon a special agreement, and likewise upon a *quantum meruit*, and

In an action of *indebitatus assumpsit* for goods sold and delivered, (g) it appeared that the goods in question had been valued at a certain sum, for which *payment* was to be made by the defendant *in three months after the 15th of September, 1802*, (the day on which the bargain was concluded,) *by a bill of two months*. The action was commenced in Hilary Term, 1803, before the expiration of five months from the day on which the contract was made. The Court of King's Bench (dissentiente *Ellenborough*, C. J.) were of opinion that the action was prematurely brought on the implied assumpsit before the expiration of the credit, and that a special action of assumpsit was the mode in which the defendant ought to have been sued for the not giving at the

(g) *Mussen v. Price*, 4 East, 147.

at the trial prove a special agreement, but different from that which is laid in the declaration, he cannot recover on either count: not on the first, because of the variance; nor on the second, because there was a special agreement; but *if he prove a special agreement and the work done, but not pursuant to such agreement, he shall recover upon the quantum meruit; for otherwise he would not be able to recover at all.*" Bull. N. P. 139; Str. 638. "I apprehend the rule to be this: where a party declares on a special contract, seeking to recover thereon, but fails in his right so to do altogether, he may recover on a general count, if the case be such, that, supposing there had been no special contract, he might still have recovered for money paid or for work and labor done. As in a case of a plaintiff suing a defendant as having built a house for him according to agreement: there, if he fail to prove that he has built it according to agreement, he may still recover for his work and labor done." Per Sir J. Mansfield, delivering the opinion of the court in *Cooke v. Munstone*, 1 Bos. & Pul. N. R. 354. "If a man agrees to build for another a house, to be paid for it, and afterwards builds the house, in this case he has two ways of declaring, either upon the original executory agreement, as to be performed *in futuro*, or upon an *indebitatus assumpsit*, or *quantum meruit*, when the house is actually built, and the agreement executed." Per Denison, J., *Alcorn v. Westbrook*, 1 Wils. 117. If there be a count on a special contract, and a common count for work, labor, and materials, and the plaintiff fails to recover on the special contract, the plaintiff can recover on the common count, only so much as the work and materials are worth. *Chappell v. Hickes*, 2 Cr. & M. 214. So where the defendant answers the plaintiff's claim for breach of the special contract, and the plaintiff resorts to a *quantum meruit* for service performed, the jury may inquire what that service is reasonably worth. *Baillie v. Kell*, 4 Bing. N. C. 638; 6 Sc. 379. See *Reed v. Rann*, 10 B. & C. 438. It lies where a special contract has been performed. *Ches. & Ohio C. Co. v. Knapp*, 9 Pet. 541; *M'Intire v. Morris*, 14 Wend. 90; *Feeter v. Heath*, 11 Id. 477; *Shearer v. Jewett*, 14 Pick. 232. Or the services sued for are not embraced in it. *Dubois v. Del. & H. Co.*, 4 Wend. 285. Or the plan agreed upon has been abandoned. *Hollingshead v. Mactier*, 13 Wend. 276. For work done not pursuant to contract if accepted, even though the original contract were under seal. *Watchman v. Crook*, 5 Gill. & J. 239; *Munroe v. Perkins*, 9 Pick. 298. See *Jewett v. Weston*, 2 Fairf. 346; *Morris v. Windsor*, 3 Id. 293. But not for *part* performance of an *entire* contract. *Butler v. Wright*, 14 Wend. 257. If a party undertakes to perform an entire work at a stipulated price, and fails to perform it, but receives the whole contract price, he has no further claim on a *quantum meruit*, although the part performed is beneficial to the other party. *Phelps v. Sheldon*, 13 Pick. 50; *Jewell v. Sheroeppel*, 4 Cowen, 564. And it does not affect the right to recover in *assumpsit*, that the defendant had previously sued the plaintiff for not performing in time, and had recovered damages. *Ib.* See *Cansten v. Burke*, 2 Har. & M'Gill, 295.

Where a party declares on a special agreement, seeking to recover thereon, but fails altogether, he may recover on a general count, if the case be such, that supposing there had been no special contract, he might still have recovered; *Tuttle v. Mayo*, 7 Johns. Rep. 132; and it is immaterial whether he has attempted to prove the special agreement or not. *Linningdale v. Livingston*, 10 Johns. Rep. 36; *Keyes v. Stone*, 5 Mass. Rep. 391.

It seems from this case, that where performance of the agreement on the part of the plaintiff had been rendered impossible by the act of the defendant, the defendant might still give the agreement in evidence, with a view to lessen the *quantum* of damages, though not if he offered it for the express purpose of defeating the action altogether. . .

[*74] end of three months a bill of two months, in which action the plaintiff would have been entitled *to recover damages against the defendant for his not having given the bill, such as the loss of interest, &c.(1) So where goods were purchased by the defendant of the plaintiff, (h) to be paid for by a bill at two months, which bill was accordingly drawn upon the defendant for the amount of the goods, and tendered for acceptance, which was refused; an action of *indebitatus assumpsit* for goods sold and delivered having been brought before the expiration of the two months, it was holden by the Court of Common Pleas, on the authority of the preceding case, that the action could not be sustained.(2)

Where goods(i) are fraudulently bought on credit, the seller cannot sue for goods sold and delivered before the credit has expired, though he might have maintained trover.

Goods were sold at six months' credit, payment to be then made by a bill at two or *three* months, at the purchaser's option; it was holden(k) *Parke, J.*, dubitante, that this was in effect a credit for nine months; that the statute of limitations would begin to run from the expiration of that time, and that before that time no action for goods sold and delivered could be maintained, although the plaintiff might have declared specially on the omission to give a bill at the end of six months. Where goods were sold "to be paid for in two months," it was holden,(l) that the day of the contract was excluded.

A. agreed to deliver to B. 100 bags of hops, at a certain price per cwt., by a certain time.(m) A. having delivered twelve bags before the stipulated time, and demanded payment, which was re-
[*75] fused, *immediately commenced an action for the price of the bags delivered. It was holden, that as the contract was en-

(h) *Dutton v. Solomonson*, 3 Bos. & Pul. 582.

(i) *Ferguson v. Carrington*, 9 B. & C. 59, recog. in *Strutt v. Smith*, 1 Cr. M. & R. 312.

(k) *Helps v. Winterbottom*, 2 B. & Ad. 431. (l) *Webb v. Fairmaner*, 3 M. & W. 473.

(m) *Waddington v. Oliver*, 2 Bos. & Pul. N. R. 61.

(1) Care must be taken to distinguish cases of this kind from the common cases in which goods are sold, and a bill taken in payment payable a future day, but *without any express agreement for time* for the payment of the goods; in this last-mentioned case, if the bill is dishonoured, the drawer may be sued immediately upon the original cause of action, without any regard being had to the time which the bill has to run; for there being no agreement as to time, the party takes the bill as payment, and, therefore, if it turn out to be good for nothing, the creditor has not received that which the other undertook to give him, and may therefore pursue his remedy immediately. *Stedman v. Gooch*, 1 Esp. N. P. C. 5; *Puckford v. Maxwell*, 6 T. R. 52; *Owenson v. Morse*, 7 T. R. 64. A debtor is not discharged by giving a cheque which produces nothing, although payment in cash may have been previously tendered; and the circumstance of the cheque being given by the agent of a debtor, who is at the time indebted to his principal in a larger amount, makes no difference. *Everett v. Collins*, 2 Camp. 515. *S. P. Girard v. Taggart*, 5 S. & R. 19. But if the vendee refuse to take the goods, the vendor may, before the expiration of the term of credit, maintain an action for damages for breach of the contract. *Ib. Sands v. Taylor*, 5 Johns. 395; *Story on Contr.* § 813.

(2) *Contra. Loring v. Gurney*, 5 Pick. 15. On a sale of goods at auction for approved indorsed note at six months on delivery of the goods and refusal of the note, the plaintiff may reclaim his goods or treat the sale as without credit and sue at once for the price. *Corlies v. Gardner*, 2 Hall. 345; *Reeves v. Harris*, 1 Bail. S. C. 563; *Marston v. Baldwin*, 17 Mass. 606.

tire and could not be split, the plaintiff was not entitled to bring an action, until the whole quantity was delivered, or until the time for delivering the whole had arrived. So where A. undertook, for a specific sum of money, to repair and make perfect a given article, then in a damaged state, and did repair it in part, but did not make it perfect, it was holden,⁽ⁿ⁾ that he could not recover for the value of the work done and materials found. In this case the contract was to do a specific work for a specific sum. Materials used, or intended to be used, in the construction of a fixed building, cannot be deemed goods sold and delivered.^(o) Where a ship outward bound with goods, being damaged at sea, put into a harbor to receive some repairs which had become necessary for the continuance of her voyage, and a shipwright was engaged and undertook to *put her into thorough* repair: before this was completed, he required payment for the work already done, without which he refused to proceed, and the vessel remained in an unfit state for sailing: it was holden,^(p) that the shipwright might maintain an action for the work already done; for there was nothing in the present case amounting to a contract to do the whole repairs, and make no demand till they were completed. So where, upon an entire contract for the sale and delivery of goods at a particular time, and some of the goods are delivered, although the purchaser is not bound to pay for that part before the expiration of the time fixed for the delivery of the whole; yet if, upon the seller's failure to complete the contract, the purchaser does not return the part delivered, but elects to keep that part, then the seller may bring an action for the value^(q) (not the stipulated price) of that part, although he (the seller) is liable to a cross action for the breach of his contract. So where, by a contract of sale, the vendor agreed to deliver 250 bushels of wheat within a specific time, and delivered part, but not the residue; it was holden,^(r) that he might, after the time mentioned in the contract had expired, recover from the purchaser the value of the wheat delivered to and retained by him.⁽¹⁾ Where A. purchased goods of B. and paid a sum in deposit, and received part of the goods, but A. required B. to take them back, as not being equal to the sample, and to repay the deposit, B. re-sold the residue, and A. sued B. for the deposit; it was holden, that A.

⁽ⁿ⁾ *Sinclair v. Bowles*, 9 B. & C. 92.

^(o) *Cotterell v. Apsey*, 6 Taunt. 322; *Tripp v. Armitage*, 4 M. & W. 687; *Clark v. Bulmer*, 11 M. & W. 243.

^(p) *Rober ts v. Havelock*, 3 B. & Ad. 404.

^(q) *Shipton v. Casson*, 5 B. & C. 378.

^(r) *Oxendcale v. Wetherell*, 9 B. & C. 386. See also *James v. Cotton*, 7 Bingh. 266; *Richardson v. Dunn*, 2 Q. B. 218, 1 G. & D. 417.

(1) Where a special agreement, after being executed by one of the parties, is annulled by the other party, it is as if it had never been made, and an action may be maintained on the implied promise, which is revived when the special agreement is disaffirmed. As where a widow lived with an infant daughter who had property to support her, in the daughter's house, under an agreement that the mother should board the daughter in consideration of having the house free of rent; after the daughter's marriage, her husband having sued and recovered of the mother for the rent, the latter brought this action against the husband for the daughter's board; and it was holden that as the mother was under no obligation to support the daughter, and the agreement being annulled, she was entitled to recover. *Whipple v. Dow*, 2 Mass. Rep. 415.

could not recover the deposit as money had and received, unless
 [*76] there was *fraud in the contract, or there had been an agreement between the parties to rescind the contract.(s)

A collateral undertaking must be declared on specially; as where B. undertook in writing to A. to answer for the payment of certain goods to be sent by him to C., it was holden,(t) that A. could not maintain an *indebitatus assumpsit* against B. for the price of the goods sent to C., but that he ought to have declared specially on the guaranty.

The general *indebitatus assumpsit* for money paid, and for money had and received, being those forms of action which are of more extensive application than any other known in the law, I shall proceed to inquire in what cases they may be brought, beginning with the *indebitatus assumpsit* for money paid.

Of the Indebitatus Assumpsit for Money Paid.—Where a person has laid out his own money for the use of another,(1) either with the express or implied consent of such other person, the law implies a promise of repayment, for a breach of which an *indebitatus assumpsit* for money paid, laid out, and expended, may be maintained.(u)(2) As where one person is surety for another, and compellable to pay the whole debt,(x) and the surety is called upon to pay, it is money paid to the use of the principal debtor, and may be recovered against him in an action for money paid, even though the surety did not pay
 [*77] the debt by the desire of the principal.(3) *So where two

(s) *Fitt v. Cassanet*, 4 M. & Gr. 898; 5 Scott's N. R. 902.

(t) *Mines v. Sculthorpe*, 2 Campb. 215.

(u) See *Jefferys v. Gurr*, 2 B. & Ad. 843.

(x) Per *Kenyon*, C. J., 8 T. R. 310; [*Powell v. Smith*, 8 Johns. Rep. 249; *Ramsey v. Gardner*, 11 Johns. 439.]

(1) See *Packard v. Lenoir*, 12 Mass. 11.

(2) A tax imposed by a municipal corporation cannot be recovered on a count for money paid, although such corporation has paid the cost of the improvement for which the tax was laid. *Mayor v. Hughes*, 1 Gill. & J. 480. It does not lie for money paid as part consideration of land reclaimed for breach of subsequent conditions. *Frost v. Frost*, 2 Fairf. 235.

(3) *Decker v. Pope*, London Sitings, 9th July, 1757, MSS. This was an action brought by an administrator *de bonis non* of a surety, who, at defendant's request, had joined with another friend of defendant's in giving bond for the payment of the price of some goods that were sold to defendant: and the surety having been obliged to pay the money, the administrator declared against defendant for so much money paid to his use: Lord Mansfield directed the jury to find for the plaintiff; observing, that where a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law, and to charge the principal in an action for money paid to his use. He added, that he had conferred with most of the judges upon it, and they agreed in that opinion. One man who is compelled to pay money, which another is bound by law to pay, is entitled to be reimbursed by the latter; and money paid under such circumstances may be considered as money paid to the use of the person who is so bound to pay it. Hence, where the indorser of a bill, being sued by the holder, paid him part of the sum mentioned in the bill; it was holden, that he might recover the same from the acceptor in an action for money paid to his use. *Pownall v. Ferrand*, 6 B. & C. 439. So where several persons jointly contract for a chattel to be made or procured for the benefit of all, and as to which the executors of any party dying before the work is completed, are by agreement to stand in the place of the party dying; in such a case, though the legal remedy of the party employed would be solely against the survivors, yet the law would certainly imply a

persons are sureties for another, (y) and the obligee compels one of the sureties to pay the whole debt, such surety may maintain an action against his co-surety, and thereby compel him to contribute his proportion towards the payment of the debt. N. In such case, it does not appear to be necessary, that the insolvency of the principal debtor should be proved. But where it appeared that one of two sureties had been prevailed on to become a surety at the instance of the other, (z) and the other had been compelled to pay the debt, Lord *Kenyon* would not permit him to call on his co-surety for contribution, more especially as he had taken a bill of sale from the principal debtor in order to protect himself. (1)

A. being in want of goods, went to B., accompanied by C., and ordered some, C. saying in A.'s presence, that if A. did not pay he would; the goods having been supplied, and C. having paid the money, it was holden, (a) that he might recover it back from A.; inasmuch as the promise being made in the presence of A., there was an implied contract that if C. paid the money, A. would repay it.

(y) See *Cowell v. Edwards*, 2 Bos. & Pul. 268; and *Pitt v. Pussord*, 8 M. & W. 538; and see decision of Lord *Kenyon*, C. J., in the following case.

(z) *Turner v. Davis*, 2 Esp. N. P. C. 478.

(a) *Alexander v. Vane*, 1 M. & W. 511; 1 Tyr. & Gr. 865.

contract on the part of the deceased contractor that his executors should pay their proportion of the price of the article to be furnished. Per *Alderson*, B., delivering the judgment of the court in *Prior v. Hembrow*, 8 M. & W. 873; 2 Wms. on Exrs., 1487, 4th Am. Ed. *Hassinger v. Solms*, 5 S. & R. S. But he cannot maintain this action until he has actually paid the money, although he may have been sued, judgment obtained against him, and execution levied. *Morrison v. Berkey*, 7 S. & R. 238. An action lies by surety for money paid, if he has given his note, which is accepted in satisfaction. *Pearson v. Parker*, 3 N. H. R. 366. *Craig v. Craig*, 5 Rawle, 91. And even where the principal has a good defence, as usury, if the surety voluntarily pay the debt, with a knowledge of such defence, this action lies; for no man is bound to take advantage of a penal law, to avoid a contract which he ought in equity to perform: the surety was under no obligation to dispute the payment of the debt. *Ford v. Keith*, 1 Mass. Rep. 139. So where two persons are sureties for another and the obligee compels one of the sureties to pay the whole debt, such surety may maintain an action against his co-surety, and thereby compel him to contribute his proportion towards the payment of the debt. *Johnson v. Johnson*, 11 Mass. Rep. 359. *Taylor v. Savage*, 12 Mass. Rep. 93. *Morris v. Wills*, 5 Har. & J. 120. *S. P. Owens v. Collinson*, 3 Gill. & Johns. 25. So if two persons agree equally to bear the loss to be sustained in consequence of one of them becoming special bail for a third person, and, after they have equally contributed to the payment of the debt, one is refunded the amount paid by him, he is liable in this action to the other for a moiety of the sum so refunded. *Smith v. Hicks*, 5 Wend. 48. So also assumpsit lies for money paid at request of one of three jointly liable to a third person, against all three. *Tradesman's Bank v. Astor*, 11 Wend. 87.

(1) The plaintiffs chartered their vessel to A., who covenanted, among other things, to pay the charge of manning the vessel during the voyage; the defendant, who was master of the vessel, received a certain sum from A., to be appropriated to the payment of the wages of the seamen; but A. being indebted to him, he applied the sum, so received, in payment of his own debt, and did not pay the seamen; the seamen libelled the vessel, and the plaintiffs, in order to get her liberated, paid their wages: It was holden, that as the plaintiffs were not personally liable for the seamen's wages, A. having covenanted, in the charter party, to pay them, and the defendant being liable as master to pay them, an action for money paid could be maintained by the plaintiffs against the defendant for the amount advanced to the seamen; but it was doubted whether an action for money had and received, would lie, under the circumstances of the case, for the sum received by the defendant from A. *Goodridge v. Lord*, 10 Mass. 483.

An action for money paid cannot be maintained unless there be a request to pay it, either express or implied. Hence, where the defendant contracted to transfer stock on a certain day to the plaintiff, but failed to perform his contract; upon which the plaintiff bought the stock, and to recover the consequent loss sustained by him, brought an action against the defendant for money paid: Held, (b) that such action was not maintainable, as the plaintiff should have declared specially on the contract. A tenant, by a written agreement under which he took a house, agreed to pay taxes, which by statute were due from the landlord. The tenant, having made default, and the landlord having been obliged to pay, sued the tenant for the amount *as money paid to his use*. It was holden, (c) that the form of action was misconceived, and that the tenant ought to have been sued on the [*78] agreement. (1) The ground of the decision *was "that the plaintiff's payment relieved the defendant from no liability but what arose from the contract between them." (d)

This action may be maintained by the bail against their principal, (e) for the recovery of such sums of money, as they, from their situation as bail, and in order to secure themselves, have been fairly and necessarily obliged to expend. The bail may surrender their principal in their own discharge, and for their own security; consequently, if the principal absconds, and the bail incur expenses in sending after him, and securing him, in order that he may be surrendered, such expenses may be recovered in this action against the principal. (2) So where A., B., and C. were lessees of certain premises by deed from D., (f) to whom they covenanted to pay the rent, and B. and C. assigned their interest to A., subsequent to which assignment, and with full knowledge whereof, the plaintiff put his goods on the premises, under the care of A., where they were taken as a distress by D. for rent arrear; and the plaintiff, in order to redeem his goods, was obliged to pay the rent due, taking at the time a receipt from D.'s attorney as for so much received on account of A., B., and C.; it was holden, that the plaintiff might maintain an action for money paid against A., B., and C., on the ground that the three defendants were liable to the landlord for the rent in the first instance; and as, by the payment made by the plaintiff, all the three were released from the demand of the rent, and as such payment was not a voluntary but a compulsory payment, because the plaintiff could not have relieved himself from the distress; under these circumstances

(b) *Lightfoot v. Creed*, 8 Taunt. 268.

(c) *Spencer v. Parry*, 3 A. & E. 331.

(d) Per *Alderson, B.*, in *Kemp v. Finden*, 12 M. & W. 423; which see.

(e) *Fisher v. Fellows*, 5 Esp. N. P. C. 171.

(f) *Exall v. Partridge and others*, 8. T. R. 308, recognized in *Pownal v. Farrand*, 6 B. & C. 439, and *ante*, p. 76, n. (29.) See *Hancock v. Caffyn*, 8 Bingh. 358.

(1) Assumpsit lies for money paid against a tenant who suffers plaintiff's property to be sold on a distress, and which he buys in. *Wells v. Porter*, 7 Wend. 119.

(2) And where there are two or more grantees under a mortgage, whether severally or in common, if either pay off the mortgage, the other shall be holden to a reasonable contribution. *Taylor v. Porter*, 7 Mass. Rep. 355. Where a party has paid a judgment recovered against him, for an entire demand, to which a person not a party to the suit was jointly liable with himself, he cannot maintain an action against that person for contribution. *Murray v. Bogert*, 14 Johns. Rep. 318.

the law would imply a promise by the three defendants to repay the plaintiff. In this case, the money paid was the plaintiff's money: this is requisite for the maintenance of the action; for where A. let a house to B., which B. underlet to C., and A. distrained the goods of C. for rent due from B., which goods were afterwards sold by virtue of the stat. 2 Will. & Ma. sess. 2, c. 5, s. 2, and the money arising from the sale paid over by the auctioneer to A.; it was holden, *(g)* that C. could not maintain an action against B. for money paid to his use, because the money in question never was the money of C. but the money of the landlord; for the moment the goods were converted into money, that money became an executed satisfaction in the landlord for the rent arrear; and C., the tenant, was only interested in the surplus proceeds, if any, of the goods.

It is observable, that the mere circumstance of one person having received an advantage, from the payment of money by another, is not sufficient to raise an assumpsit against the former: *(1)* the consent of the party, either expressed or implied, is essentially necessary to **the support of the action.* *(2)* In an action for money [*79] paid, *(h)* by the plaintiffs, to the use of the defendants, it appeared that, by stat. 22 & 23 Car. II. c. 11, the parishes of St. Vedast's and St. Michael le Quern were united; and that since that time, one set of officers had served for the two parishes, the election of whom had always been made at a joint vestry; that only nine vacancies in the office of sexton had happened since, all of which had been filled up agreeably to this custom; that in the year 1759 the sexton's salary was fixed at 20*l.* per annum, which was agreed to be paid equally by both parishes; that the overseers of St. Vedast's had paid the sexton who was last chosen the whole sum, to recover a moiety of which this action was brought. The defence was, that the last election of a sexton was not a joint one, and that the parish of St. Michael claimed a right of choosing a separate sexton for themselves, of which they had given notice to the other parish. Lord *Mansfield*, C. J. *This action must be grounded either on an express or implied consent; but here is neither. Buller, J.* If this were held to be a joint obligation, it would be saying that the sexton might bring his action against one of the parishes for the whole sum, which is not the case. In like manner it was holden,

(g) *Moore v. Pyrke*, 11 East, 52.

(h) *Stokes and another, Overseers of St. Vedast's, v. Lewis and another, Overseers of St. Michael le Quern, London*, 1 T. R. 20.

(1) See *Mayor v. Hughes*, 1 Gill. & J. 482. *Turner v. Egerton*, 1 Id. 430.

(2) See *Hassenger v. Johns*, 5 S. & R. 4. So, where three of the defendants were principals, and the fourth a surety, on a bond given to the United States for duties, and the plaintiff, at the request of one of the principals, paid the bond, and brought assumpsit for money paid against the principals and surety: at the trial he was nonsuited, and the judgment was affirmed on exceptions; for, though the request of one principal might well enure at the request of the others who were concerned in interest, and ultimately responsible; yet the law, in such a case, will not imply an assumpsit in the surety, who has no interest. If the defendant, who made the request to the plaintiff, had himself paid off the bond, he never could have called upon the surety to contribute; and a payment by the plaintiff, at his request, ought not to have a greater operation than an actual payment by him. *Elmendorph v. Tappen*, 5 Johns. Rep. 176.

that a broker(*i*) (who had contracted with third persons for the sale of stock at a future day by the authority of his principal, but without disclosing the name of his principal, who afterwards, in consequence of the rise of the stocks, refused to make good his bargain,) could not, by paying the difference to the persons to whom the stock had been sold, maintain an action for money paid on an implied assumpsit against his principal for the amount.(1)

If an auctioneer is employed to sell an estate by auction,(*k*) and he undertakes to conduct the auction so as to avoid incurring the duty if the estate is not sold, but through mistake transacts the business so that the duty attaches, which he is obliged to pay, the law will not raise an implied promise on the part of the employer to reimburse the auctioneer the money paid for the duty, which has been thus incurred through his own blunder. So an officer guilty of a breach of duty cannot recover money which he has paid in consequence of it, though for the benefit of the defendant.(*l*)(2)

If A recover in an action founded on *tort* against B. & C.(*m*)
[*80] *and levy the whole damages on B., B. cannot maintain an action against C. upon an implied assumpsit for a reimbursement of a moiety; for a contribution cannot be claimed as between joint wrong-doers.(3) "From the inclination of the court, in *Phillips v. Biggs*, Hard. 164, and from the concluding part of Lord *Kenyon's* judgment in *Merryweather v. Nixan*, [in which he says, that decision would not

(i) *Child v. Morley*, 8 T. R. 610, cited by *Bosanquet, J.*, in *Young v. Cole*, 3 Bingh. N. C. 731, and *post*, p. 86; but see *Sutton v. Tatham*, 10 A. & E. 27; 2 P. & D. 308.

(k) *Capp v. Topham*, 6 East, 392.

(l) *Pitcher v. Bailey*, 8 East, 171.

(m) *Merryweather v. Nixan*, 8 T. R. 186.

(1) "A person employing one who is notoriously a broker, must be taken to authorize his acting in obedience to the rules of the Stock Exchange." Per Lord *Denman*, C. J., *Sutton v. Tatham*, 10 A. & E. 29.

(2) So, if an officer having an execution, without demanding the amount from the defendant, and without his request, pay it over to the plaintiff, he cannot maintain an action against the defendant for the money paid; for an officer has no right to sleep on his execution, and then pay the money himself and bring an action for it; such a practice is not only against the rules of law, but would tend to multiply suits and increase litigation. *Jones v. Wilson*, 3 Johns. Rep. 434. *Menderback v. Hopkins*, 8 Johns. Rep. 436.

If a collector of taxes pay over the defendant's tax to the treasurer, without defendant's request, and there has been no subsequent promise to repay, he cannot maintain an action. *Beach v. Vandenburg*, 10 Johns. Rep. 361. *Overseers of Wallkill v. Overseers of Mamakating*, 14 Johns. Rep. 87.

(3) A different rule holds in the case of a joint judgment against several defendants in an action of assumpsit. Per Lord *Kenyon*, C. J., *S. C.* So an action of assumpsit lies by a ship-owner, to recover, from the owner of the cargo, his proportion of a general average loss, incurred by sacrificing the tackle belonging to a ship on an extraordinary emergency for the benefit of the whole concern. *Birkley v. Presgrave*, 1 East's R. 220. So an action may be maintained to recover a contribution in the nature of a general average by one shipper of goods against another. *Dobson v. Wilson*, 3 Campb. 480. The owners of a ship's cargo are liable to contribution, at the suit of the ship-owners, for ship's stores necessarily thrown overboard after a vessel was captured, and while she was in the hands of the enemy. *Price v. Noble*, 4 Taunt. 123. The proprietor of goods laden on the deck of a ship according to the custom of a particular trade, is entitled to contribution from the ship-owner for a loss by jettison. *Gould v. Oliver*, 4 Bingh. N. C. 134, recognizing *Dacosta v. Edmunds*, 4 Campb. 142.

affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right,] and from reason, justice, and sound policy, the rule that wrong-doers cannot have contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." Per *Best*, C. J., delivering judgment in *Adamson v. Jarvis*, 4 Bingh. 82, 3. One of several partners, who pays money on account of his partners, cannot maintain an action against them for contribution, on the ground that he made such payment, not voluntarily, but by compulsion of law.(n)

A. having recovered a judgment against a trader,(o) and taken out execution, a levy was made on the goods of the trader, but after he had committed an act of bankruptcy; the money levied was paid over to A. An action of trover was afterwards brought by the assignees against A., the sheriff, and the bailiff, in which damages were recovered: and these damages, together with the costs, were paid by the bailiff; it was holden, that there was no implied promise on the part of A. to indemnify the bailiff, or to contribute to the damages and costs in the action of trover; but that the bailiff might, in an action for money had and received, recover the levy-money, being money paid under a mistake to A., and the bailiff being answerable for it to the assignees.

In a case where there were three assignees of a bankrupt's estate *who had acted in the commission, and two of them [*81] paid the solicitor's bill,(p) it was holden that the two could not maintain a joint action against the third for contribution, but that each ought to bring a separate action. So where three had entered into a joint and several bond of indemnity to a sheriff,(q) for the protection of their separate interests, and the sheriff had compelled two of them to pay the whole sum, it was holden that they could not maintain a joint action against the third for contribution.(1)

Of the Indebitatus Assumpsit for Money had and received.—The action for money had and received is founded on all the equitable circumstances of the case between the parties; and, consequently, in order to recover in this form of action the plaintiff must show that he has

(n) *Sadler v. Nixon*, 5 B. & Ad. 936.

(o) *Wilson v. Milner*, 2 Campb. 452.

(p) *Brand and another v. Boulcott*, 3 Bos. & Pul. 235.

(q) *Kelby v. Vernon*, 5 Esp. N. P. C. 194.

(1) In order to sustain an action for money paid, it must appear that money has been actually advanced. *Cumming v. Hackley*, 8 Johns. Rep. 202. But a bond given is not equivalent to the payment of money, and not sufficient to entitle the plaintiff to recover under a count for money paid. *Ib.* *Taylor v. Higgins*, 3 East's Rep. 169. Though there are some cases in which the giving negotiable paper has been held equivalent to the payment of money. *Barclay v. Proctor*, 2 Esp. Rep. 571. *Morrison v. Berkey*, 7 S. & R. 246, supports this doctrine; and *Pearson v. Parker*, 3 N. H. R. 366; *Craig v. Craig*, 5 Rawle, 91. *M'Clellan v. Crofton*, 6 Greenl. 307.

This action will not lie to recover back money paid for a conveyance of land by a deed, containing covenants of warranty, if there be no fraud in the transaction, and the covenants be not void, although nothing past by the deed. *Richards v. Killam*, 10 Mass. Rep. 239; *Phelps v. Decker*, *Ib.* 267; *Bliss v. Negus*, 8 Id. 46. But if there was fraud or deceit in the sale, an action lies. *D'Ulrich v. Melchor*, 1 Dallas's Rep. 428.

equity and conscience on his side. From the following positions it may be collected in what cases this action may be maintained:—

1. If I pay money to a person who claims an authority to receive it, but really has not any such authority,^(r) and afterwards I am compelled to pay it again to the person lawfully entitled to receive it, an action for money had and received will lie against the person unjustly receiving the money.⁽¹⁾

2. Where a person has usurped an office belonging to another,^(s) and taken the known and accustomed fees of office, an action for money had and received will lie at the suit of the party really entitled to the office, against the intruder, for the recovery of such fees. Hence this action is frequently brought to try the right to offices^(t) to which fees are annexed.^(u) It must be observed, however, that this action will not lie to recover gratuitous donations given to the intruder, as money given by strangers for showing a church. An action for money had and received^(x) does not lie by the nominee of a perpetual curacy for the profits thereof, until he has obtained the bishop's license; for, in curacies, the party is not in possession until license. But in the case of a donative, the party is in full possession immediately on the no-
[*82] mination; and, *consequently, if any other person takes the rents and profits, he may maintain an action for money had and received.^(y)⁽²⁾

(r) *Bonnell v. Fouke*, 2 Sid. 4. See post, page 87, *Cripps v. Reade*.

(s) *Arris v. Stukeley*, 2 Mod. 260. See also *Howard v. Wood*, 2 Lev. 245, and the opinion of Holt, C. J., in 1 Ld. Raym. 703.

(t) *Boyer v. Dodsworth*, 6 T. R. 681.

(u) See *R. v. Bingham*, 2 East's R. 311. Information in nature of quo warranto is the only convenient method of trying the right, where there are no fees.

(x) *Powel v. Milbank*, 1 T. R. 399, n. 2 Bl. R. 851, S. C.

(y) Per *Ashhurst, J.*, in *The King v. Bishop of Chester*, 1 T. R. 403.

(1) If A. be indebted to B., and pay such debt to the attorney of a person suing A. in B.'s name, but without B.'s authority, B. may, notwithstanding, recover the debt in an action against A., whose remedy is against the attorney, although the attorney was deceived by a counterfeited warrant of attorney. *Robson v. Eaton*, 1 T. R. 62.

(2) It lies although it may involve the trial of the title to an office, if the party has once been in possession. *Allen v. McKean*, 1 Sumner, 276. So also against administrator of a regimental paymaster, by his successor. *Blackwell v. Irwin*, 4 Dana, 187. At the suit of the U. S. for money received by one public agent of another. *U. S. v. Buford*, 3 Peters, 28. Where an allowance is made by the revenue laws to the marshal for custody of property seized, under order of court, which, for a portion of the time, has been in the keeping of a predecessor, no action at law lies by him against his successor, to whom it was paid, for a proportionable share. *Waddell v. Morris*, 14 Wend. 76. It is the appropriate remedy for money collected under an illegal assessment. *Adam v. Litchfield*, 10 Conn. 127. Or illegal toll. *Chase v. Dwinal*, 7 Greenl. 134. *Boston Glass Co. v. Boston*, 4 Metc. 181; *Watson v. Princeton*, Ib. 599.

It lies wherever by the ties of natural justice and equity, and when no rule of policy or strict law intervenes to prevent, the defendant ought to refund the plaintiff's money, and cannot with a good conscience retain it. *Irvine v. Hanlin*, 10 S. & R. 219; *Bogart v. Nevins*, 6 S. & R. 369; *Morris v. Torrin*, 1 Dall. 148; *Barr v. Craig*, 2 Id. 154; *Murphy v. Barron*, 1 Har. & Gill, 258; *Wiseman v. Lyman*, 7 Mass. 288; *Wright v. Butler*, 6 Wend. 290; *Eddy v. Smith*, 13 Id. 488; *Guthrie v. Hyatt*, 1 Harring. 447; *Farmers' Bank v. Brown*, Ib. 330; *Tevis v. Brown*, 3 J. J. Marsh. 175. And generally by bringing it the plaintiff waives all torts and special damages, and recovers only for the money received; and in most cases he so far confirms the defendant's acts that he cannot deny his right to receive it. *Estwick v. Hugg*, 1 Dall. 222; *Hanna v. Pegg*, 1 Blackf. 181. Sed vide *Farnsley v. Murphy*, Addis. 22.

3. Where money, to which there was not any ground of claim in conscience, has been paid under a mistake, the party may recover it back again in an action for money had and received: (1) As where A., (2) who was indebted to the estate of B., a bankrupt, paid the debt to his assignees without setting off, as he was entitled to do, a sum of money due to himself from the bankrupt, it was holden, that A. might recover the money, which he had neglected to set off, in an action for money had and received against the assignees. So where an action was brought against a person upon a groundless demand, (a) and the cause was compromised by the payment of the money demanded, it was holden, that money had and received would lie for the recovery of the sum so paid.

But where money has been paid under the compulsion of legal process in an action, which the party might have defended successfully if he had been prepared with his evidence, this money cannot be recovered in an action for money had and received; although such evidence be

(z) *Bize v. Dickason*, 1 T. R. 285.

(a) *Cobden v. Kendrick*, 4 T. R. 432, in notâ. But see *Hamlet v. Richardson*, 9 Bingh. 647; 2 M. & Scott, 811.

There need be no privity of contract between the parties in order to support this action, except that which results from one man's having another's money, which he has not a right conscientiously to retain. *Mason v. Waite*, 17 Mass. 563; *Hall v. Marston*, Ib. 579; *Eagle Bank v. Smith*, 5 Conn. 71; *Dickson v. Cunningham*, Mart. & Yerg. 221. Sed vide *Rapalye v. Emory*, 2 Dall. 54. The money must have been received by the defendant. *Beardsley v. Root*, 11 Johns. 464; *Luckett v. Bohanon*, 3 Bibb, 378; *Maddison v. Wallace*, 7 J. J. Marsh. 100; *Johnson v. Haggin*, 6 Id. 581.

Although negotiable notes received by the defendant are often regarded as money. *Floyd v. Day*, 3 Mass. 405; *Hemmenway v. Bradford*, 14 Id. 122; *Willie v. Green*, 2 N. Hamp. 333; *Clark v. Pinney*, 6 Cow. 297.

The general principal seems to be that to sustain a count for money had and received, it must appear that the defendant had received money due to the plaintiff, or something which he had really or presumptively converted into money before suit brought, or which he had received as money and instead of it. *Hatton v. Robinson*, 2 Blackf. 479; *Haskins v. Dunham*, Anthon, 81. Where one man has money in his hands which *ex æquo et bono* belongs to another, if there be a contract modifying or controlling the general liability to pay, the person entitled to the money may recover it in an action of money had and received. *Hitchcock v. Lukens*, 8 Port. 333.

(1) As for excess of money obtained under an extent on a recognizance taken in too large a sum by the fraud of conusee, notwithstanding a writ of entry and final judgment for conusee. *Morton v. Chandler*, 8 Greenl. 9. So also for interest credited by mistake on a settlement. *Tinslar v. May*, 8 Wend. 561. So for money paid on execution on a satisfied judgment. *Wisner v. Bulkley*, 15 Id. 321. Against the holder of a note by an indorser who paid it under a judgment where the holder had previous to the payment discharged a prior party. *Brown v. Williams*, 4 Wend. 360.

So, too, where the defendants sent to the plaintiffs a bad check, which they supposed and declared they had of the plaintiffs; but which in fact was received of the Boston Bank; and the plaintiffs, confiding in the affirmation of the defendants, paid them the money for the check, and did not discover the mistake until after the drawer of the check had become insolvent: it was holden, that the plaintiffs might recover back the money paid for the check; for whatever delay there was in the plaintiffs, in not collecting the check, arose from their confiding in the mistaken affirmation of the defendants. *The President, &c. of the Union Bank v. The Bank of the United States*, 3 Mass. Rep. 74.

Bank notes, and any other property received as money will support the action the same as if money itself had been received. *Mason v. Waite*, 17 Mass. 560; *Minslee v. Wilson*, 7 Cow. 662; *Arms v. Ashley*, 4 Pick. 74; *Thompson v. Babcock*, Brayt. 24; and see *McIntire v. Kennedy*, 5 Am. Law Reg., May 1857, Opinion per Woodward, J.

produced at the trial of the second action, as shows that the other party was not entitled to recover it in the first.(1)

The defendant had brought an action against the present plaintiff for goods sold,(b) for which the plaintiff had before paid and obtained the defendant's receipt, but not being able to find the receipt at that time, and having no other proof of the payment, he could not defend the action, but was obliged to submit and pay the money again, and gave a cognovit for the costs. The plaintiff afterwards found the receipt, and brought an action for money had and received in order to recover the amount of the sum so wrongfully enforced in payment. But *Kenyon*, C. J., was of opinion, that, after the money had been paid *under legal process*, it could not be recovered, however unconscionably retained by the defendant, though the case of *Moses v. Macferlan*, 2 Burr. 1009, was referred to; and thereupon the plaintiff was nonsuited. On a motion to set aside the nonsuit, Lord *Kenyon* said, that after recovery *by process of law* there must be an end of litigation, otherwise there would not be any security for any person. And *Grose*, J., said, that it would tend to encourage the greatest negligence, if the court were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence. Rule refused.(2) So according to *Holroyd*, J.,(c)

[*83] "If the money has been paid *after proceedings have actually commenced, there being no fraud in the party suing, it cannot be recovered back." Plaintiff being about to compound with his creditors, defendant, a creditor, refused to subscribe the deed unless he were paid in full. Plaintiff, to obtain his signature, gave a bill, payable to defendant's agent, for the difference between twenty shillings in the pound and eight shillings, the proportion compounded for. Defendant then signed the deed. Plaintiff did not honour the bill, when due; but on subsequent application he paid it some months after the dishonour, to the payee, and defendant received the money. The other creditors were paid according to the deed. It was holden,(d) that the plaintiff could not recover back the amount paid to the defendant above eight shillings in the pound; for that the transaction had been closed by a voluntary payment with full knowledge of the facts, and ought not to be reopened; and that it did not make any difference, that the sum in question had not been recovered by action. But it is otherwise, where the money has been obtained by fraudulent extortion,(e) or paid under protest.

The trustees, under a marriage settlement of stock, the dividends of

(b) *Marriott v. Hampton*, 7 T. R. 269, recognized by *Park*, J., in *Reynolds v. Webb*, 4 Bingh. N. C. 700, cited by *Denman*, C. J., in *Wilson v. Ray*, 10 A. & E. 88; 2 P. & D. 253. See also *Belcher v. Mills*, 2 Cr. M. & R. 150.

(c) In *Milnes v. Duncan*, 6 B. & C. 679, recognized in *Hamlet v. Richardson*, 9 Bingh. 647.

(d) *Wilson v. Ray*, 10 A. & E. 82; 2 P. & D. 253.

(e) *Duke de Cadaval v. Collins*, 4 A. & E. 858; 6 Nev. & M. 324; *Payne v. Chapman*, 4 A. & E. 364.

(1) See *Cobb v. Curtis*, 8 Johns. R. 470; *White v. Ward*, 9 Id. 232.

(2) *Tilton v. Gordon*, 1 N. H. 33; *Loring v. Mansfield*, 17 Mass. Rep. 394. But see *Whitcomb v. Williams*, 4 Pick. 228.

which they convenanted to permit the bankrupt to receive for his life, executed, after his bankruptcy, a power of attorney to A. to receive the same. A. received the dividends, and paid them over to the wife of the bankrupt, save one sum, which he paid to one of the trustees; held, (f) that the assignees might recover the total amount of such dividends from the trustees, in an action for money had and received, inasmuch as the whole of the money had been virtually received by the trustees after full notice of the bankruptcy.

A. having received a sum of money bequeathed by will to his wife, gave it to her to take care of. The wife, without his knowledge, deposited it in a bank, in the name of her son by a former marriage, who was then an infant, and took from the bankers an accountable receipt in her son's name, bearing interest: It was holden, (g) that the bankers were liable to A. for the amount in an action for money had and received.

Where a party pays money to another voluntarily, with full knowledge of all the facts of the case, (1) the party so paying cannot recover it on account of his ignorance of the law. (2) [*84] Where an underwriter of a policy of insurance upon a ship, having paid the amount of the insurance, (h) as for a loss by capture, sought to recover it, on the ground that the assured had not, at the time of effecting the insurance, disclosed to the underwriter a material letter respecting the time at which the ship sailed; but, it being proved, that, before the loss on the policy was adjusted, all the papers, including the letter in question, had been laid before the underwriter, it was holden, that he could not recover; for every man must be taken to be cognizant of the law. (3)

(f) *Allen, Assignee of Prior, v. Impett and another*, 8 Taunt. 263.

(g) *Calland v. Loyd*, 6 M. & W. 26.

(h) *Bilbie v. Lumley*, 2 East's R. 469, recognized by *Lawrence, J.*, in *Lothian v. Henderson*, D. P. 3 Bos. & Pul. 520. See also *Gomery v. Bond*, 3 M. & S. 378. But see *Bell v. Gardiner*, *post*, 85.

(1) "Where a payment has been made, not with full knowledge of the facts, but only under a blind suspicion of the case, and it is found to have been paid unjustly, the party paying may recover it back again." Per *Ashhurst, J.*, in *Chatfield v. Paxton*, 2 East's R. 471, n. See *Milnes v. Duncan*, 6 B. & C. 671, and *post*, 85; and see *Wakefield v. Newbon*, 13 Law J., (N. S.) Q. B. 260. See *Waite v. Leggett*, 8 Cowen, 195, and *Clarke v. Dutcher*, 9 Id. 674, in which case the question was fully considered, and the authorities reviewed by *Sutherland, J.*

(2) He may if it be the law of another state, for that is an ignorance of fact. *Haven v. Foster*, 9 Pick. 112; *Newton v. Marden*, 3 Shep. 45.

(3) The defendant being tenant to the plaintiff of certain rooms at the yearly rent of twenty guineas, the plaintiff, at the expiration of the year, insisted on being paid twenty-five guineas, and threatened to distrain if it was not paid. The defendant, in consequence of the threat, paid the larger sum, and an action having been brought by the plaintiff against the defendant for another demand, the defendant insisted on setting off the five guineas which he had paid under the threat of distress, as having been paid by compulsion, and in his own wrong. But Lord *Kenyon, C. J.*, was of opinion, that this could not be deemed a payment by compulsion, as the defendant might, by a replevin, have defended himself against the distress. *Knibbs v. Hall*, 1 Esp. N. P. C. 84, cited by *Lawrence, J.*, in *Lothian v. Henderson*, 3 Bos. & Pul. 520, and recognized by *Denman, C. J.*, delivering judgment of court in *Skeate v. Beale*, 3 P. & D. 601; 11 A. & E. 991. So where a party, sued on a claim which he knows to be unfounded, pays it; although at the time of payment he protests against it, and declares his intention to bring an action to recover

The same doctrine was laid down in *Brisbane v. Dacres*, 5 Taunt. 143, with this limitation only, that the retaining the money be not against the conscience of the party to whom it is paid. And the rule holds equally where money has been allowed⁽ⁱ⁾ in account, as where it has been actually paid. The same principle was recognized in the following case. The drawer of a bill of exchange, with full [*85] *knowledge of time having been given to the acceptor, upon a supposition that he (the drawer) remained liable, three months after the bill became due, promised the holder that he would pay the bill, if the acceptor did not; it was holden,^(j) that the drawer was bound by this promise, and could not avail himself of his ignorance of the law at the time when he made the promise. See also *Bramston v. Robins*, 4 Bingh. 15, where the authority of *Brisbane v. Dacres* was recognized by Best, C. J. But if a person pay money under a mistake of the real facts, and no laches are imputable to him (in respect of his omitting to avail himself of the means of knowledge within his power) he may recover^(k) back such money.⁽¹⁾ And so where a payment

(i) *Skyring v. Greenwood*, 4 B. & C. 281, [recognized in *Bate v. Lawrence*, 8 Scott's N. R. 122.]

(j) *Stevens v. Lynch*, 12 East, 38.

(k) *Milnes v. Duncan*, 6 B. & C. 671.

back the money so paid, yet no action will lie; for he ought to have defended the action brought against him. *Brown v. McKinnally*, 1 Esp. N. P. C. 279, Lord Kenyon, C. J. See also *Cartwright v. Rowley*, 2 Esp. N. P. C. 723. It was agreed between A. and B., that A. for a certain commission should ship a cargo of wheat of a specific quality at a foreign port, for B. in England. The wheat, upon its arrival, having been found to be of an inferior quality, B. brought an action against A. for a breach of the agreement, and recovered damages. A. afterwards brought an action against B. for the commission; but it was holden, that A. could not recover; Lord Ellenborough, C. J., observing, that the facts which he relied on in this action might have been given in evidence to reduce the damages when he was defendant; and that he considered the account as closed between the parties by the former verdict. *Kist v. Atkinson*, 2 Campb. 63. See *Gower v. Popkin*, 2 Stark. N. P. C. 8.

(1) But where one pays money under a misapprehension of facts as well as law, he may recover it back. See *Mowatt v. Wright*, 1 Wend. 355, where the subject was examined by Ch. J. Savage, and the rule stated to be, that where there was no fraud nor mistake of fact, mere mistake of the law is not sufficient. *Brown v. Williams*, 4 Wend. 360. As where an indorser of a promissory note, ignorant that a demand had not been duly made on the maker, nor due notice given to himself, paid the amount to a bank for the holder, it was holden, that he might recover it of the bank, they having had notice of the mistake, and not to pay it over. *Garland v. The President &c. of the Salem Bank*, 9 Mass. Rep. 408.

So, where one of several owners of a vessel and cargo insured the same in his own name only, and a loss accrued, which an underwriter had paid; and it, afterwards appeared that the assured had covered more than his own part of the property at risk, previously to such underwriter's signing the policy; the underwriter recovered back the money he had paid, although it appeared, that the assured intended the insurance as well for his partners as himself, and that the partners had usually insured in the name of one, when intending to insure for all. *Pearson v. Lord*, 6 Mass. Rep. 81.

But it is incumbent on an assurer to make out a clear case of mistake, if he seeks to recover back a loss paid on a policy. *Elting v. Scott*, 2 Johns. Rep. 157.

Two persons go to a bank at the same time, and one deposits money there, which the other claims as his own, and has carried to his account, but without the knowledge of the person depositing it, who does nothing to countenance the mistake; an action lies for its recovery, by the real owner of the money, against the bank. *Winter v. Bank of New York*, 2 Caines' Rep. 337.

Where money is paid by the plaintiff to the defendant by mistake, notice of the mistake and demand of repayment before bringing suit to recover it back are not necessary;

is made under a forgetfulness of facts which the party making it once knew, and in the hurry of business, it may be recovered back in an action for money had and received.^(l) And it is not sufficient to prevent a party from recovering money paid by him under a mistake of fact, that he had the *means* of knowledge of the fact; unless he paid it intentionally, not choosing to investigate the fact.^(m)

Money due in point of honour or conscience, though a person is not compellable to pay it, yet, if paid, shall not be recovered.⁽ⁿ⁾

4. Where money has been paid without consideration, or on a consideration which fails, an action for money had and received will lie for the recovery of it.⁽¹⁾ The plaintiff had insured several numbers in the lottery,^(o) at the office of the defendant, for which he had paid in premiums a considerable sum of money. The defendant having refused to pay the sums insured upon some of the chances which had terminated in favour of the plaintiff, he brought an action for money had and received against the defendant, in order to recover the premiums; it was holden, that the action would well lie, although it was objected, that the contract was illegal by stat. 14 Geo. III. c. 76,^(p) and the plaintiff *particeps criminis*; *Blackstone*, J., observing, that on the part of the insured, the contract on which he had paid his money was not criminal, but merely void, *and therefore having advanced his money*

^(l) *Lucas v. Worswick*, 1 M. & Rob. 297.

^(m) *Kelly v. Solari*, 9 M. & W. 54, recognized in *Bell v. Gardiner*, 4 M. & Gr. 11; 4 Scott, N. R. 621.

⁽ⁿ⁾ *Farmer v. Arundel*, 2 Bl. R. 824.

^(o) *Jaques v. Golightly*, 2 Bl. R. 1073.

^(p) See the remark of *Ld. Ellenborough* on this case, in *Thistlewood v. Craycroft*, 1 M. & S. 502.

for the party receiving money paid under a mistake of facts is not a bailee or trustee, nor does his duty to return it arise upon request. If notice and demand were necessary, putting a letter containing such notice and demand, directed to the defendant, into the post office is sufficient. *Utica Bank v. Van Geison*, 18 Johns. Rep. 485.

Money paid under a mistake or ignorance of the law, but with a knowledge of the facts, or with the means of such knowledge, cannot be recovered back. *Elliott v. Swartwout*, 10 Pet. 137; *Mowatt v. Wright*, 1 Wend. 355; *Clark v. Dutcher*, 9 Cow. 674; *Hubbard v. Matin*, 8 Yerg. 498; *Jones v. Watkins*, 1 Stew. 81; *Dickens v. Jones*, 6 Yerg. 483; *Elling v. Scott*, 2 Johns. 157; *Ladd v. Kenney*, 2 N. Hamp. 341; *Lee v. Stuart*, 2 Leigh, 76; *Mayor, &c. v. Judah*, 5 Leigh, 305; *Bean v. Jones*, 8 N. Hamp. 149; *Filgo v. Penny*, 2 Murph. 182; *Norton v. Marden*, 3 Shep. 45; *Trustees, &c. v. Keller*, 1 Ala. 406; *Esby v. Allison*, 9 Watts, 462. But where money has by mistake, in a matter of fact, been paid to a wrong person, it may be recovered back in an action for money had and received. *Bank of Louisiana v. Ballard*, 7 How. Miss. 371; *Norton v. Marden*, 3 Shep. 45; *Pearson v. Lord*, 6 Mass. 84; *Bond v. Hays*, 12 Id. 36; *Lazelle v. Miller*, 15 Id. 208; *Mowatt v. Wright*, 1 Wend. 355; *Burr v. Veeder*, 3 Id. 412; *Dickens v. Jones*, 6 Yerg. 483.

To deprive a party of his action for money voluntarily paid when it was not due, it must appear that it was paid with a full knowledge that it ought not to be paid. *Waite v. Legget*, 8 Cow. 195. So money paid under a mutual mistake of facts between the parties, there being no fraud and no beneficial interest obtained, may be recovered back. *Norton v. Marden*, 3 Shep. 45. Or money paid as damages on a protested bill of exchange, without a legal liability, if paid with a full knowledge of the facts, cannot be recovered back. *Commercial Bank v. Reed*, 11 Ohio, 498. So it has been held that the payee of a check is not responsible to the bank for the amount of it, paid to him without fraud on his part, although the payment was made to him under a mistake, the bank supposing that it had funds of the drawer when in fact it had not. *Hull v. Bank of the State*, Dudley, S. C. 259.

⁽¹⁾ See *Spring v. Coffin*, 10 Mass. Rep. 31; *Rice v. Peet*, 15 Johns Rep. 503; *Murphy v. Barron*, 1 Har. & Gill, 258.

without any consideration, he was entitled to recover it back. See *Jaques v. Withy*, 1 H. Bl. 65; *S. P. Clarke v. Shee*, Cowp. 197, and *post*, under the sixth rule, p. 90.

Plaintiff, a stockbroker, sold for defendant four Guatemala bonds and paid him the amount; the bonds, after they had been in the hands of the purchaser two days, were discovered to be not marketable; [*86] whereupon plaintiff took them back and reimbursed *the purchaser. The defendant upon being applied to, answered, that he was agent only as to part of the bonds, but that if the payment had been made for his own part, he would desire his clerk to reimburse the plaintiff. At the trial the defendant did not show all the bonds were not his. It was holden, (q) that plaintiff was entitled to recover from defendant, in an action for money had and received, the amount he had paid to defendant.

The deeds for securing an annuity were set aside for an informality in registering the memorial; (r) it was holden, that money paid to the grantor, as the consideration of the annuity, might be recovered in an action for money had and received. So where a deed, a bond, and warrant of attorney (upon which judgment had been entered) (s) had been given for securing an annuity, and on the application of the grantor to the Court of King's Bench, the judgment was set aside, and the warrant of attorney directed to be delivered up to be cancelled, because the latter instrument was improperly described in the memorial, but no order was made as to the deed or bond, which remained uncanceled; it was holden, that the grantee might recover the consideration in an action for money had and received, on the ground that he had contracted for one entire assurance, consisting of several securities, and that he had a right to have the assurance entire, or to have back his money; and the defendant having taken away one of the securities, the consideration for the money had failed. In cases of this kind, (t) the action for money had and received will not lie against a mere surety, who has not actually received any part of the consideration, although he has joined with the grantor in signing a receipt for it. A receipt is not a discharge of an action, nor is it pleadable in bar; it is only a *prima facie* acknowledgment that money has been paid. Hence, in assumpsit by two co-trustees for money had and received to their use, where the defendant produced a receipt for the money given by one of the plaintiffs, it was holden, (u) that this was not conclusive, and that evidence was properly admitted to show that the giving the receipt was a fraudulent transaction, and that the money had not been paid. (1)

A receipt, (v) is an *admission* only, and the general rule is that an admission, though evidence against the person who made it and those

(q) *Young v. Cole*, 3 Bing. N. C. 724.

(s) *Scurfield v. Gowland*, 6 East, 241.

(u) *Skaike and another v. Jackson*, 3 B. & C. 421.

(v) *Graves v. Key*, 3 B. & Ad. 318, n. See also *Farrar v. Hutchinson*, 9 A. & E. 641.

(r) *Shove v. Webb*, 1 T. R. 732.

(t) *Straton v. Rastall*, 2 T. R. 366.

(1) Where a feme covert made a deed of land which she had no power to make, and which was void; it was holden that this action could be maintained to recover back the consideration money. *Shearer v. Fowler*, 7 Mass. Rep. 31

claiming under him, is not *conclusive* evidence, except as to the person who may have been induced by it to alter his condition. A receipt may, therefore, be contradicted or explained, and there is no case in which a receipt upon a negotiable instrument has been considered to be an exception to the general rule; on the *contrary, [*87] Lord *Kenyon*(*w*) was of opinion that a receipt on the back of a bill might be explained by parol evidence, and shown to be a receipt from the drawer and not from the acceptor.(1)

A lease was sold to the plaintiff by defendant as administrator,(*x*) without any regular assignment or other conveyance; but, at the time of sale, the defendant said, that the premises were his property, to do as he liked with, and if any thing happened, he would see the plaintiff righted. Afterwards the defendant's letters of administration were repealed, and the plaintiff was turned out of possession by a recovery in ejectment at the suit of the new administrator: whereupon the plaintiff brought an action for money had and received against the defendant, to recover the consideration paid for the lease; and it was holden, that it would well lie: Lord *Kenyon*, C. J., observing, that he did not wish to disturb the rule of *caveat emptor*, adopted in *Bree v. Holbeach*,(*y*) and in other cases, where a regular conveyance was made, to which other covenants were not to be added; for in general the seller covenanted for his own acts, and for those of his ancestors only, in which respect the case of a mortgage differed from it, as a mortgagor covenanted, that at all events he has a good title; but here the whole passed by parol, and it proceeded on a misapprehension by both parties, that the defendant was the legal administrator of the lessee, though it turned out afterwards that he was not. As, therefore, *the money was paid under a mistake*, he thought that an action for money had and received would lie to recover it back; in the case cited (*Bree v. Holbeach*) no action at all could have been maintained.(2) So where

(*w*) *Scholey v. Walsby*, Peake's N. P. C. 24.

(*x*) *Cripps v. Reade*, 6 T. R. 606.

(*y*) *Doug.* 654.

(1) Such circumstances as would set aside a contract in equity, avoid a receipt at law. *Fuller v. Crittenden*, 9 Conn. 401; 1 Greenl. on Evid. § 212, 305.

(2) But after an agreement for the conveyance of land has been executed by payment of the consideration, and delivery of the deed in which the number of acres is expressed, if the vendee should find a deficiency in the quantity, he cannot bring an action for money had and received, to recover a proportional part of the consideration money; his relief, if any where, is in equity. *Howes v. Barker*, 3 Johns. Rep. 506.

This action lies to recover back money paid on a contract which has been rescinded. *Gillet v. Maynard*, 5 Johns. Rep. 85; *Davis v. Marston and Trustee*, 5 Mass. Rep. 199; *Kimball v. Cunningham*, 4 Mass. Rep. 502; *Raymond v. Bernard*, 12 Johns. Rep. 274; *Wheeler v. Board*, 12 Johns. Rep. 363; *Smith v. Ware*, 13 Johns. Rep. 257; *Hill v. Green*, 4 Pick. 114; Vid. also *Buck v. Waddle*, 1 Ohio 170; *Alcorn v. Harmonson*, 2 Blackf. 235. But see *Frost v. Clarkson*, 7 Cowen, 24. And it makes no difference although the contract be under seal; *Weaver v. Bently*, 1 Caines' Rep. 47; *Byers v. Bostwick*, 2 Rep. Con. Ct. 75; *Anderson v. Solomon*, Ib. 329; *Boyd v. Anderson*, 1 Tenn. Rep. 438. But it does not lie to recover money ordered to be restored on the reversal of the judgment of an inferior Court; though it seems that if there were a reversal without an order of restitution, the action might be maintained. *Duncan v. Kirkpatrick*, 13 S. & R. 292. And such has been the determination in Maryland, 1 Har. & John. 405, and in New York, 6 Cowen, 297. It lies for costs paid by defendant in error, on reversal and subsequent judgment in his favor. *Hamilton v. Aslin*, 3 Watts, 222. See also *Sturges v. Allen*, 10 Wend. 354; and *Ante*, p. 82, note 1.

defendant, who was in possession of the premises, of which he had been tenant under a lease from a tenant for life, then dead, sold to the plaintiff the lease, pretending that it was a good lease for seven years, and shortly afterwards the plaintiff was ejected, it was holden, by *Lawrence, J.*, on the authority of *Cripps v. Reade*, that the plaintiff might recover the consideration paid for the lease in an action for money had and received. *Matthews v. Hollings*, Salop Summer Assizes, 1801; Woodfall's Landlord and Tenant, 4th edit. by Wollaston, 649, n. See *Johnson v. Johnson*, 3 B. & P. 162. Where money is paid, and the thing contracted for is not delivered, it is money had and received to the use of the party who has paid it. *Anon. per King, C. J.*, Str. 407. A. paid B. a sum of money for a bill of exchange on a banker, who broke before it could be tendered; it was holden that A. might recover back the money in an action for money had and received. Bull. N. P. 131. But where a plaintiff has received benefit from a thing which he has purchased, *e. g.* a patent for an invention, [*88] although the patent should turn out to *be void, the plaintiff cannot recover the consideration originally paid.(y)(1)

5. If an undue advantage be taken of a person's situation,(2) and money obtained from him by compulsion, such money may be recovered,(z) in an action for money had and received. The plaintiff having in the month of August pawned some goods with the defendant for 20*l.*,(a) without making any agreement for interest, went in the October following to redeem them, when the defendant insisted on having 10*l.* as interest for the 20*l.*, the plaintiff tendering(b) him the 20*l.* and 4*l.* for interest, knowing the same to be more than the legal interest amounted to; the defendant still insisted on having 10*l.* as interest, whereupon the plaintiff, finding that he could not otherwise get his goods back, paid the defendant the sum which he demanded, and brought an action for the surplus beyond the legal interest, as money had and received to his use; the court held, that the action would well lie, for it was a payment *by compulsion*,(3) and the plaintiff might have

(y) *Taylor v. Hare*, 1 N. R. 260.

(z) Cited by *Coleridge, J.*, in *Duke de Cadaval v. Collins*, 4 A. & E. 867.

(a) *Astley v. Reynolds*, Str. 915; and see *Scarfe v. Hallifax*, 7 M. & W. 288; *Ashmole v. Wainwright*, 2 Q. B. 837; 2 G. & D. 217.

(b) See *Fitzroy v. Gwillim*, 1 T. R. 153, as to the necessity of a tender of the money really advanced. But see 10 B. & C. 684, where the authority of this case was doubted. See also *Tregoning v. Attenborough*, 7 Bingh. 97, where *Tindal, C. J.*, said the case of *Fitzroy v. Gwillim* can scarcely be supported in point of law, because under the statute of Anne every contract for more than 5*l.* per cent. interest is absolutely void. See also *Hargreaves v. Hutchinson*, 2 A. & E. 13.

(1) An *invention* is a fair subject of sale; and, if sold in good faith, no matter how worthless it may be, the price may be recovered. Whether it be an *invention* or not is for the jury. *Marshall v. Peck*, 1 Dana, 615.

(2) No degree of physical or mental imbecility is of itself sufficient to avoid a contract, unless it deprives the party of legal competency. *Farnam v. Brooks*, 9 Pick. 212. See 1 Parsons on Cont. 310, 326.

(3) "For nothing having been said at the time when the money was lent, as to the quantum of interest which should be paid for the loan of it, the law must determine that matter; and the broker having possessed himself of the pawn, upon the implied contract to restore it upon the principal and legal interest being tendered, the increase of the demand beyond what he must be supposed to have contracted for, and what

had such an immediate want of his goods that an action of trover would not have answered his purpose, and the rule *volenti non fit injuria* holds only where the party has a freedom of exercising his will.(1) The principle, that money extorted by duress of the plaintiff's goods, and paid by the plaintiff under protest, may be recovered in an action for money had and received, is well established and generally recognized.(c) It has been holden, that an agreement is not void on the ground of having been made under duress of goods; and that there is not *any distinction in this respect between a deed [*89] and an agreement not under seal.(d)

6. Where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another, if money is paid upon such contracts by the one, who from their situation and condition are liable to be oppressed and imposed upon by the other, the party paying is not considered as standing *in pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract. A creditor(e) refused to sign the certificate of a bankrupt, unless a sum of money was given him by a friend of the bankrupt. The friend gave the money, and the creditor in consequence signed the certificate. It was holden, that this money might be recovered in an action for money had and received,(2) for the party, who insisted on payment, was acting with extortion, and oppressively, and in the teeth of that which he had agreed to accept. See *Bayley, J.*, in *Smith v. Cuff*, 6 M. & S. 165, 6.

In the preceding case, and in *Lowry v. Bourdieu*, Doug. 471, Lord

(c) Per Lord Denman, C. J., in *Wakefield v. Newbon*, 13 Law J. (N. S.) Q. B. 260, citing *Parker v. The Great Western Railway Company*, 13 Law J. (N. S.) C. P. 105.

(d) *Skeate v. Beale*, 3 P. & D. 597; 11 A. & E. 983.

(e) *Smith v. Bromley*, Doug. 696, n., and Bull. N. P. 133. See an application of the principle of this case, by Buller, J., in *Nerot v. Wallace*, 3 T. R. 25.

the law prescribes, is a fraud; and upon the detention of the pledge until such demand is satisfied, is a force, which might well induce the plaintiff to pay his money, and make such payment involuntary." Arg. MSS.

(1) A., a stockholder in an insurance company, assigned his stock to the plaintiff, who paid several instalments on it, but the company refused to transfer the stock unless the plaintiff would pay them the amount of certain notes made by A., of which they were the holders, and which were not yet due; A. being insolvent, the plaintiff had no other way of indemnifying himself, but by procuring a transfer, and, accordingly, paid the money; it was holden that this payment was compulsory, and that the plaintiff might recover the money back. *Bates v. New York Insurance Company*, 3 Johns. Cas. 238.

Where a collector of the customs wrongfully demanded tonnage duty, and compelled the plaintiffs to pay it in order to obtain a clearance for their vessel, and afterwards paid it over to the United States; it was holden that he was liable for it to the plaintiffs, although he had never received notice from them not to pay it over. *Ripley v. Gelston*, 9 Johns. Rep. 201. S. P. *Frye v. Lockwood*, 4 Cowen, 454.

So where the Clerk of the District Court of the United States wrongfully exacted costs as a condition of his granting an order, which it was his duty to grant, this action was sustained to recover them back. *Clinton v. Strong*, 9 Johns. Rep. 370.

(2) The plaintiff first brought his action against the agent who transacted the business for the creditor, and had in fact received the money; but as it appeared that the agent had actually paid over, or accounted for, the money to his principal, Lord Mansfield, C. J., was of opinion, that the action would not lie against the agent, and the plaintiff was nonsuited. Doug. 696, n. See further, on the subject of payment to agents, *post*, p. 102, and notes there added.

Mansfield, C. J., expressed an opinion, that the same principle applied to cases upon usurious contracts, where the debtor might recover from the creditor all beyond legal interest, in an action for money had and received, because the parties did not stand *in pari delicto*, and denied the authority of *Tomkins v. Barnet*, Skinn. 411, and Salk. 22, where a contrary opinion had been holden at Nisi Prius by *Holt*, C. J., according to Skinner's, and by *Treby*, C. J., according to Salkeld's Report.

The same principle was recognized in the following case: An action for money had and received was brought to recover a sum of money, as having been unduly obtained by the defendant from the plaintiff, (f) under an agreement to compromise a qui tam action for penalties of usury, (which had been brought by the defendant against the plaintiff,) on the ground of certain usurious transactions, which had taken place between the plaintiff, Williams, and one Eagleton. The sum sought to

be recovered was the amount of the debt which had been owing [*90] from Eagleton to Hedley and his *partner; and the jury, to whom the question was left at the trial, found that the payment of this debt of Eagleton by the plaintiff to the defendant, was obtained from the plaintiff under the terror of the above-mentioned action of usury brought by the defendant, and then depending against him, and through the means of an agreement between the parties to compromise that action; and the plaintiff thereupon recovered a verdict against the defendant for the amount of the money he had so obtained from him. Upon the authority of *Smith v. Bromley* and *Jaques v. Golightly*, as applied to the preceding facts, and founding themselves upon the distinction taken and relied upon in those cases, in favour of the party for whose benefit the provisions of the law, which had been violated, were peculiarly made, and of whose situation advantage had been unduly taken, the court were of opinion, that this action was, under the circumstances of this case, maintainable.(1)

The cases of *Shove v. Webb*, 1 T. R. 732, and *Scurfield v. Gowland*, 6 East, 241, (on the Annuity Act,) furnish a further illustration of the same principle. See also *Clarke v. Shee*, Cowp. 197, (g) where a clerk of the plaintiff had received money, and negotiable notes, from the plaintiff's customers, and paid them over to the defendant as premiums for illegal insurances in the lottery, it was holden, that the plaintiff, upon identifying the property, might recover it in an action for money had and received; for the plaintiff was not *particeps criminis*, and the money had come to the defendant's hands iniquitously and illegally in breach of the statute.(2)

(f) *Williams v. Hedley*, 8 East, 378. See *Wood v. Grimwood*, 10 B. & C. 686.

(g) See *ante*, p. 85, *Jaques v. Golightly*, 2 Bl. R. 1073, and *Jacques v. Withy*, 1 H. Bl. 65.

(1) *The Inhabitants of Worcester v. Eaton*, 11 Mass. Rep. 368. *Bond v. Hays' Exr.*, 12 Mass. Rep. 34.

(2) In *Mason v. Waite*, 17 Mass. Rep. 560, it was held, that where a carrier who had been intrusted with bank notes belonging to the plaintiff, paid them to the defendant, having lost the amount to him at a gaming table, the plaintiff might maintain this action to recover the amount. See *Best v. Strong*, 2 Wend. 319.

One who has voluntarily offered to pay a sum of money for the use of the poor of the parish,^(h) in order to avoid a prosecution by a magistrate upon a charge of having instigated the escape of a prisoner in custody for a misdemeanor, which offer was consented to by the magistrate, and the money accordingly paid by the party to the master of the workhouse, for the use of the poor, may countermand the application of the money before it is so applied, and may recover it back in an action for money had and received.

Where defendant, being a creditor of plaintiff, entered into a composition deed with the other creditors to receive 10s. in the pound, under an agreement with the plaintiff, that he, plaintiff, would give defendant his promissory notes for the remainder of the debt, which notes were accordingly given, and the composition was paid to defendant, and he negotiated the notes, the holder of one of which enforced payment from plaintiff by action; it was holden,⁽ⁱ⁾ that plaintiff might recover back the amount from defendant in an action for money had and received; for this was *not a case of *par delictum*, but of oppression on one side and submission on the other; and this might be considered as money paid to the order of the defendant, or, in other words, money had and received by him through the medium of the person to whom, by his order, it was paid.

7. Where money has been paid by one of two parties to an illegal contract to a third person, for the use of the other party, an action for money had and received will lie against such third person to recover it. As, where money was paid by an underwriter to a broker for the use of the assured on an illegal contract of insurance,^(k) it was holden, that the assured might recover the money from the broker, on the ground that the broker could not insist on the illegality of the contract as a defence, the obligation on him arising out of the fact of the money having been received by him to the use of the plaintiff, which created a promise in law to pay.⁽¹⁾ *Farmer v. Russell*, 1 Bos. & Pul. 296, S. P., in which case, *Buller, J.*, said, that the knowledge and participation of the defendant in the illegal contract could not make any difference in an action for money had and received, which was not founded on the illegal contract, but on a ground totally distinct from it. *Heath, J.*, said, the distinction was, that whether the consideration was good or bad, a man might recover his own money, though not that of another person. See further on this point, *M'Gregor v. Lowe*, Ry. & Mo. 57, *Abbott, C. J.* In *Faikney v. Reynous and Richardson*, 4 Burr. 2069, it was holden, that the plaintiff was entitled to recover upon a bond given by the defendants to secure the repayment of a sum of money paid by the plaintiff to a third person on account of the defendants, on a settlement of stock-jobbing differences. The authority

^(h) *Taylor v. Lendey*, 9 East, 49.

⁽ⁱ⁾ *Smith v. Cuff*, 6 M. & S. 160; *Turner v. Hoole*, Dow. & Ry. N. P. C. 27, S. P.; both relied on in *Alsager v. Spalding*, 4 Bingh. N. C. 410; and *Horton v. Riley*, 11 M. & W. 492. But see *Wilson v. Ray*, 10 A. & E. 87.

^(k) *Tenant v. Elliot*, 1 Bos. & Pull. 3.

(1) See *Anderson v. Moncrief*, 3 Dessaus. 132. *Bowen v. Doggitt*, 2 Nott & M'C. 127.

of this decision, however, was doubted in *Aubert v. Maze*, 2 Bos. & Pul. 371; and in *Cannan v. Bryce*, 3 B. & A. 179, it was holden, that money lent for the express purpose of settling losses on illegal stock-jobbing transactions, and so applied by the borrower, could not be recovered back, although the lender was no party to the stock-jobbing. *Cannan v. Bryce* was recognized in *M'Kinnell v. Robinson*, 3 M. & W. 441: and in *The Gas Light and Coke Company v. Turner*, 5 Bingh. N. C. 667; 6 Bingh. N. C. 324, on error. "In the case of *M'Kinnell v. Robinson*, it was held, and I think properly held, that money lent to play an illegal game could not be recovered. This was decided on the principle that money lent for the purpose of enabling the party to do an illegal act, and this with the knowledge of the lender, could not be made the foundation of an action." Per Lord Lyndhurst, C., in *Quarrier v. Colston*, 1 Phill. 151.

Where the money does not appear to have been actually paid into the hands of the defendant,⁽¹⁾ but only an account stated between [*92] him and the other party to the illegal contract, in which *the defendant has given credit to such party for the money, the court will not sustain the plaintiff's demand; for by so doing they would compel the execution of an illegal contract, as if it were a legal one.⁽¹⁾

8. Where money is paid by one of two parties to an illegal contract *to the other*,⁽²⁾ in a case where both parties may be considered as *participes criminis*, an action cannot be maintained, after the contract is executed, to recover the money;⁽³⁾ for *in pari delicto est conditio defendantis*.⁽⁴⁾

(1) *Edgar v. Fowler*, 3 East, 222.

(1) Lord *Ellenborough*, C. J., observed, that in cases of illegal transactions, the money may always be stopped while it is *in transitu* to the person who is entitled to receive it.

(2) This rule is confined to the case of money paid by one of the parties *to the other*, as will appear from the 7th rule, and from the decision of *Cotton v. Thurland*, 5 T. R. 405. That was an action for money had and received, to recover a sum of money which had been deposited by the plaintiff, as his share of a stake, in the defendant's hands, upon the event of a boxing-match between the plaintiff and another person. The court were of opinion that the action would well lie: Lord *Kenyon*, C. J., observing, that the action was brought *not against one of the parties laying the wager*, but a stake-holder. "If the defendant had paid his money over to the winner, *perhaps* he would not have been answerable in this action; but here the money is still in the defendant's hands, and therefore I think the plaintiff may recover it from him." *Grose*, J., concurred in opinion with Lord *Kenyon*, relying on the case of *Wilkinson v. Kitchen*, Lord Raym. 89. See further on this point, *Smith v. Bickmore*, 4 Taunt. 474, recognizing and adopting *Cotton v. Thurland*. *Tenant v. Elliot*, 1 Bos. & Pul. 3, and *Farmer v. Russell*, 1 Bos. & Pul. 296, establishing the same doctrine, that money received by a third person, not a party to the illegal contract, *may* be recovered before it is paid over. But it is now a settled rule, that when a wager has been laid on the event of a boxing-match, either party may recover his own stake from the holder, even where the money has been paid over before action brought, if it has been paid over without authority from the party, and in opposition to his desire. *Hastelow v. Jackson*, 8 B. & C. 221; recognized by *Bayley*, B., in *Hodson v. Terrill*, 1 Cr. & M. 804; 3 Tyr. 936. See *Marryat v. Broderick*, 2 M. & W. 369; *Goldsmith v. Martin*, 4 M. & Gr. 5; 4 Scott, N. R. 620.

(3) Where a man is cheated out of his money, though it is in playing at a game forbidden by law, he may recover back what he has paid from the person who practised the fraud upon him. *Webb v. Fulchire*, 3 Iredell, 485. But money paid on an illegal contract,

(4) See note (4), next page.

There is a sound distinction between contracts *executed [*93] and executory; and if an action is brought to rescind a contract, you must do it while the contract remains executory. Per *Buller, J.*, in *Lowry v. Bourdieu*, Doug. 468. *Heath, J.*, in *Tappenden v. Randall*, 2 Bos. & Pul. 471, speaking of the preceding observation of *Buller, J.*, said, that it seemed to him that the distinction between contracts executory and executed, if taken with those modifications which Mr. J. *Buller* would necessarily have applied to it, was a sound distinction; that undoubtedly there might be cases where the contract might be of a nature too grossly immoral for the court to enter into any discussion of it, as where one man has paid money by way of hire to another to murder a third person; but where nothing of that kind occurred, he thought there ought to be a *locus pœnitentiæ*, and that a party should not be compelled against his will to adhere to the contract. *Rooke, J.*, in the same case, 2 Bos. & Pul. 471, said, that he wished it to be understood, that he fully acceded to the doctrine laid down by Mr. J. *Buller* respecting contracts executory and executed. "In *Tappenden v. Randall*, the court considered the distinction between contracts executed and executory as established; the judges all make that distinction; it is not called in aid; it is the ground of their judgment." Per Sir J. *Mansfield*, C. J., in *Aubert v. Walsh*, 3 Taunt. 281. Agreeably to this distinction was the case of *Walker v. Chapman* (stated by *Buller, J.*, in *Lowry v. Bourdieu*, Doug. 471.) A sum of money had been paid in order to procure a place in the customs; the place had not been procured, and the party who had paid the money having brought an action to recover it back, it was holden that he should recover; because the contract remained executory. See also *Wilkinson v. Kitchen*,

the party paying being in *pari delicto*, cannot be recovered back. *Spalding v. Bank of Muskingum*, 12 Ohio, 544. Money fairly paid over to the winner, in case of an illegal and void wager, cannot be recovered back. *Perkins v. Eaton*, 3 N. Hamp. 152; *Rust v. Gott*, 9 Cow. 169; *McCullum v. Gourlay*, 8 Johns. 147; *Livingston v. Wootan*, 1 N. & M. 178. *Aliter*, if the money be in the hands of a stake-holder, though the wager be lost. *Vischer v. Yates*, 11 Johns. 23; *Perkins v. Hyde*, 6 Yerg. 228, 3 N. Hamp. 152. *Contra*, *Yates v. Foot*, 12 Johns. 1. Where money or other property has been paid on a contract which is illegal, and where the parties are in *pari delicto*, it cannot be recovered back. *Greenwood v. Curtis*, 6 Mass. 381; *Barnard v. Crane*, 1 Tyler, 457; *Burt v. Place*, 6 Cow. 431; *Pearson v. Lord*, 6 Mass. 84; *Babcock v. Thompson*, 3 Pick. 446.

(4) It must be admitted the case of *Lacause v. White*, 7 T. R. 535, militates against this position. There, money paid on an illegal wager was recovered, after the event upon which the wager proceeded had terminated against the plaintiff, the Court holding it more consonant to sound policy to permit money paid on an illegal consideration to be recovered by the party paying it, than by denying the remedy to give effect to the illegal contract. But *Le Blanc, J.*, in *Vandyck v. Hewitt*, 1 East's R. 98, said that the ground of the determination in *Lacause v. White* had been very much canvassed in *Howson v. Hancock*, 8 T. R. 575. And *Lawrence, J.*, in *Williams v. Hedley*, 8 East, 382, n., appears to have considered *Lacause v. White*, as overruled by *Howson v. Hancock*. And *Mansfield, C. J.*, delivering the opinion of the court in *Aubert v. Walsh*, 3 Taunt. 284, speaks to the same effect. See *Burt v. Place*, 6 Cowen, 431; *Best v. Strong*, 2 Wend. 319; *Hodges v. Pitman*, 2 Car. Law Rep. 394. Where money is advanced upon a contract, which is *malum prohibitum*, merely, it seems that it may be recovered back by an action proceeding upon a disaffirmance of the contract. *Utica Ins. Co. v. Kip*, 8 Cowen, 20; *Perkins v. Strange*, 15 Wend. 412. Where A. furnishes goods to B. to hold as agent for C., and at his request to secure them from B.'s creditors, the fraud is a defence in a suit by A. against C. for goods sold and delivered. *Smith v. Hubbs*, 1 Fairf. 71.

Lord Raym. 89; *Pickard v. Bonner*, Peake's N. P. C. 221; and *Aubert v. Walsh*, 3 Taunt. 277. As to what shall be notice of rescinding the contract, see 4 Taunt. 290. The reader, however, should be apprised, that there is a case in which the circumstances were similar to those in *Walker v. Chapman*, and yet the decision was different. The case alluded to is that of *Norman v. Cole*, C. B. Middx. Sitt. after M. T. 41 Geo. III., 3 Esp. N. P. C. 253. There I. S. being under sentence of death in Newgate, the plaintiff was prevailed upon to lodge a sum of money in the hands of the defendant, to be applied to the purpose of procuring him a pardon. The pardon not having been procured, an action was brought to recover the money; but Lord *Eldon*, C. J., was of opinion, that the action was not maintainable; that where a person interposed his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money; the doing an act of that description should proceed from pure, and not from pecuniary motives.

[*94] *The plaintiff and defendant had laid a wager on the event of a horse-race, (m) prohibited by stat. 13 Geo. II. c. 19, s. 2, (n) and deposited the money in the hands of the defendant; the money was paid over to him, with the consent of the plaintiff, who afterwards brought an action to recover it; but it was holden, that it would not lie; for although the law would not have enforced the payment of it, yet having been paid, it was not against conscience for the defendant to retain it. (1)

The plaintiff and defendant, (o) who were lottery-office keepers, entered into an agreement mutually to insure the number of a ticket with each other, upon condition that he whose number should be drawn on the day next following the agreement, should receive from the other an undrawn ticket, or the value of it; the defendant's number being drawn, he chose the value of it, and received the same from the plaintiff; the agreement having been continued, the plaintiff's number was drawn, but the defendant refused to give the plaintiff either an undrawn ticket or the value, whereupon the plaintiff brought an action for money had and received, to recover the sum which he paid to the defendant on his number being drawn; it was holden, that the action would not lie, because the plaintiff was not only *in pari delicto*, but also stood in the light of that species of insurer, from whom the statute meant to protect the unwary.

(m) *Howson v. Hancock*, 8 T. R. 575.

(n) So much of this act as relates to horse-racing is now repealed, by stat. 3 & 4 Vict. c. 5.

(o) *Browning v. Morris*, Cowp. 792.

(1) If A. agree to give B. money for doing an illegal act, B. cannot (although he do the act) recover the money by an action: yet if the money be paid, A. cannot recover it. *Webb v. Bishop*, Gloucester Lent Assizes, 1731, coram *Reynolds*, Ch. B., Bull. N. P. 16, 132. If plaintiff, who by defendant's authority has laid illegal bets in defendant's name, upon losing, pays them *without an express direction to do so*, he cannot recover the amount from the defendant afterwards. *Clayton v. Dilly*, 4 Taunt. 165. See *Wood v. Wood*, 2 Murph. 172; *Forrest v. Hart*, Ib. 458; *Livingston v. Wootan*, 1 Nott. & M'C. 180; *Whiteside v. Tabb*, Cooke, 387; *Pennington v. Townsend*, 7 Wend. 276; *Perkins v. Savage*, 15 Id. 412.

The plaintiff executed an indenture of apprenticeship, (to which was appended a printed notice for the insertion of the premium, &c., under stat. 5 Geo. III. c. 46, s. 19,) by which she bound her son apprentice to the defendant, and she paid the defendant a premium. The indenture did not contain any statement respecting the premium, and was not stamped; by reason of which omissions the indenture was void. The plaintiff sought to recover the premium, on the ground that the indenture being void, the money was paid without consideration. But it was holden, *(p)* that she could not recover, inasmuch as she had lent assistance to the defendant in giving effect to unlawful purposes for defrauding the revenue.

In like manner, where an assurance was made on a ship, *(q)* *belonging to a British subject, without interest, (which is [*95] illegal by stat. 19 Geo. II. c. 37,) it was holden, that the assured could not recover the premium, after the ship had arrived safe: for the court will not interfere to assist either party, where they are *in pari delicto*. On the same principle it was adjudged, *(r)* that a premium paid by the plaintiff on a re-assurance of a ship, (void by stat. 19 Geo. II. c. 37,) could not be recovered in an action for money had and received after the ship had been captured. In like manner it has been holden, *(s)* that the premium paid on an illegal assurance to cover a trading with the enemy, cannot, after the risk has been run, be recovered back again, although the underwriters could not have been compelled to make good the loss. So where the plaintiff had insured colonial produce *(t)* on a voyage from the West Indies for Gibraltar, and the ship, on board which the goods were laden, was lost by the perils of the seas, it was holden, that the premium could not be recovered; because colonial produce cannot legally be shipped from the British West Indies for Gibraltar, and consequently the insurance was illegal. And, as every person must be taken to be cognizant of the law, the ignorance of the assured, at the time when the assurance was made, that the insurance was illegal, will not avail him. And this rule holds even in cases where the premium is paid by a foreigner, *(u)* although the policy is illegal by the municipal law of this country only, *(x)* and not by the law of the country to which the foreigner belongs; because the rigour of our great political relations ought not to be relaxed in favour of foreigners offending against them, and there is very little reason to presume ignorance of laws peculiarly applicable to the subjects of a foreign state. But where an insurance had been made on goods, at and from a port in Russia to London, by an agent residing here for a Russian subject abroad, which insurance was in fact made after the commencement of hostilities by Russia against this country, but before the knowledge of it here, and after the ship had sailed, and been seized and confiscated, it was holden, that the policy was void in

(p) *Stokes v. Twitchen*, 8 Taunt. 492.

(q) *Lowry v. Bourdieu*, Doug. 467.

(r) *Andree v. Fletcher*, 3 T. R. 266.

(s) *Vandyck v. Hewitt*, 1 East's R. 97.

(t) *Lubbock v. Potts*, 7 East, 449.

(u) *Andree v. Fletcher*, 3 T. R. 266, and *Morck v. Abel*, 3 Bos. & Pul. 35.

(x) Stat. 12 Car. II. c. 18, s. 1, now repealed by 6 Geo. IV. c. 105, which was also repealed by 3 & 4 Will. IV. c. 50. The present Navigation Act is the 3 & 4 Will. IV. c. 54, amended by 4 & 5 Will. IV. c. 89, s. 11.

its inception; but that the agent of the assured was entitled to a return of the premium paid, under ignorance of the fact of such hostilities.^(y) So where a license was obtained and insurance effected from Riga to Hull, on goods the produce of Russia, on board a Swedish ship, but the ship sailed three days before the letter directing the license to be obtained reached the agent, the letter having been delayed by contrary winds beyond the usual time, and the license was obtained two days afterwards, and the insurance effected subsequently to that:

[*96] it was holden,^(z) on the same *principle as in the foregoing case, that though the voyage was in its inception illegal, being contrary to 12 Car. II. c. 18, s. 8, nevertheless the assured might recover back the premium.

9. Where the contract is not *malum in se*, nor prohibited by any positive law, but is of such a nature that it cannot be put in force, merely because it would be inconvenient that the merits of the question should be publicly discussed, in such case, while the contract remains executory, money paid upon it by one of the parties to the other *may* be recovered. A., in consideration of a sum of money paid to him by B.,^(a) gave a bond conditioned for the payment of an annuity to B. until A. should make it appear to the satisfaction of B. that the hop duties should amount to such a sum in any one year. Before the day on which the first payment of the annuity was to have taken place, and before any payment had been made, B. applied to A., stating that he considered the bond to be illegal,⁽¹⁾ and demanded a return of the consideration, which having been refused, B. brought an action against A. for money had and received: it was holden, that it would well lie; *Rooke, J.*, observing, that "there was nothing criminal in this contract, nor had it been executed, nor was this a case where money, which has been paid over by a stake-holder, was sought to be recovered." A party who had contributed to a proposed tontine scheme was, on the abandonment of the project, allowed to recover^(b) his contribution from the director; the scheme not being within the Bubble Act, 6 Geo. I. c. 18.^(c) So where A. had sold shares to B. in a projected joint stock company, wherein nothing was to be done until the sanction of the legislature was obtained; it was holden,^(d) that, the undertaking having been abandoned before any thing was done pursuant to the project, B. might recover from A. the money paid for the shares.

10. The proprietor of cattle wrongfully distrained damage feasant,^(e) who, although insisting on a right of common, has paid money for the purpose of having his cattle re-delivered to him, cannot recover that money in an action for money had and received: 1. because such a mode of proceeding would impose great difficulties on the defendant,

(y) *Oom v. Bruca*, 12 East, 225.

(z) *Hentig v. Staniforth*, 5 M. & S. 122.

(a) *Tappenden v. Randall*, 2 Bos. & Pul. 467.

(b) *Nockels v. Crosby*, 3 B. & C. 814.

(c) Repealed by stat. 6 Geo. IV. c. 91.

(d) *Kempson v. Saunders*, 4 Bingh. 5.

(e) *Lindon v. Hooper*, Cowp. 414.

(1) Wagers on amount of the hop duties are neither illegal nor immoral, but the courts refuse to enforce them, on account of public inconvenience. See *Shirley v. Sankey*, 2 Bos. & Pul. 130.

by not apprising him of what he was to defend: 2. because the law has provided two specific remedies for trying questions of this kind, namely, actions of replevin and trespass.(1)

*In the foregoing case, the right of common was in dispute [*97] at the time when the action for money had and received was brought to recover the money paid for the release of the cattle; the defendant, who had distrained the plaintiff's cattle, agreed to return the money if the plaintiff should make out his right, and the action was brought to try the right. But where it appeared that the plaintiff had, from time to time, paid rent to the defendants for premises which he held of them; and it afterwards turned out that the defendants had no title, and the plaintiff was ejected and compelled to pay the mesne profits for the time during which he had held of the defendants; it was holden,(f) that an action for money had and received would lie to recover the rent which the plaintiff had so paid to the defendants; but in this case it did not appear that the defendants, either at the time when this action was brought, or at the trial, claimed to have any title to the land.

Where an action for money had and received was brought against an overseer of the poor,(g) to recover money in his hands, which had been levied by a sale of the plaintiff's goods on a conviction which was afterwards quashed, the court held, that the action was maintainable for the clear money produced by the sale of the goods; for the plaintiff might waive the tort, and sue for the money really due. So if a revenue officer seize goods as forfeited,(h) which are not liable to seizure, and take money of the owner to release them the owner may recover back the money in an action for money had and received.(2)

(f) *Newsome v. Graham and another*, 10 B. & C. 234.

(g) *Feltham v. Terry*, Bull. N. P. 131, cited in Cowp. 419, and 1 T. R. 387.

(h) *Irving v. Wilson*, 4 T. R. 485. But see *Atlee v. Backhouse*, 3 M. & W. 633.

(1) In *Anscom v. Shore*, 1 Campb. 285, it was holden by Sir J. Mansfield, whose opinion was afterwards recognized by the court, that an action on the case would not lie for detaining cattle distrained damage feasant, after a tender of amends, such tender not having been made until after the impounding.

(2) A question arose in this case, whether the officer was entitled to a month's notice, before the action was brought, under stat. 23 Geo. III. c. 70, s. 30, in order to give him an opportunity of tendering amends. The court decided that he was not; *Grose, J.*, observing, that the act was confined to actions of trespass or tort, and did not extend to an action of assumpsit, 4 T. R. 487, cited by Lord *Ellenborough, C. J.*, in *Wallace v. Smith*, 5 East, 122. But see *Greenway v. Hurd*, 4 T. R. 553, where an excise officer having levied duties under an act which was repealed at the time when the duties were levied, Lord *Kenyon, C. J.*, expressed an opinion, that the officer was entitled to notice, although the plaintiff sued in assumpsit; because the defendant acted as an officer of the excise when he received the money, and the plaintiff paid it to him in that character. There was, however, another point in the case, and it does not appear clearly on which the case was ultimately decided. See *Umphelby v. M'Lean*, 1 B. & A. 42, where assumpsit for money had and received was brought, to recover the amount of an excessive charge made by the defendants, as collectors, on a distress for arrears of taxes; and it was holden that defendants were not entitled to a month's notice before action brought, under stat. 43 Geo. III. c. 92, s. 70; because the taking the excessive charge was not an act done *colore officii*. In *Waterhouse v. Keen*, 4 B. & C. 200, it was holden, that in assumpsit against a toll collector, brought to recover back money alleged to have been exacted by him improperly as toll, twenty-one days' notice of action ought to have been given. See stat. 5 & 6 Vict. c. 97, s. 4, *post*, tit. "Imprisonment."

[*98] A sheriff's officer had wrongfully seized, under a **fi. fa.* against A., a horse belonging to B. The horse was sold by the sheriff, and the money paid over to the officer ; B. brought an action against the officer for money had and received. It appeared, that the horse had belonged to B's husband, but that, after his death, she had provided for its keep. No letters of administration were produced. It was holden,⁽ⁱ⁾ that this was sufficient evidence against a wrong-doer to entitle her to recover in an action for money had and received.

11. In cases where the contract is legal, the plaintiff cannot recover on the *general* counts in an action of assumpsit, while the contract remains open and not rescinded by the defendant ; the only remedy is on the *special* agreement. As where the defendant sold a horse to the plaintiff with a warranty of soundness,^(k) and the horse proved unsound ; the plaintiff tendered a return of the horse, but the defendant refused to take him back ; an action for money had and received having been brought, it was holden, that it would not lie. So where the defendant, in consideration of seventy guineas, sold the plaintiff a pair of coach horses,^(l) which he undertook to take back if the plaintiff should disapprove of them, and return them within a month ; the plaintiff did return them within a month, but took another pair from the defendant, without making any new agreement ; these the plaintiff also returned within a month, and received a third pair on the 23d of December, without making any new agreement ; the plaintiff disapproved of the third pair, because they were restive and would not draw, and offered to return them on the 5th of January following, but the defendant refused to take them back, and, thereupon, the plaintiff brought an action against the defendant for money had and received : it was holden that it would not lie, for the original special contract having been continued through all the subsequent dealings, the defendant ought to have had notice by the declaration, that he was sued upon that contract. So

where a seaman had contracted with the defendant to go a voyage from A. to B.^(m) and back again, with a stipulation, **that* he should not be entitled to his wages until the end of the voyage ; it was holden, that he could not maintain a general *indebitatus assumpsit* to recover his wages *pro ratâ* as far as B., though he had been wrongfully dismissed at B. by the defendant. Where, however the contract is rescinded by the original terms of it,⁽ⁿ⁾ no act remaining to be done by the defendant, the plaintiff is entitled to recover back his money. As where plaintiff had paid to the defendant ten guineas for a chaise, on condition to be returned in case the plaintiff's wife did not approve of it, paying 3s. 6d. *per diem* for the time ; the plaintiff's wife not approving of the chaise, it was sent back at the expiration of three days, and left on defendant's premises without any consent on his part to receive it ; the hire of 3s. 6d. *per diem* was tendered at the same time, which defendant refused, as well as to return

(i) *Oughton v. Seppings*, 1 B. & Ad. 241.

(k) *Power v. Wells*, Doug. 24, n. ; Cowp. 818, S. C.

(l) *Weston v. Downes*, Doug. 23, recognized in *Street v. Blay*, 2 B. & Ad. 462.

(m) *Hulle v. Heightman*, 2 East's R. 145.

(n) *Towers v. Barrett*, 1 T. R. 133. But see *Hurst v. Orbell*, 8 A. & E. 107.

the money. An action for money had and received being brought for the ten guineas, it was holden, that it would well lie. So where A. agreed to sell an estate to B., upon a deposit of a sum of money, but was afterwards disabled from performing the agreement; it was holden,^(o) that B. might recover the deposit although the agreement for the sale was by deed. So where a contract is not carried into execution by reason of some negligence or default of one party,^(p) the other party,⁽¹⁾ not having done anything which can be considered as an execution of the contract in part, may abandon the contract and recover the money which he has paid on such contract: but this rule holds only where the contract can be rescinded *in toto*,^(q) so as to place both parties in the same situation they were in before. See further on this point, *Cooke v. Munstone*, 1 Bos. & Pul. N. R. 351.⁽²⁾

12. In an action for money had and received to the plaintiff's use, the plaintiff cannot recover the money, unless it be against conscience that the defendant should retain it: Hence, where a forged bill of exchange was drawn upon the plaintiff,^(r) which he accepted and paid to an innocent indorsee for a valuable consideration, and the plaintiff on discovering the forgery brought an action against the indorsee to recover back the money as money paid by mistake, it was holden, that the action would not lie: for it was not unconscientious in the defendant to retain the money when he had once received it, upon a bill for which he had given a fair and valuable consideration, without the least privity or suspicion of any forgery; and the plaintiff ought to have satisfied himself, whether the bill was really drawn upon him by the person *whose name was subscribed to it. This de- [*100] cision appears to have been grounded on the general principle, that an acceptor is bound to know the handwriting of the drawer, and that it is rather by his fault or negligence, than by mistake, if he pays on a forged signature. But where the defendant had got the plaintiff to discount a navy bill, which turned out to be forged, he was holden^(s) liable to refund the money; although both parties were, at the time, equally ignorant of the forgery. So in *Bruce v. Bruce*, 5 Taunt. 495, note, and 3 B. & C. 437, a similar decision was made on a victualling bill, which the victualling office on which it was drawn had paid before the forgery was discovered. So where bills of exchange, purporting among others to have the indorsement of H. & Co. bankers of Manchester, were presented for payment in London, where the acceptance directed them to be paid; payment being refused, the notary who presented them took them to the London correspondent of H. & Co.,

(o) *Greville v. Da Costa*, Peake's Additional Cases, 113, *Kenyon*, C. J.

(p) *Giles v. Edwards*, 7 T. R. 181.

(q) *Hunt v. Silk*, 5 East, 449, recognizing *Giles v. Edwards*; *Beed v. Blandford*, S. P., (on the authority of *Hunt v. Silk*,) 2 Y. & Jer. Exch. Rep. 278.

(r) *Price v. Neile*, 3 Burr. 1354; 1 Bl. R. 390, S. C. See *Smith v. Mercer*, 6 Taunt. 76, and 1 Marsh. R. 453, S. C. and *post*, under title "Bills of Exchange." See also *Barber v. Gingell*, 3 Esp. N. P. C. 60.

(s) *Jones v. Ryde*, 5 Taunt. 488.

(1) See *Howes v. Barker*, 3 Johns. Rep. 506; *Weaver v. Bentley*, 1 Caine, Rep. 47.

(2) See also *Chapman v. Shaw*, 5 Greenl. 59; *Green v. Green*, 9 Cowen, 46.

who took up the bills for their honour, and struck out the indorsements subsequent to that of H. & Co., and the money was paid over to the defendants, the holders of the bills. The same morning it was discovered, that the bills were not genuine, and that the names of the drawer, acceptor, and H. & Co. were forgeries; plaintiff immediately sent notice to the defendants, and demanded repayment. This notice was given in time for the post, so that notice of the dishonour could have been sent the same day to the indorsers. It was holden,^(t) that the plaintiff, having paid the money through a mistake, was entitled to recover it back, the mistake having been discovered before the defendant had lost his remedy against the prior indorsers: and that the rights of the parties were not altered by the erasure of the indorsements; that having been done by mistake, and being capable of explanation by evidence.⁽¹⁾

(t) *Wilkinson and others v. Johnson and others*, 3 B. & C. 428.

(1) This action may also be maintained by a person to recover money received for his benefit, or to which he is entitled. But it will not lie to recover money received from land, if the plaintiff's title to the land be disputed by the defendant. *Baker v. Howell*, 6 S. & R. 476.

As where an agent receives goods, on condition to pay B., a creditor of the principal, and who is ignorant of the arrangement, a sum of money out of the proceeds, and the goods are sold; B. may have an action for money had and received, against the agent, notwithstanding the principal had previously assigned the goods to C. without the knowledge of the agent. *Neilson v. Blight*, 1 Johns. Cas. 205.

Where a tenant in common sells the things held in common, and receives the money, his co-tenant may maintain this action to recover his proportion of the money received. *Selden v. Hicock*, 2 Caines' Rep. 166; *Coles v. Coles*, 15 Johns. Rep. 159. *S. P. Brinckerhoff v. Wemple*, 1 Wend. 470.

Indebitatus assumpsit, as well as an action of account, will lie by one tenant in common against his co-tenant, who has received more than his share of the profits of the property owned in common. *Brigham v. Evelith*, 9 Mass. Rep. 538; *Bond v. Hayes*, 12 Id. 34; *Jones v. Harraden*, 9 Id. 540; *Sargent v. Parsons*, 12 Id. 149; *Gardiner Man. Co. v. Heald*, 5 Greenl. 381.

And where the declaration stated, that the intestate, of whom the plaintiffs in error were administrators, as sheriff, had levied and received the amount of an execution sued out by the defendant in error, and converted the same to his own use, and being so indebted, assumed, &c.; the declaration was holden to be good in assumpsit, for the law will, and always does, raise an assumpsit from the misapplication of money received to use of another. *Administrators of Dumond v. Carpenter*, 3 Johns. Rep. 183.

If a public agent or officer receive money from the government, for the purpose of discharging a contract which he has made in behalf of the government, and refuses to pay it over, the party for whose benefit the money is intended, may recover it of the agent or officer, in an action for money had and received. *Freeman v. Otis*, 9 Mass. Rep. 272. Assumpsit lies against the deputy of sheriff for money collected under execution, where he undertakes to pay it over to plaintiff with the assent of sheriff. *Keene v. Thompson*, 4 Gill & J. 466.

The holder of a promissory note proved it under a commission of bankruptcy against the first indorser, and afterwards demanded and received payment of it from the second indorser, but before any dividend of the bankrupt's estate had been made; he subsequently received a dividend; and it was holden, that he should account for it to the second indorser, and not to the creditors of the bankrupt. *Selfridge v. Gill, Trustees*, 4 Mass. Rep. 95.

Where money was lent on bottomry, on a certain voyage to be performed, and the bond was to be void, on condition that the vessel should perform the voyage, and the borrower repay the money loaned, with the specified interest and adventure; or in case the vessel should be lost through perils of the seas, or by fire, or the enemies of the United States; and the vessel was captured by British subjects, and condemned as law-

13. The plaintiff, as assignee of a bankrupt, brought an action to recover the proceeds of goods of the bankrupt, sold by the defendants as sheriff, under a writ of *fi. fa.*, the commission having been issued upon an act of bankruptcy prior to the *fi. fa.* The defendants had not any notice of the bankruptcy until after the levy, and they had paid over the proceeds to an execution creditor under an indemnity. It was first objected, that the plaintiff, by suing in form *ex contractu* thereby treated the sheriff as his agent and affirmed all his previous acts; to which it was answered and resolved, that the plaintiff did not do so; he merely waived his claim to damages for a wrong, and sought to recover only the proceeds of the sale. Secondly, it was objected, that the action was too late, after the sheriff had paid the money over in obedience to the writ. But it was resolved, that money paid over on an indemnity might be considered as not having been paid over at all. It was also objected, that the property had *been changed by the [*101] sale, to which it was answered, per *Alderson, J.*, that although the property was changed as between a purchaser and the parties against whom the execution had issued, yet it was not changed against a party whose goods had been wrongfully taken.(u)

14. In order to sustain this action, there must be a privity between the plaintiff and defendant.

If I give a sum of money to my servant to pay a tradesman, the tradesman cannot maintain an action for money had and received against the servant.(x) So where the solicitor to the assignees of a bankrupt had received from them money to be applied in payment of the costs of the petitioning creditor, up to the time of the choice of assignees, and thereupon the solicitor offered to pay the money, on condition that the bill should be subject to further taxation, which was refused. The petitioning creditor sued the solicitor for money had and received. There was not any proof that the commissioners had ascertained the amount

(u) *Young, Assignee of Young, Bankrupt, v. Marshall and another, Sheriff of Middlesex*, 8 Bingh. 43.

(x) *Per Parke, J.*, 4 B. & Ad. 612.

ful prize, and never performed the voyage, but the condemnation was afterwards reversed by the Lords Commissioners of Appeals in Great Britain, and the British government made full reparation to the borrower; it was holden, that the bond was discharged. and that an action of debt could not be maintained upon it; but that the lender might maintain an action against the borrower for money had and received. *Appleton v. Crowningshield*, 3 Mass. Rep. 443; *Same v. Same*, 8 Id. 340.

So, where defendant chartered his vessel to plaintiff for a certain voyage, for a stipulated sum per month, and during the voyage the vessel was captured by a British fleet, and the plaintiff paid the defendant the hire of the vessel up to the time of her capture; and afterwards the plaintiff claimed compensation for the cargo, and the defendant for the vessel and freight, before the commissioners in England sitting under the treaty of London, and both claims were allowed; it was holden, that the rights of the parties depended on their interests; and that though the award of the commissioners was made nominally to the defendant, yet the interest being in the plaintiff, he was entitled to the benefit intended. *Heard v. Bradford*, 4 Mass. Rep. 326. Where two persons became bail for A. and agreed to bear equally the risk and loss, and each was compelled to pay his proportion of the debt, after which one of them received from a partner of A. the amount advanced by him, it was held, that the other might maintain this action to recover of him a moiety. *Smith v. Hicks*, 1 Wend. 202. See S. C. 5 Wend. 48.

of the ~~costs~~ according to the statute; this the judge thought necessary, and nonsuited(y) the plaintiff; and the court afterwards, upon consideration, confirmed the nonsuit; inasmuch as the defendant had received the money as the agent of the assignees, and not of the plaintiff; he held it subject to their control and directions, and would continue to be accountable to them, until he entered into some binding engagement with the plaintiff to hold it for his use. Where money, or bill productive of money, is remitted by A. to B., with directions to pay to C., C. cannot maintain(z) an action against B. for money had and received, without something having been done by B. which amounts to a privity or assent, independent of the mere receipt of the money; but where such assent has been given, it becomes an appropriation irrevocable, except by the consent of all the parties, and for which an existing debt, though not then payable, is a good consideration.(a)

15. The consideration of this action must be *money*.(1) Hence stock cannot be recovered in an action for money had and received,(b)(2) stock being a new species of property, and not money. But where, upon a wager of ten guineas to one, the stake-holder received country bank-notes, and paid them over wrongfully to the party who had lost the wager; it was holden,(c) that an action for money had and [*102] received would lie at the suit of the winner; Lord **Ellenborough*, C. J., observing, that provincial notes were certainly not money; yet, if the defendant received them as money, and all par-

(y) *Baron v. Husband*, 4 B. & Ad. 611, recog. in *Howell v. Batt*, 5 B. & Ad. 504.

(z) *Williams v. Everett*, 14 East, 582, recog. in *Brind v. Hampshire*, 1 M. & W. 365; *Wedlake v. Hurley*, 1 Cr. & Jer. 83. See further on this subject, *Scott v. Porcher*, 3 Merivale, 652; *Hutchinson v. Heyworth*, 9 A. & E. 404.

(a) *Walker v. Rostron*, 9 M. & W. 411.

(b) *Nightingale v. Devisme*, 5 Burr. 2589. See also *Jones v. Brinley*, 1 East, 1.

(c) *Pickard v. Bankes*, 13 East, 20, recog. by Best, C. J., in *Spratt v. Hobhouse*, 4 Bingh. 179.

(1) Assumpsit for money paid, had and received, &c., will not lie where property not money has been paid or received, &c. *Luckett v. Bohannon*, 3 Bibb, 378; *Morrison v. Berkey*, 7 S. & R. 246; *Doebler v. Fisher*, 14 Id. 179; *Slaymaker v. Gundacker*, 10 Id. 75; *Keurney v. Tanner*, 17 Id. 94; *Greathouse v. Throckmorton*, 7 J. J. Marsh, 18; *Turner v. Egerton*, 1 Gill & Johns. 433, 436. *Aliter*, where property has been taken as money. *Ainslie v. Wilson*, 7 Cow. 662. Thus, the giving of a note is not equivalent to the payment of money, unless the note is received as such, in payment, or discharge of a debt or liability sought to be charged. *Van Ostrand v. Reed*, 1 Wend. 424. Being committed in execution seems to be equivalent to payment. *Parker v. United States*, Peters' C. C. 266; *Magniac v. Thompson*, 15 How. U. S. 281. So if a surety have paid money for his principal, the law implies an assumpsit, and the proper form of action is *indebitatus assumpsit* for money paid. *Powell v. Smith*, 8 Johns. 249; *Hassinger v. Solms*, 3 S. & R. 8; *Bunce v. Bunce*, Kirby, 137; *Gibbs v. Bryant*, 1 Pick. 118; *Ward v. Henry*, 5 Conn. 596; *Smith v. Sayward*, 5 Greenl. 504; *Lansdale v. Cox*, 7 Monr. 405; *Gray v. Bowls*, 1 Dev. & Bat. 437. And a bill of exchange or negotiable note, given and received in satisfaction of the debt, will support a count for money paid. *Pearson v. Parker*, 3 N. Hamp. 366; *Cumming v. Hackley*, 8 Johns. 202; *Lapham v. Barnes*, 2 Verm. 213; *Cornwall v. Gould*, 4 Pick. 447; *Douglass v. Moody*, 9 Mass. 558; *Peters v. Barnhill*, 1 Hill, 234, 236, note; *Wetherby v. Mann*, 11 Johns. 518; *McLellan v. Crofton*, 6 Greenl. 333; *Ingalls v. Dennett*, 6 Greenl. 80; *Clark v. Foxcroft*, 3 Id. 355; *Dole v. Hayden*, 1 Id. 152.

(2) A. being indebted to B., C. without authority receives a note drawn by A. to order of C. for the debt, but does not call on A. for many years, and in the mean time pays B. part of the debt. Held, assumpsit for money had and received lies by B. against C. although A.'s note was unpaid. *Fairbanks v. Blackington*, 9 Pick. 93.

ties agreed to treat them as such, at the time, he should not be permitted to say, that they were only paper, and not money.(1) As against him, it was so much money received by him. So where an insurance broker having received credit in account with an underwriter for a loss, upon a policy, whereupon the name of the underwriter was erased from the policy; it was holden,(d) that the principal might maintain an action for money had and received against the broker, although he had not actually received any money from the underwriter; for the broker having deprived the plaintiff of his remedy against the underwriter, and having received credit in account for the money, he was estopped from saying that he had not the sum in his hands for the plaintiff's use. But no security or equivalent for money can form the subject-matter of this action, unless the parties have treated it as money, or a sufficient time has elapsed, so as to raise an inference, that it has been converted into money. Hence this action will not lie(e) to recover the value of foreign securities paid to the defendant, where it appears that he had not any opportunity of converting such securities into British money.(2)

Payment to Agent.(3)—It is a general rule, that in cases of payment to a known agent, the action for money had and received ought to be brought against the principal.(4) A., as receiver of W., received money for quit rents due to W., and gave a receipt for them as such. (Bull.

(d) *Andrew v. Robinson*, 3 Campb. 199.

(e) *M'Lachlan v. Evans*, 1 Y. & Jer. Exch. R. 380.

(1) A declaration for *bank bills* of an alleged value, had and received to plaintiff's use was holden bad in *Barnard v. Whiting*, 7 Mass. Rep. 358.

(2) Plaintiff indorsed and delivered to defendant a note of a third person, as security for a debt, from which defendant afterwards voluntarily discharged plaintiff, having agreed to look to another person for its payment, who had assumed plaintiff's responsibility; defendant commenced a suit in his own name on the note, against the maker, and obtained judgment; the maker paid a part of the execution in money, and his land was levied on for the residue and specifically received by the defendant in satisfaction; holden, that this action could be maintained not only for the money collected, but for the sum at which the land was received; for the satisfaction of the execution ought to be considered as a payment of the debt in money; and although land is taken, it is taken at money's worth; and the debt which might have been exacted in money at all events has been discharged. *Randall v. Rich*, 11 Mass. Rep. 494. And see *Amos v. Ashley*, 4 Pick. 71; *Ainslie v. Wilson*, 7 Cowen, 662; *Vanostrand v. Reed*, 1 Wend. 424; *Bonney v. Seeley*, 2 Id. 481.

Where plaintiff employed defendant to obtain a debt due to her, and defendant, instead of getting the money received a note indorsed to himself and gave the debtor a discharge, and refused to deliver over the note to plaintiff; it was holden, that, though trover would not lie for the note, the property being in defendant, an action for money had and received could be maintained, although it did not appear that defendant had collected the whole amount of the note. "Although the defendant received no money, yet by his transaction he discharged the debtor from the plaintiff's demand on him for money, and he must be considered as having made himself answerable to her for the money he ought to have received of the debtor." *Floyd v. Day*, 3 Mass. Rep. 403.

On the same principle, and the authority of the preceding case, it was holden, that where an attorney issued execution on a judgment recovered by his client, and became himself the purchaser of the land sold under the execution, and paid for the same by discharging the judgment against the defendant, his client might maintain this action against him. *Beardsley v. Root*, 11 Johns. Rep. 464. In *Hook v. Boleter*, 3 H. & M'Hen. 348, it was held, that this action would lie under the statute of Anne against gaming, for money lost at play, though the winner was paid in goods.

(3) See Story on Agency, § 181.

(4) See *Ashe v. Livingston*, 2 Bay, 85.

N. P. 133.) An action for money had and received having been brought against A. to try W.'s right to the quit rents, it was holden, that the action would not lie, and that it ought to have been brought against W.; the court observing, that in cases of payment to a known agent, the action ought to be brought against the principal, unless in special cases, as under notice, or *malâ fide*.(f) In like manner it has been holden, that assumpsit for money had and received does not lie against an excise officer to recover duties received by him after the act imposing them is repealed, if the officer has paid them over to his superior.(g)(1) So where a sum of money had been paid to a churchwarden for burial dues, which he afterwards without notice paid over to the treasurer of the trustee of the chapel, to which the burial ground belonged; it was holden, that money had and received would not lie against the churchwarden.(h) In *Campbell v. Hall*, Cowp. 204, where an action for money had and received was brought against a custom-house officer to recover back some duties which had been paid to him, on the ground that the duties had not been imposed by a lawful or sufficient authority, it was stated in the special verdict that the money still remained in [*103] the hands of the defendant, *not paid over* by him to the use of the king, with the *consent* of his Majesty's attorney-general, for the express purpose of trying the question as to the validity of these duties. If money be paid by mistake to an agent, and placed by him to the account of his principal, but *not paid over*, money had and received will lie against the agent; and the mere passing such money in account, or *making rest*, without any new credit given, fresh bills accepted or further sums advanced for the principal, in consequence of it, is not equivalent to a payment of it over.(i) To the general rule, that in case of payment to a known agent, the action for money had and received ought to be brought against the principal, the following authority furnishes an exception. The plaintiff, being a prisoner in the Coldbath-fields Prison, of which the defendant was governor, contracted with defendant for the purchase of an annuity, and paid him 750*l.* as a consideration for it. This annuity was afterwards set aside, and the plaintiff called on defendant to refund. The defendant paid back 715*l.* 15*s.* but insisted that he was entitled to the remainder as due to him for the rent of a room, at one guinea per week, which plaintiff had been permitted to occupy during his residence in the prison. It was objected that by the regulations of the prison, the gaoler had no authority to let any room upon such terms. As an answer to this, the prison books were produced, by which it appeared that the governor charged himself with the guinea per week, and accounted for it to the court;

(f) *Sadler v. Evans*, 4 Burr. 1984.

(g) *Greenway v. Hurd*, 4 T. R. 553.

(h) *Horsfall v. Handley*, 2 Moore, (C. P.) 5; 8 Taunt. 136, *S. C.*

(i) *Buller v. Harrison*, Cowp. 586, recognized in *Cox v. Prentice*, 3 M. & S. 344.

(1) A collector of the revenue is not personally liable for excess of duties received by him and paid over to the treasury when he acted in good faith and under the instructions of the department, no protest being made at the time nor notice given not to pay over. *Elliot v. Swartwout*, 10 Peters, 137.

and one of the visiting magistrates of the prison was called, who said, he was aware that there were such rooms, and that no objection had ever been made, and that the gaoler's book had been regularly passed at the quarter sessions. *Kenyon*, C. J. "I think this action may be maintained.—I am aware it has been holden, in the case of *Sadler v. Evans*, 4 Burr. 1984, that an action cannot be brought against an agent for money had and received for the use of his principal, but in that case there was nothing corrupt in the foundation. This agreement is one of those which the law will not allow. Besides, the county is not a corporate body, and, therefore, cannot be sued, except in those cases where acts of parliament have made it expressly liable. I am of opinion, therefore, that the plaintiff, notwithstanding this money has been paid over to the county, is entitled to recover." *Miller v. Aris*, B. R. Middx. Sitt. after M. T. 41 Geo. III. MS. The same doctrine, viz. that if a person gets money into his hands illegally, he cannot discharge himself by paying it over to another, was laid down by Lord *Ellenborough*, C. J., in *Townson v. Wilson and others*, 1 Campb. 396.(1) There an action was brought to recover back money paid to parish officers by a person who had been taken up under a warrant as the putative father of a bastard child. The money had been paid for the purpose of indemnifying the plaintiff against all future charges which might accrue in respect of the child. The *child died [*104] before all the money was expended; it was holden, that the plaintiff was entitled to recover the surplus, beyond the expenses of the lying-in and maintenance of the child, against the officers who had received the money, although it appeared that they were gone out of office, and had paid over to their successors the sum in question. See *Watkins v. Hewlett*, 1 Brod. & Bingh. 1, S. P. The mother of an illegitimate child may recover money deposited with a parish officer to meet any charges to which the parish may be liable in respect of the child.(k) It should be remembered also, that an agent cannot defend himself on the ground of having paid over the money, unless it appear the money was paid to the agent for the purpose of paying it to the principal, (as was the case of *Sadler v. Evans*, where the money was paid to the agent of Lady Windsor for Lady Windsor's use;) for where plaintiff paid a sum of money to a bailiff, who had exceeded his authority, under the terror of process, for the purpose of redeeming his goods, and not with an intent that the money should be delivered over to any one in particular; it was holden, that plaintiff might maintain an action for money had and received against the bailiff, although the bailiff had in fact paid the money over to the sheriff, and the sheriff to the exchequer.(l)(2)

(k) *Clarke v. Johnson*, 3 Bingh. 424.

(l) *Snowden v. Davis*, 1 Taunt. 359, recognized by *Parke*, B., in *Atlee v. Backhouse*, 3 M. & W. 648.

(1) See *Inge v. Lockwood*, 4 Cow. 454.

(2) See *Webster v. Drinkwater*, 5 Greenleaf, 319. In *Mowat v. McClellan*, 1 Wend. 173, where an attorney had received money for his principal, paid over part and retained a

J., an attorney who was accustomed to receive dues for the plaintiff his client, went from home, leaving B., his clerk, at the office; who, in his master's absence, received money on account of the above dues, which he was authorized to do,) and gave a receipt signed "B. for Mr. J.". B. afterwards refused to pay the money over to the plaintiff, who thereupon brought an action for money had and received against B.; but it was holden,^(m) that it would not lie; B. received the money as the agent or servant of J., and must have paid it over to him if he had returned: there was no privity of contract between B. and the plaintiff, the privity of contract was between B. and J., and between J. and the plaintiff. And the court distinguished it from the case of *Stead v. Thornton*,⁽ⁿ⁾ where a party was holden to have received money belonging to a bankrupt's estate, on behalf of the general body of creditors, and not for an assignee who had become lunatic; for there the defendant could not have any authority to receive it for the lunatic assignee. Where the receipt of money by defendant was wrongful, the paying it over to another will be no defence to an action for money had and received by the rightful owner.^(o)

An agent must account to his principal, and cannot,^(p) set [*105] up the *jus tertii in an action by his principal against him.

An agent to receive for the use of another cannot, by a notice from a third person, be converted into an implied trustee;^(q) and his possession is the possession of the principal. Defendant, an auctioneer, was employed by C., a person in embarrassed circumstances, to sell his property; defendant sold, and paid the proceeds to C.'s order. C. having shortly afterwards been declared insolvent, it was holden,^(r) that although the defendant was aware of C.'s embarrassment when he sold the property, yet he was not liable to C.'s assignee. But where the plaintiff's possession of the goods arises out of a fraud concerted between him and the insolvent, the argument as to jus tertii does not arise. The defendant was employed by the plaintiff to sell, as auctioneer, certain goods then in the plaintiff's possession. Before the sale, notice was given to the defendant by the assignees of the insolvent, that the goods were their property as such assignees, and that they had been fraudulently removed by collusion between the plaintiff and the insolvent. The defendant, after that notice, sold the property, and rendered an account of the sale of it to the plaintiff. But in the result, on an indemnity given to him by the assignees, he refused to pay over to the plaintiff the money arising from the sale; and on an action for money had and received being brought against him by the plaintiff, the defendant set up the right of the assignees; the jury found the fraud,

^(m) *Stephens v. Badcock*, 3 B. & Ad. 354.

⁽ⁿ⁾ 3 B. & Ad. 357, n.

^(o) *Tugman v. Hopkins*, 4 M. & Gr. 389; 5 Scott's N. R. 464.

^(p) See *Myler v. Fitzpatrick*, 6 Madd. 360; *Stonard v. Dunkin*, 2 Campb. 344; *Dixon v. Hammond*, 2 B. & A. 310; *Roberts v. Ogilby*, 9 Price, 269; *Gosling v. Birnie*, 7 Bingh. 339.

^(q) *White v. Bartlett*, 9 Bingh. 378.

^(r) *S. C.*

part with the principal's assent, for counsel's fees, &c., it was held that the sum so retained could not be recovered back by the original payer.

and a verdict for the defendant; which the court afterwards(s) refused to set aside, on the ground that if the insolvent had put the goods into the defendant's hands, for sale, the assignees might have interposed and claimed the produce from the defendant; and that the insolvent could not have maintained this action after such claim. And that the plaintiff, who took the goods by a fraud between him and the insolvent, could not be in a better situation than the insolvent himself.

An attorney, who was also an auctioneer, received a deposit on property which he had sold by auction, and, after queries raised on the title, and before they were cleared, paid over the deposit to his principal; on a demand of the deposit by the buyer, he answered, that his principal would not consent to return it, and would enforce the contract. Held, that the buyer might recover the deposit from the auctioneer, as money had and received to the plaintiff's use, because the defendant, as attorney, had notice that the title had not been completed before he paid over the money, and because he misled the plaintiff to sue himself, by not saying he had paid it over. *Edwards v. Hodding*, 5 Taunt. 815. But see *Horsfall v. Handley*, (2 Moore 5, and 8 Taunt. 136, S. C., and ante, p. 102,) wherein the case of *Edwards v.*

Hodding was cited and distinguished. *But where the memorandum of agreement to purchase and sell, and the receipt for the deposit were signed by the vendor's attorney "as agent for the purchaser," and the sale went off through the vendor's default, it was holden that the purchaser could not maintain an action against the attorney for the deposit, for that he was not stakeholder, but merely the vendor's agent, and that payment of the deposit to him was payment to the vendor.(t)

Indebitatus Assumpsit for money lent, Money had and received, and on an account stated.—The production by plaintiff of an "I. O. U." signed by the defendant, but without any address, is *prima facie* evidence(u) that it was given by the plaintiff by the defendant; and if the defendant wishes to rebut the inference arising from its production by the plaintiff, he should show that it had been in the hands of some other party.(1)

III. Of the Declaration.(2)

Venue.—The action of assumpsit, being founded on contract, is

(s) *Hardman v. Wilcock*, O. B. Lancaster, coram Alderson and Patteson, Js., 9 Bingh. 382, n.

(t) *Bamford v. Shuttleworth*, 11 A. & E. 926.

(u) *Curtis v. Rickards*, 1 M. & Gr. 46, recognized in *Douglas v. Holme*, 12 A. & E. 641; 4 P. & D. 685.

(1) In *Fesmeyer v. Adcock*, it was held that an I. O. U. was credible evidence of money lent and money had and received, of goods and chattels, or work and labor, and is *prima facie* evidence of an account stated. See Legal Observer, vol. 35, p. 553; 8 Law Journal, p. 393; 10 Id. p. 137. *Douglass v. Holme*, consequently is overruled.

(2) It is a general rule in assumpsit that it must be stated that defendant undertook

transitory,(1) and consequently the venue may be laid in any county at the election of the plaintiff.

By R. G. H. T. 4 Will. IV., after reciting that, by the mode of pleading hereinafter prescribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore; and that, by the act of the 3rd and 4th Will. IV. c. 42, s. 23,(x) the powers of amendment at the trial, in cases of variances in particulars not material to the merits of the case, are greatly enlarged; it is ordered, that several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each; nor shall *several* pleas, or avowries, or cognizances be allowed, unless a distinct ground of answer or defence is intended to be established in respect to each.(y) Therefore, counts founded on one and the same principle matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed. *Ex. gr.*—Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed; for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract. So counts for not giving, or delivering, or accepting a bill of exchange [*107] change in payment, according *to the contract of sale, for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed. So counts for not accepting and paying for goods sold; and for the price of the same goods, as goods bargained and sold, are not to be allowed. But counts upon a bill of exchange or promissory note, and for the consideration of the bill or note in goods, money, or otherwise, are to be considered as found-

(x) Continued by stat. 1 & 2 Vict. c. 100.

(y) See *Bleaden v. Rupallo*, 3 Scott's N. R. 564; 3 M. & Gr. 116; *Deere v. Iry*, 4 Q. B. 379.

and promised, &c., or something equivalent, or the declaration is bad, even after judgment. *Candler v. Rossiter*, 10 Wend. 487. In declaring on a collateral undertaking the declaration must be special. *Northrop v. Jackson*, 13 Wend. 85; *Johnson v. Clark*, 5 Blackf. 564.

In assumpsit on a written agreement, an express promise should be laid in the declaration; a mere recital of the writing, or of the circumstances of the case, is not sufficient. *Cook v. Simmes*, 2 Call, 39; *Wood v. Flourney*, 6 Munf. 506; *Chandler v. Rossiter*, 10 Wend. 487; sed vide *Kelly v. Owen*, Minor, 252; where it was held, that if the writing set forth shows the defendant's liability, the allegation of a promise is not necessary. The gist of the action is the promise, and unless this is averred, the declaration is bad after verdict. *Winston v. Francisco*, 2 Wash. 187. *Bruner v. Stout*, Hardin, 225; *Benden v. Manning*, 2 N. Hamp. 289. The word "promised" is not, however, indispensable; any word of the same import, as "agreed," is sufficient, especially after verdict. *Avery v. Fryingham*, 3 Mass. 160; *Candler v. Rossiter*, *supra*. The promise and the breach thereof must be alleged to have been made before the commencement of the action; if alleged to have been made after, the declaration is bad, in any stage of the cause. *Boyce v. Morgan*, 3 Caine, 133; *Warring v. Yates*, 10 Johns. 119; *Harper v. Montgomery*, 5 Litt. 347; *Road v. Griffith*, 11 S. & R. 130; *Langor v. Parrish*, 8 S. & R. 134; *Gordon v. Kennedy*, 2 Binn. 287. And the *narr.* should regularly allege the promise to be by the defendant to the plaintiff; but an omission in that respect may not be fatal, as it will be intended that the promise was made to him from whom the consideration proceeded. *Blackwell v. Irvin*, 4 Dana, 187. *Salmon v. Brown*, 6 Blackf. 347.

(1) *Debitum et contractus sunt nullius loci*. 2 Inst. 230.

ed on distinct subject-matters of complaint; for the debt and the security are different contracts, and such counts are to be allowed. Where several debts are alleged in *indebitatus assumpsit* to be due in respect of several matters, *ex. gr.* for wages, work, and labour as a hired servant, work and labour generally, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts. Provided, that a count for money due on an account stated, may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts. The rule which forbids the use of several counts is not to be considered as precluding the plaintiff from alleging more breaches than one of the same contract in the same count.

Where an action is brought in an inferior court, it must be stated in the declaration, that the *cause of action* accrued within the jurisdiction. Hence in assumpsit in an inferior court, not the promise only, but the consideration^(z) also, on which such promise is founded, must be laid within the jurisdiction: for the inferior court cannot hold plea unless the *whole matter* is within their jurisdiction; ^(a) consequently, if a declaration for goods sold and delivered, ^(b) or money had and received, ^(c) or money paid, ^(d) merely state that the defendant promised to pay within the jurisdiction, without stating the sale and delivery of the goods, or the receipt or payment of the money, to have been within the jurisdiction, it will be error; and error, even after verdict; ^(e) for in this case nothing shall be intended to be within the jurisdiction, that is not expressly averred to be so. ^(f) When, however, a suit commenced by *justices* in the County Court, is removed to the superior court by *pone*, the declaration need not state the cause of action to have arisen within the inferior jurisdiction. ^(g)

*Every material and traversable ^(h) fact must be laid with [*108] time and place. ⁽¹⁾ But a count stating that the defendant was indebted to the plaintiff on such a day for goods sold and delivered to the defendant on his request is sufficient, ⁽ⁱ⁾ without alleging any time when the goods were sold and delivered. Although the courts give, under the new rules, certain forms as examples, they are merely

(z) *Ramsey v. Atkinson*, 1 Lev. 50; *Whitehead v. Brown*, 1 Lev. 96.

(a) *Drake v. Beare*, 1 Lev. 104, 5.

(b) *Price v. Hill*, 1 Lev. 137; *Stone v. Waddington*, 1 Lev. 156; *Hanslip v. Coater*, 2 Lev. 87; *Waldock v. Cooper*, 2 Wils. 16.

(c) *Trevor v. Wall*, 1 T. R. 151.

(d) *Heaven v. Davenport*, 11 Mod. 365, 8vo. ed.

(e) *Winford v. Powell*, Lord Raym. 1310.

(f) Per *Atkins and Scroggs, Js.*, 2 Mod. 197.

(g) *Powell v. Ansell*, 3 Scott's N. R. 444; 3 M. & Gr. 171.

(h) *Ring v. Roxbrough*, 2 Cr. & J. 418.

(i) *Lane v. Thelwell*, 1 M. & W. 140; 1 Tyr. & Gr. 352, adjudged on special demurrer.

(1) See 1 Greenl. on Evid. § 60, 61.

given for that purpose, and prohibit any longer forms; but there is not any illegality in any forms which do not conflict with that prohibition, and which contain all necessary allegations. In this case, the count is in substance the same, as if the words "before that time" had been inserted.

Day.—The day mentioned in the declaration, on which the cause of action is stated to have accrued, is not material, ^(k) provided it be a day after the cause of action accrued, and before action brought. ⁽¹⁾ If the defendant by his plea makes the time material, the plaintiff may by his replication answer to that plea, without being guilty of a departure; as where the promise was laid on the 1st of May, ^(l) 3 Car. I., and the defendant pleaded that the writ was first brought the 4th February, 14 Car. II., and that he did not promise within six years before the said 4th February. Replication, that he promised within six years before the said 4th of February: on motion in arrest of judgment, it was holden, that the replication was not a departure from the declaration; because the time in the declaration was not material. So where the plaintiff declared upon a promise made ^(m) 26th March, 12 Geo. I., the defendant pleaded, after the promise, and before the bill filed, viz. 2d April, he tendered the money; the plaintiff replied, that after making the promise, viz. 12th February, he filed his bill: on demurrer, it was objected, that plaintiff had brought his action, as appeared by his own showing, before the cause of action accrued. But the court overruled the objection, observing, that as the plaintiff would not in evidence have been confined to the day in his declaration, there was not any reason he should be more confined in pleading; that in the case of a common assumpsit, the day was alleged for form only, and therefore the defendant could not confine the plaintiff to the day alleged in the declaration. ⁽²⁾

Manner of stating the Contract.—In the action of as-
[*109] sumpsit, the *declaration must state the contract on which the action is founded truly and correctly; that is, either in

^(k) *Inkersalls v. Samms*, Cro. Car. 130.

^(l) *Lee v. Rogers*, 1 Lev. 110.

^(m) *Matthews v. Spicer*, Str. 806, recognized by *Tindal*, C. J., in *Arnold v. Arnold*, 3 Bingh. N. C. 84, since new rules.

(1) See *Cheetham v. Lewis*, 3 Johns. Rep. 42; *Waring v. Yates*, 10 Id. 119. It was held in *Story v. Barrell*, 2 Conn. Rep. 665, that it was not ground to arrest the judgment, that the promise was alleged to have been made on a day subsequent to the issuing of the writ.

In assumpsit on a parol contract, where the day upon which it was made is alleged only for form, the plaintiff may prove that the contract, whether express or implied, was made at any other time. *Dawkins v. Smithwick*, 4 Florida, 158. But when time is material it is traversable, and the plaintiff must prove it; and it makes no difference that it is alleged under a *videlicet*. Ib.

When the time laid is the Sabbath, and is material, the court will take judicial notice of the fact; but if the time is immaterial, and laid under a *videlicet*, the court cannot judicially know that the contract declared on was actually made on that day. Ib. But even in such case, the defendant having failed to plead the fact, and thus make the time material, cannot move in arrest of judgment. Ib.

(2) A different rule holds in actions on promissory notes, where the day forms an essential part of the agreement. *Stafford v. Forcer*, E. 1 G. I., cited in *Cole v. Hawkins*, Str. 22, and reported in 10 Mod. 311. See also 3 Bingh. N. C. 84.

the terms in which it was made,(1) or according to the legal effect and operation of those terms;(2) for a material variance between the contract alleged and the contract proved will be fatal:(n)(3) As where the contract alleged was, to deliver good "*merchandizable wheat*,"(o) and the proof was to deliver good "*second sort*" of wheat, the plaintiff was nonsuited for the variance: so where the plaintiff declared, upon a contract for wages upon a certain voyage from London to Africa, and thence to the West Indies; but the proof was of a contract for a voyage from London to Africa,(p) and thence to the West Indies or America, *and afterwards to London, &c.*; the variance was holden to be fatal, the contract proved being for a different voyage than that declared on.(4) So where the declaration stated a specific contract for

(n) *Cooke v. Munstone*, 1 Bos. & Pul. N. R. 351; [*Lent v. Padelford*, 10 Mass. Rep. 230; *Richards v. Kiliam*, Ib. 239; *Crocker v. Whitney*, Ib. 316; *Midway Cotton Manufactory v. Adams*, Ib. 360; *Hopkins v. Young*, 11 Mass. Rep. 302.]

(o) Per *Holt*, C. J., Lord Raym. 735.

(p) *White v. Wilson*, 2 Bos. & Pul. 116. See also *Penny v. Porter*, 2 East's R. 2.

(1) In declaring on a written contract, it is not necessary to use the precise words of the contract; it is always allowable, and often necessary, to declare according to their legal effect and import. *Lent v. Padelford*, 10 Mass. 230; *Hopkins v. Young*, 11 Mass. 307; *Walsh v. Gilmer*, 3 Har. & J. 487; *Grannis v. Clark*, 8 Cow. 36; *Ridgely v. Riggs*, 4 Har. & J. 363; *Silver v. Kendrick*, 2 N. Hamp. 160; *Thomas v. Van Ness*, 4 Wend. 549; *Sheehy v. Munderville*, 7 Cranch, 208; *Ferguson v. Harwood*, Ib. 408; *Hasting v. Lovering*, 2 Pick. 22; *Osborne v. Lawrence*, 9 Wend. 135; *Herrick v. Bennett*, 8 Johns. Rep. 374; *Crawford v. Morell*, 1 Johns. Rep. 253.

(2) Or as defendant says it was made. A bill of exchange was drawn in this form: "Pay to our order," &c., signed in the name of two persons and Co., and accepted by the defendant; it was holden, that in an action against the defendant as acceptor, it might be declared upon by the indorsees as a bill drawn by an aggregate firm; and although it was proved that the firm consisted of one person only, it was holden not to be a variance. *Bass v. Clive*, 4 M. & S. 13.

(3) See *Pope v. Barret*, 1 Mason, 117.

(4) A contract to pay \$92 50 for twelve months does not support a declaration to a promise to pay \$9 25 for 10 months. *Cranmer v. Graham*, 1 Blackf. 406. So a written agreement with a memorandum subjoined, limiting its continuance to a certain day, does not support a declaration on the agreement only, unless it was added without plaintiff's knowledge or assent. *Newell v. Mayberry*, 3 Leigh, 250.

So where the plaintiff declared on a contract by which the defendant agreed to pay him a certain sum for *half* the land taken for a certain road; and the contract proved at the trial was, that the defendant was to pay for *all* the land, the variance was holden fatal. *Crawford v. Morrell*, 1 Johns. R. 253.

In an action by plaintiff as indorsee of a promissory note against the makers, the declaration stated that the defendants made their note in writing, their own proper hands and names being thereunto subscribed by the name and description of John and George Pease; the proof was, that George Pease alone signed the note; holden, that as there was no averment in the declaration that the defendants were partners, or acted under the firm of John & George Pease, the variance was fatal. *Pease v. Morgan*, 7 Johns. Rep. 468.

The declaration stated the terms of a promissory note, concluding with the usual words "for value received;" the note offered in evidence did not contain those words; it was contended for the plaintiffs, that these words were not descriptive, but an averment of the consideration. Per Curiam. "The words 'for value received,' were used and intended for a description of the note declared on, and not an averment inserted by the pleader. The precedents of declarations on promissory notes are all that way; and no counsel on the part of the defendant would have supposed that these words were inserted as an averment of value; and if he had demurred in consequence of a defective averment of the consideration, the court, no doubt, would have considered the words as part of the note." *Sexton v. Johnson*, 10 Johns. Rep. 418.

the sale of a dwelling-house and fixtures, for the residue of a term of years, to commence from a certain day, in proof of which, the following paper, signed by the defendant, was given in evidence:—"I agree to sell the house and fixtures No. 163, Piccadilly, to commence from 2nd January next, for 60*l*." This was holden to be a fatal variance, as showing a sale of a fee simple, or at least leaving it uncertain, what was the interest intended to be conveyed.^(q)

The Consideration.—Every part of the entire consideration for any promise contained in the agreement must be stated in the declaration.⁽¹⁾ But in framing a declaration on an agreement,^(r) which consists of several distinct parts and collateral provisions, it is not necessary to state in the declaration every part of such agreement; it is sufficient to state so much of the agreement as contains the entire consideration for the act, and the entire act which is to be done, in virtue of such consideration. The rest of the contract, which respects the liquidation of damages only, after a right to them has accrued by a breach of the contract, is matter proper to be given in evidence to the jury, but not necessary to be shown to the court in the first [*110] instance, on the face of the record.⁽²⁾ In like *manner,

(q) *Hughes v. Parker*, 8 M. & W. 244.

(r) Per Lord *Ellenborough*, C. J., delivering the judgment of the court in *Clarke v. Gray*, 6 East, 569, 570.

(1) *Beauchamp v. Bosworth*, 3 Bibb, 115; *Treadway v. Nicks*, 3 M'Cord, 196.

In actions of assumpsit a consideration must be alleged; otherwise no cause of action is shown, and the declaration will be bad after verdict and on error. *Bruner v. Stout*, Hardin, 225; *Hemmenway v. Hicks*, 4 Pick. 497; *Gains v. Kendrick*, 2 Rep. Con. Ct. 339; *Benden v. Manning*, 2 N. Hamp. 289; *Mosely v. Jones*, 5 Munf. 23; *Beverly v. Holmes*, 4 Munf. 95; *Bailey v. Freeman*, 4 Johns. 280; *Wheelwright v. Moore*, 1 Hall, 201; *Connolly v. Cottle*, 1 Breese, 286. It is not sufficient to allege that the defendant "being indebted" in a certain sum, in consideration thereof promised to pay, &c., without alleging the cause or consideration on which the debt is founded; and this rule applies to special as well as to general assumpsit. *Beauchamp v. Bosworth*, 3 Bibb, 115, S. P.; *Chandler v. State*, 5 Har. & J. 284; *Maury v. Olive*, 2 Stew. 472. And the whole consideration of a special contract must be explicitly and correctly stated; otherwise the variance, or exception to the evidence will be fatal. *Hendrick v. Seeley*, 6 Conn. 176; *Russell v. South Britain Society*, 9 Id. 508; *Carley v. Dean*, 4 Id. 259; *Brooks v. Lowrie*, 1 N. & M. 342; *De Forest v. Frary*, 6 Cow. 151; *Lansing v. M'Killip*, 3 Caines, 286; *Carrell v. Collins*, 2 Bibb, 429; *Moore v. Ross*, 7 N. Hamp. 528; *Shelton v. Bruce*, 9 Yerg. 24. A past or executed consideration must be laid to have been done upon the request of the defendant, or the declaration is bad. *Parker v. Crane*, 6 Wend. 647; *Leland v. Douglass*, 1 Id. 492; *Livingston v. Rogers*, 1 Caines, 586; *Comstock v. Smith*, 7 Johns. 87; *Hicks v. Burhams*, 10 Id. 243; *Outfield v. Warring*, 14 Id. 188; *Doty v. Wilson*, Ib. 378; *Balcon v. Craggin*, 5 Pick. 295; *Train v. Gold*, Ib. 386; *Mills v. Wyman*, 3 Id. 209; *Jewett v. Somerset*, 1 Greenl. 128.

An averment of a promise and a consideration, are both essential. Hence, a declaration averring an undertaking in consideration that the public should be conveyed by means of defendants' ferry, and for hire to receive and safely to convey, and that plaintiff learning said offer, did use the ferry and commit his horse to defendant in consideration of an undertaking to convey, was held to be a declaration in tort. *Smith v. Seward*, 3 Barr, 342.

(2) "There are a great variety of agreements not under seal, containing detailed provisions regulating prices of labor, rates of hire, times and manner of performance, adjustments of differences, &c., which are every day declared upon in the general form of a count for work and labor." Per Lord *Ellenborough*, C. J., S. C. See *Woodely v. Flourney*, 6 Munf. 506.

where the plaintiff states the whole consideration truly,^(s) and then states those parts of the defendant's promise, the breach of which he complains of, truly and correctly; that is sufficient, without stating other parts of the promise irrelevant to the breach complained of. It is enough to state that part of the agreement truly which applies to the breach complained of, if that which is omitted do not qualify that which is stated.^(t)

Idle and insufficient considerations do not form any essential part of the contract,^(u) consequently it is neither necessary to state them in the declaration, nor, if stated, to prove them. By the term "idle and insufficient considerations," must be understood such considerations as, if they stood alone, unconnected with one or more sufficient considerations, would not support the promise of the defendant. They are distinguishable from illegal considerations; for if one of the considerations, where there are two or more, is illegal, it will vitiate the whole contract, and the action cannot be supported; but an idle or insufficient consideration may be rejected; in truth, it is a nullity.⁽¹⁾

Executory considerations are traversable,^(x) and the performance of

(s) *Miles v. Sheward*, 8 East, 7.

(t) *Tempest v. Rawling*, 13 East, 18. See also *Cotterill v. Cuff*, 4 Taunt. 285.

(u) *Crisp v. Gamel*, Cro. Jac. 127.

(x) *Sexton v. Miles*, Salk. 22.

(1) But if the plaintiff state two or more sufficient considerations, he must prove them all. As in assumpsit, on a special agreement in consideration of a horse, and divers goods and merchandises, to deliver for value received, forty dollars worth of merchantable boards. At the trial it was proved that the horse was the only consideration. *Kent*, Chief Justice. "If a plaintiff allege several good considerations, they must all be proved, for the promise shall be deemed to be founded on both considerations taken together. The promise to pay, in the present case, boards to the value of forty dollars, was founded, not singly upon the sale of the horse, (and which we must presume was not estimated at that value,) but upon the sale of divers goods and chattels, as distinct articles from the horse, and which, when added to the value of the horse, amounted to the full consideration of forty dollars. This rule appears to have been long ago settled, and repeatedly recognized. In *Tindale's* case, Cro. Eliz. 758, the court of C. B. held, that where a consideration consisted of two or three parts, and every one of them was valuable, the plaintiff was bound, of necessity to show the performance of every part thereof. And in the case of *Coulston v. Carr*, Cro. Eliz. 847, the K. B. agreed, that if two considerations be alleged, and one of them be found false by the jury, the action fails. So again, in the case of *Seneret v. Rivet*, Cro. Jac. 503, the K. B. ruled, in arrest of judgment, that if the plaintiff declare on two considerations, he must make a good and sufficient averment of the performance of both." *Lansing v. M'Killip*, 3 Caines, Rep. 286.

But the common counts in assumpsit, alleging several distinct considerations, may be included in one count, and the plaintiff is not bound to prove them all, in order to entitle him to recover; but it is enough if he prove any one, and he will recover *pro tanto*. *Bailey v. Freeman*, 4 Johns. Rep. 280.

In 1 Chitty on Pleadings, 337, it is laid down, that several distinct contracts may be included in one count of this description, and the plaintiff will succeed, *pro tanto*, though he only prove one of such contracts; for if the defendant be indebted for any one cause, it is a sufficient consideration for the promise (which the law raises,) of the defendant to pay the money. Sergeant *Williams* recommends the practice of including the common counts in one count, as was done in this case, in order to avoid an useless prolixity in the pleadings, and unnecessary expense. 2 Saund. 122, a. n; 2 Cro. Jac. 245; Yelv. 195; 1 Brownl. Ent. 71; 2 Black. Rep. 910; Bunb. 262; Impey's Mod. Plead. 207, 234, 271.

Goods may also be united with the money counts. *Nelson v. Swan*, 13 Johns. Rep. 483.

them must be averred with time and place. In cases where the promise of the defendant is founded on two or more executory considerations, the performance of all must be fully and expressly averred; (y) for an imperfect allegation of the performance of one only will vitiate the declaration. Where the consideration is executed, (in which case it is not traversable,)(z) and the promise to pay a sum certain, or to do or forbear from doing some specific act, the declaration proceeds at once from the statement of the contract to the breach, without any intermediate averment.

Breach.—The breach may be co-extensive with the promise, but must not be enlarged beyond it.(a) If the promise is in the disjunctive the breach should be so also. Thus, where the promise was that if the defendant did not return some horses to the plaintiff by a day named in as good plight as they were at the time of lending, the defendant would pay him so much per horse. The breach assigned was, that one of the horses was detained so many days beyond the time named, and that the other had not been returned at all. After verdict [*111] for the plaintiff, judgment was arrested, *because the breach was not laid according to the promise.(b) It will be sufficient, however, if the breach pursue the words of the promise.(c)(1)

(y) *Leneret v. Rivet*, Cro. Jac. 503.

(z) 1 Rol. Rep. 43, 401; Hob. 106.

(a) Cro. Jac. 115.

(b) *Wright v. Johnson*, 1 Sid. 440.

(c) *Pilchard v. Kingston*, Cro. Car. 202.

(1) Any defect or inaccuracy in assigning the breach is aided after verdict, for the court will intend that damages could not have been given if a good breach had not been shown. As where the declaration stated a promise by defendant to pay plaintiff "in a good horse, to be worth, with saddle and bridle, 80 dollars, and goods out of the store amounting to 20 dollars," &c. The breach stated was, that defendant had "not paid the said several sums of money," &c. After verdict for the plaintiff, it was holden, that there was no ground to arrest the judgment. *Thomas v. Roosa*, 7 Johns. Rep. 461.

Where two acts are to be done at the same time, as where one agrees to sell and deliver, and the other to receive and pay, it is necessary in an action for non-delivery that the plaintiff should aver his readiness to pay, whether the defendant was at the place ready to deliver or not. *Porter v. Rose*, 12 Johns. 209; *Topping v. Root*, 5 Cow. 404; *S. P. Tinney v. Ashley*, 15 Pick. 546; *M'Gehee v. Hill*, 4 Porter, 170. It is a sufficient averment of an offer to perform, if the plaintiff allege that he attended at the time and place appointed, and offered to execute a conveyance according to his agreement, and that the defendant did not attend, and that he refused to accept the same and perform the agreement on his part. *Miller v. Drake*, 1 Caines, 45. *Savary v. Gell*, 3 Wash. C. C. 140; *Anderson v. Gaith*, 1 Stew. 160.

Where the contract is special, and the payment of the money and the delivery of the thing are concurrent acts, it is incumbent on the plaintiff to entitle himself to damages for a breach of the contract, to aver in the declaration and prove an offer to perform his part of the contract. *Morrison v. Ives*, 4 Smedes & Marsh. 652. To constitute a count in assumpsit there must be an agreement laid between the parties or a promise from the defendant to the plaintiff for a consideration; and where there was no such agreement laid, but only an agreement between a third person and the defendant, without anything connecting such third person in any way with the plaintiff, it was held that the count was not one in assumpsit, but in tort. *Spencer v. Pilcher*, 8 Leigh, 565.

In assumpsit upon an executory agreement, where the plaintiff's promise is the consideration for the defendant's undertaking, the declaration must allege the plaintiff's promise explicitly and expressly. *Russell v. Slade*, 12 Conn. 455. But the action may be brought upon an instrument which itself contains a promise or undertaking to pay; it is not necessary formally to set forth another promise resulting from legal liability. *Woodson v. Moody*, 4 Humph. 303.

Notice. Averment thereof.—Where the action does not lie without notice given to the defendant, an averment of such notice ought to be inserted in the declaration. The defendant bought of the plaintiff a quantity of barley, (d) and promised to pay him for it as much as he could get from any other person. The plaintiff averred in his declaration, that he afterwards sold *the same quantity to J. S.* for such a sum, but did not aver that the defendant had notice of the sum given by J. S. : for this omission the judgment was arrested; and this distinction was taken, (e) that if the agreement had been that the defendant should pay as much as J. S. paid, in that case, *quia constat de personâ*, and he is indifferently named between them, the defendant at his peril should inquire of him, and the plaintiff was not bound to give notice; but where the person was altogether uncertain, there the plaintiff, to entitle himself to the action, ought to give notice. See *Holmes v. Twist*, on error from B. R. in Exch. Ch. Hob. 51, to the same effect, where an averment of notice was holden necessary, on the ground that the matter rested in the privity and knowledge of the plaintiff alone; but where the consance of the act to be done lies as well in the notice of the defendant as of the plaintiff, an averment of notice is not necessary; as where the act is to be done by a stranger: (f)(1) so when an act is to be done by the plaintiff to a stranger, (g)(2) as where the declaration stated, that, in consideration that the plaintiff had agreed to give his bond to J. S. for the debt of the defendant, the defendant promised to save him harmless, and averred that he gave the bond, and was sued, &c. An exception was taken, because it was not averred, that the plaintiff gave the defendant notice of his giving the bond; but it was overruled, because the defendant at his peril ought to take notice of the obligation, as in a bond to stand to an award. (3)

Request.—When a debt (h) or mere duty is promised to be paid

(d) *Hall v. Hemminge*, Cro. Jac. 432; 1 Rol. Abr. 463; 1. 25; 3 Bulst. 85, 6, 7, S. C.

(e) See Lord Raym. 1127, where this case was put by *Holt*, C. J., *Brice v. Carre*, 1 Lev. 47, S. P.

(f) *Powle v. Hagger*, Cro. Jac. 492.

(g) *Juzon v. Thornhill*, Cro. Car. 132.

(h) *Bartlet v. Bartlet*, Winch. 2; *Vivian v. Shipping*, Cro. Car. 385; *Wallis v. Scott*, 1 Str. 88.

(1) That is, a stranger named and agreed upon between the parties, agreeably to the distinction taken in Cro. Jac. 432, and *supra*.

(2) See the preceding note.

(3) Notice need not be given of a matter which a person is awarded to do, because he may inquire of the arbitrators. Per *Powell*, J., in *Smith v. Goffe*, Lord Raym. 1128. See also 8 Rep. 92, b, S. P.

Where money is paid by the plaintiff to the defendant by mistake, notice of the mistake and demand of repayment, before bringing a suit to recover it back, are not necessary; for, the party receiving the money paid under a mistake of facts, is not a bailee or trustee, nor does his duty to return it arise upon request. *Utica Bank v. Van Gieson*, 18 Johns. Rep. 485.

In *Ward v. Henry*, 5 Conn. Rep. 600, it was said by the court to be the rule, as collected from the adjudged cases, that if the obligation of the defendant depends upon the performance of an act by the plaintiff to a third person, or by a third person to the plaintiff, it is unnecessary either to prove or allege notice of the act on which the defendant's obligation is to arise. Therefore, in an action by a surety against his principal for money paid, laid out, &c., it is not necessary for the plaintiff to prove notice to the defendant of having paid the money.

[*112] upon request, it is not necessary to make an *actual request before action brought, and consequently an averment of such request in the declaration is unnecessary; for the bringing the action is a sufficient request.⁽¹⁾ In assumpsit upon a promissory note,⁽ⁱ⁾ payable four months after date, it was objected in error, that the request to pay the money on the note was laid upon the same day and year that the note was dated, which was four months before it became due; to this it was answered and adjudged by the court, that there was not any occasion to lay any request: that the bringing the action was a request in law, and it appeared that the action was not brought until above a year after the note was due. It is observable, however, that when the defendant is chargeable, upon a collateral promise to pay,^(k) do, or omit some act, *upon request*, and not for a mere debt or duty, an actual request ought to be made before action brought, and consequently, it ought to be averred in the declaration; and the day, year, and place, where the request was made, must be expressed, as in such case the request is parcel of the duty. Hence it will appear, that the general averment, "although often requested," is not sufficient in a case of this kind, not on account of the word "although," because that has been determined^(l) to be an express averment, and equivalent to the words "the plaintiff in fact says" or any other words of averment, but because time and place are omitted. Formerly, indeed, the omission of time and place was considered as a defect in substance, and as good ground for general demurrer, or arresting the judgment,^(m) and some modern cases⁽ⁿ⁾ also appear to support the same doctrine; but in a later case^(o) it was solemnly decided, that since the statute^(p) for the amendment of the law, such defect can be taken advantage of by special demurrer only, and cannot be a ground for arresting the judgment even after a judgment by default; because it is an omission "of a like nature," or rather of a less material nature, than those specified in the statute, such as the *prout patet per recordum, hoc paratus est verificare, &c.*, and consequently cured by the *healing operation* of that statute.

(i) *Frampton v. Coulson*, 1 Wils. 33.

(k) *Birks v. Trippet*, 1 Saund. 32; *Selman v. King*, Cro. Jac. 183; *Hill v. Wade*, Cro. Jac. 523; and 2 Rol. Rep. 62.

(l) 3 Leon. 67.

(m) *Hill v. Wade*, Cro. Jac. 523.

(n) *Bach v. Owen*, 5 T. R. 409.

(o) *Bowdell v. Parsons*, 10 East, 359.

(p) 4 Ann. c. 16, s. 1.

(1) *Lent v. Padelford*, 10 Mass. Rep. 230; *Pettibone v. Pettibone*, 5 Day, 324. Where any thing is to be performed by the plaintiff, precedent to performance by the defendant, the plaintiff, as a general rule, must allege performance by himself in declaring for a breach of the defendant's promise; an averment of readiness is not sufficient. *Zerger v. Sailer*, 6 Binn. 24; *Salmon v. Jenkins*, 4 M'Cord, 288; *M'Intire v. Clark*, 7 Wend. 330; *Gray v. James*, Peters, C. C. 482; *Bank v. Hagner*, 1 Pet. 467; *Justice v. Board of Justices*, 2 Blackf. 149. But this rule does not hold where the defendant has disabled himself from performing his part of the contract; as where A. promised to convey land to B. as soon as B. should pay him a certain sum, and A. conveyed the land to C. On stating this fact in the declaration, B. was held entitled to recover without alleging payment or tender. *Newcomb v. Brackett*, 16 Mass. 161; *S. P. Johnson v. Caulkins*, 1 Johns. Cas. 116; *Davis v. Crawford*, 2 Rep. Con. Ct. 401; *Clark v. Moody*, 17 Mass. 149; *Webster v. Coffin*, 14 Id. 196; *Cooper v. Mowry*, 16 Id. 5; *Frost v. Clarkson*, 7 Cow. 24; *Hill v. Campbell*, 6 Greenl. 111.

Having exhibited to the student a general outline of the declaration in assumpsit, I shall proceed to a full explanation of some special averments which are requisite in particular cases, beginning with conditions precedent.

Of Conditions precedent.(1)—1st. If A. promise to do, or to abstain from doing, a certain act, in consideration of the antecedent performance of some act or promise on the part of B., the promise of A. is called a dependent promise; because B.'s right of *action [*113] for a breach of such promise depends on the prior performance, (or that which is equivalent to performance) of the act or promise on the part of B.; and the act or promise to be performed by B., being in the nature of a condition precedent, is usually distinguished by this appellation, because the performance (or that which is equivalent to performance) of such act or promise, precedes B.'s right of action to recover damages against A. for the non-performance of his promise, and must be specially averred in the declaration.(2) The plaintiff declared that the defendant was possessed of 17 tod of wool,(q) and that there was a conversation between them for 15 tod of the 17 tod *to be chosen by the plaintiff*; that the defendant, in consideration of a sum of money to be paid on such a day, promised to deliver to the plaintiff the aforesaid 15 tod of wool, and averred that he was ready at the day to pay the defendant the money, yet the defendant had not delivered the wool; after non-assumpsit pleaded, and a verdict for the plaintiff, an exception was taken in arrest of judgment, because the plaintiff had not shown that he had chosen 15 tod of the 17, which is *quasi a condition precedent*, and an act to be first performed by the plaintiff before the defendant is bound to do any thing; which was assented to by the whole court.(3)

The case of *Thorpe v. Thorpe*, Lord Raym. 662; Salk. 171, *S. C.*, has been considered as a leading case on this subject. The declaration stated,(r) that the defendant held of the plaintiff certain lands by way of mortgage, that the plaintiff *agreed* to make a good and sufficient release of his equity of redemption, *in consideration whereof* the defendant promised to pay to the plaintiff a certain sum of money; and that the defendant, in consideration of the said agreement, and in consideration that the plaintiff would perform his part of the agreement, promised to perform his part; and assigned for breach, that although

(q) *Raynay v. Alexander*, Yelv. 76.

(r) See record, 1 Lut. 245.

(1) Where defendant agreed to be responsible for a thousand copies of a work to be printed by plaintiff for a third person, the number is not a condition precedent, if a less number is required by such third person. *Kemble v. Wallis*, 10 Wend. 374.

(2) *Zerger v. Sailer*, 6 Binn. 24; *Whitall v. Morse*, 5 S. & R. 358; *Johnes v. Potter*, 5 S. & R. 519; *Pinkus v. Hamaker*, 11 S. & R. 200. *Grace v. Regal*, 11 S. & R. 351. *Jewell v. Thompson*, 2 Litt. 52.

(3) On an agreement between plaintiff and defendant, that if defendant can get possession of a runaway slave belonging to plaintiff *before* a certain day, he shall have him at a stipulated price, and that the agreement shall continue in force only till that day; if defendant gets him *after* the day he is not liable for the stipulated price. *Newell v. Mayberry*, 3 Leigh, 250. An agreement to pay a debt of a third person, if plaintiff will dismiss his suit against him at *his own cost*, does not bind, if the suit be dismissed *generally*. *Couch v. Hooper*, 2 Leigh, 557.

the plaintiff had performed every thing contained in the agreement to be performed on his part, yet the defendant had not paid the sum of money agreed on; the defendant pleaded a release, of which the plaintiff cravedoyer, and then demurred. It was insisted, on the part of the defendant, that this action was founded, not upon the making the release of the equity of redemption, but upon the *promise* to make it, and consequently the plaintiff had a right of action at the time of the promise made; and then the release of all demands, &c., coming afterwards, released it, and was a good bar to the action. To this it was answered, and resolved by the court, that, if there had been a positive agreement, that the plaintiff should release the equity of redemption, and that the defendant should pay the money, the plaintiff might have maintained an action before he had made such release: but here the promise was

“in consideration whereof,” which made the release on the part [*114] of the plaintiff to be a condition precedent. *Holt*, C. J., *then entered into the distinction between positive agreements and conditions precedent, and observed, that in the case of conditions precedent, an action could not be maintained before *performance*; but in the case of positive agreements it was otherwise: he then laid down the following rules:

1. If a day be appointed for payment of the money, and the act for which the money is to be paid, cannot be done before the day appointed, then, though the agreement be to pay the money for the doing of the thing, yet the action may be brought for the money before the thing done: because the agreement is positive, that the money shall be paid at the day appointed. With respect to the reasonableness of this rule, the chief justice observed, that the bargain of every man ought to be performed as he understood it; and if a person will make such an agreement as to pay his money before he has the things for which he ought to pay, and will rely upon the remedy he has to recover the said thing, he ought to perform his agreement.(1)

[If it be *agreed* by specialty between A. and B., that B. shall pay A. a sum of money for his lands, &c., on a *particular day*, these words amount to a covenant by A. to convey the lands, for the word *agreed* is the word of both; but it is an independent covenant; and A. may bring an action of covenant or debt for the money *before* any conveyance by him of the land.(s)]

2. Though a day certain be appointed for payment of the money, yet if the day is to occur *after* the time in which the consideration ought to be performed, for which the money should be paid, the performance of the consideration ought to be averred in an action brought for the money.(2)

The chief justice then adverted to an objection which had been made

(s) *Pordage v. Cole*, 1 Saund. 319, recognized in *Mattock v. Kinglake*, 10 A. & E. 50; 2 P. & D. 346; and in *Wilks v. Smith*, 10 M. & W. 355.

(1) When the day appointed for payment of money or doing an act must or may happen before the thing to be performed by the plaintiff, he may sue without averring performance. *Stevenson v. Kleppinger*, 5 Watts, 420.

(2) See *Bailey v. Clay*, 4 Rand. 346; *Brockenbrough v. Ward*, Id. 352.

to the declaration, (*viz.*) that the plaintiff had not sufficiently averred, that he had made a release of the equity of redemption; for he ought to have shown *how* he had done it, in order that the court might judge whether it was done according to the agreement. The chief justice admitted, that the plaintiff in his declaration ought to have shown the time and place when and where the release was executed, and how the equity of redemption was released, and that for want of that, this declaration would have been ill on demurrer; but he added, that the defendant, by pleading over, had admitted that the release of the equity of redemption was properly made, and thereby aided this defect in the declaration.

A similar exception was made in the following case: (t) In assumpsit by the vendor against the vendee of land for not performing an agreement to purchase on certain terms, the plaintiff in *his* [*115] declaration alleged, that he was seized in fee of the land in question, and that the defendant agreed to purchase it *on having a good title*, and then averred, that the title to the land *was made good, perfect, and satisfactory* to the defendant; on demurrer, (1) it was holden, that it was not necessary for the plaintiff to set forth in the declaration all the particulars of his title, and that the averments in the present case were sufficient to enable the plaintiff to call upon the defendant for the non-execution of his part of the agreement. (2)

But in a prior case (u) where the purchaser of a copyhold estate had agreed to make a deposit, and pay the remainder of the purchase money, at a certain time, on having a good title and a proper surrender made to him, an action having been brought by the seller for the non-performance of the conditions on the part of the purchaser, wherein the seller alleged that he had been *always ready and willing*, and frequently offered, to make a good title to the estate, and to make a proper surrender of it, on payment of the purchase money, it was holden not sufficient, but that the plaintiff ought to have averred that he actually made a good title and surrendered the estate to the purchaser, or a tender and refusal, and ought also to have shown *what* title he had.

It has been already observed, that in the cases of conditions precedent, either performance, or that which the law considers as equivalent to performance, must be specially averred in the declaration. A tender and refusal has been deemed to be equivalent to performance, and an averment to that effect is sufficient, but an averment of a tender alone

(t) *Martin v. Smith*, 6 East, 555.

(u) *Phillips v. Fielding*, 2 H. Bl. 123.

(1) It was a special demurrer to the replication; but the plea and replication being admitted to be bad, the question turned wholly on the sufficiency of the declaration.

(2) In debt for a penalty against one who had articted to purchase land, it was objected that the plaintiff had stated, in the declaration, only that he was ready and willing to make a good title, but had not shown what title. Lord *Loughborough*, C. J., in delivering judgment, though tthat the objection was well founded, and that the plaintiff ought to have set forth his title. *D. of St. Albans v. Shore*, 1 H. Bl. 270. But see the remarks of Lord *Ellenborough*, C. J., and *Lawrence*, J., on this opinion of Lord *Loughborough*, 6 East, 561, 562.

without refusal is not.(x) Where there is a general allegation of performance, if the other party wants a more specific averment he must demur specially.(y)

Where the act is to be done at a particular time and place, if the party to whom the act is to be done does not attend, an actual tender becomes impossible; here then a tender in law will [*116] *be sufficient; but to support this, it will be incumbent on the party who is to make the tender, to show that he has done every thing, as far as in him lies, towards the execution of the contract, as will appear from the following cases :

In covenant(1) for not accepting stock of the Hudson's Bay Company,(z) at the company's house, on a certain notice, the plaintiff averred that he gave the notice to the other party to come to the *Hudson's Bay House* and accept the stock, and that the plaintiff *was ready there at the day*, and offered to transfer it, but that the other party did not come to accept it, nor had paid the price agreed, &c.; upon demurrer, the declaration was holden ill; for where the party to whom the act is to be done does not come to the time and place appointed, the other ought to show that he came at the last time of the day which the law has appointed for the doing the act; and if he came there before, he ought to show that he continued there to the last time. And that as the stock could only be transferred when the company's house was open, which was at stated hours of the day, the plaintiff should have averred the usage of the company in that respect, and that he came there at the proper time, and staid there until the house was shut. So where in assumpsit(a) for not accepting stock agreed to be transferred by the plaintiff at the request of the defendant, the plaintiff averred that he was ready and willing and offered to transfer, and requested the defendant to accept the stock, which he refused: and it appeared in evidence that the contract for the sale of the stock was made on the 5th of May, 1803, a little before 12 o'clock at noon: but there was not any proof of any direct application made to the defendant to accept the stock on that day, nor was it shown that the plaintiff had waited until the closing of the transfer books at the Bank for the defendant to appear and accept the transfer; but a few days afterwards an offer was made of the stock, which was then refused: on motion for setting aside the verdict which had been given for the plaintiff, it was holden, that the allegations of the declaration were not supported by the evidence; Lord *Ellenborough*, C. J., observing, that the plaintiff could not sustain the action without showing a tender of the stock and

(x) *Lea v. Exelby*, Cro. Eliz. 888; Salk. 623, S. P.

(y) *Varley v. Manton*, 9 Bing. 363.

(z) *Lancashire v. Killingworth*, Lord Raym. 686; Com. Rep. 116; 2 Salk. 623; and 13 Mod. 529.

(a) *Bordenave v. Gregory*, 5 East, 107.

(1) This case, in strictness, belongs to another title; but as I am not aware of any distinction between covenant and assumpsit, in respect of the doctrine here laid down, and as the reasoning of this decision was adopted in the succeeding case, I have availed myself of this opportunity of inserting it. This remark will apply to *Pordage v. Cole*, inserted, *ante*, p. 114.

refusal, or that which in law was tantamount to a tender and refusal; and that must be by showing either *an actual* tender and refusal, which *was not pretended to have been done in this [*117] case until after the 5th of May (the day on which it was evident that the contract was meant to be performed, the price being calculated accordingly;) or by showing that the plaintiff staid at the Bank to the last time of that day when a tender could have been made, which was so long as the transfer books remained open, and that he was there ready to have transferred, if the defendant had been there and would have accepted the stock; which would have been a sufficient substitution of the more formal evidence of an actual tender and refusal; but here there was neither a tender in fact nor in law.

Concurrent Acts.—2ndly. Where it is agreed that two concurrent acts shall be performed, the one by A. and the other by B. at the same time, one party cannot maintain an action against the other without averring either performance, or that which is equivalent to performance, of his part of the agreement: (1) As where the declaration stated, (b) that in consideration that the plaintiff had bought of the defendant a quantity of wheat at a certain price, to be paid by plaintiff to defendant, defendant undertook to deliver the wheat to plaintiff at S. in one month from the time of sale, and then averred, that although plaintiff always, from the time of sale, for one month following and afterwards, was ready and willing to receive the corn at S., yet the defendant had not delivered the same: after verdict for the plaintiff, upon the general issue, judgment was arrested; because it was not averred that the plaintiff had tendered to the defendant the price of the corn, or that he was ready to have paid for it on delivery; *Lawrence, J.*, observing, that “he considered this an agreement by the defendant to deliver the corn at S. on being paid for it; that the payment of the money was to be an act *concurrent* with the delivery,” and said the case was like that of *Callonel v. Briggs*, Salk. 112, 113; where, on an agreement to pay so much money six months after the bargain, the plaintiff transferring stock, *Holt, C. J.*, said, “If either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender; he did not say, that the not doing it should come from the defendant by way of excuse, but that the doing it must be alleged in the declaration. The tendering of the money by the plaintiff made part of the plaintiff’s title to recover, and he must set forth the whole of his title.”

But, *after verdict*, an averment, that the plaintiff was ready *and willing to perform his part of the contract, has [*118] been holden sufficient. As where assumpsit was brought for the non-delivery of a quantity of malt, (c) which the plaintiff had bought

(b) *Morton v. Lamb*, 7 T. R. 125, cited 2 N. R. 233, 240, *Smith v. Woodhouse*; and see *Stavart v. Eastwood*, 11 M. & W. 197; and *Hannuic v. Goldner*, 11 M. & W. 849.

(c) *Rawson v. Johnson*, 1 East’s R. 203, recognized in *Pickford v. Grand Junction Rail-*

(1) “If two men agree, one that the other should have his horse, and the other that he will pay ten pounds for it, an action does not lie for the money, until the horse be delivered.” Per *Holt, C. J.*, in *Thorpe v. Thorpe*, Salk. 171, 2. See note 1, *ante*, p. 111.

of the defendant at a certain price, and which defendant undertook to deliver on request; and the plaintiff averred, that although on, &c., at &c., he requested the defendant to deliver the malt, *and was then and there ready and willing* to pay the defendant for the same, according to the terms of the sale, and although he was then and there *ready and willing*, and offered to accept and receive the malt from the defendant, yet he did not deliver the same; after verdict for the plaintiff, it was moved in arrest of judgment, that the declaration was defective, because it only averred a readiness and willingness in the plaintiff to pay for the malt, and did not aver an actual tender of the price agreed upon; but the court overruled the objection, and held the averment sufficient. So where the declaration stated, *(d)* that the plaintiff had bought of the defendant a quantity of oats at a certain price per quarter, which defendant had undertaken to deliver some time between Michaelmas and Lady-day; and although the defendant did, in part performance of his promise, deliver to the plaintiff a part of the oats, and although the time for the delivery of the residue was long since elapsed, and the plaintiff *was* during all that time, and still is, *ready* to receive the residue of the oats and *pay* for the same, at the price agreed upon, yet the defendant had not delivered the same. After verdict for the plaintiff, an objection was made in arrest of judgment, because it was not averred in the declaration, that plaintiff had performed his part of the contract by tendering the price of the corn. But the objection was overruled by the court, and on the authority of the preceding case of *Rawson v. Johnson*, they held the averment sufficient.

In an action *(e)* for not delivering a quantity of oil, the declaration contained an averment *that the plaintiff was always ready and willing to accept it, and pay for the same on the terms agreed upon*; yet the defendant would not deliver it, whereby, &c.; the plaintiff proved the contract, and a demand, on his part, of the oil in question; but it was objected, on the part of the defendant, that the plaintiff should have proved that he was ready and willing to pay for the oil: *Gibbs, C. J.*, was of opinion, and the court afterwards concurred with him, that the delivery of the oil and payment for it were to be concurrent acts; and that it was not necessary for the plaintiff to prove that he had offered the money to the defendant, till the defendant was ready to perform his part of the contract by delivering the oil. By the demand [*119] which he made on the *defendant, he proved himself to be ready and willing to pay for the oil when delivered. *(1)*

The defendant became the purchaser of a leasehold estate, sold by public auction. By the conditions of sale it was stipulated that the purchaser should immediately pay down a deposit in part of the purchase money, and sign an agreement for payment of the remainder

way Company, 8 M. W. 372; and see *Kemble v. Mills*, 1 M. & Gr. 757; 2 Scott's N. R. 121.

(d) *Waterhouse v. Skinner*, 2 Bos. & Pul. 447.

(e) *Wilks v. Atkinson*, 1 Marsh. 412, recognized in *Levy v. Ld. Herbert*, 7 Taunt. 318.

(1) An averment that plaintiff has, at all times, been ready and willing to perform, is sufficient, without saying he was ready at the particular time stipulated. *Porter v. Rose*, 12 Johns. Rep. 209.

within twenty-eight days from the day of sale, when possession should be given of the part in hand, and that the purchaser should have proper conveyances and assignments of the leases, without requiring the lessor's title, on payment of remainder of the purchase-money. In an action of assumpsit, brought by the seller, for non-performance of the conditions on the part of the purchaser, the declaration stated in the first count, that the plaintiffs gave the defendant possession according to the conditions, and were also ready and willing to give him proper conveyances and assignments of the leases of the estate, on payment of the remainder of the purchase money; and the second count stated, that the plaintiffs contracted with the defendant to sell, and the defendant to purchase an estate, and that on the plaintiffs having promised the defendant to convey, he promised to accept the conveyance, and pay the remainder of the purchase money in a reasonable time: that although the plaintiffs were ready and willing, and offered to convey and assign to the defendant, and although a reasonable time had elapsed for accepting the conveyance, yet the defendant would not accept it, or pay the remainder of the purchase money. On a motion in arrest of judgment, on the ground that the plaintiffs had not set out their title, or tendered the conveyances to the defendant, it was holden, *(f)* that the plaintiffs were not bound to set out their title, and that the allegation of their being ready and willing to convey, was equivalent to a performance of the conditions on their parts; but that, at all events, such objections could not be supported after verdict.

An averment of readiness and willingness to grant a lease was holden on general demurrer to be equivalent to an averment of having title to grant one; *(g)* and a traverse of this averment puts in issue the plaintiff's ability to perform the contract, for the words "ready and willing" imply not only the disposition but the capacity to do the act. *(h)*

Where it is agreed that some act shall be performed by each of two parties at the same time, *(i)* he who was ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part of the agreement. *(1)*

**Mutual Promises.*—3rdly. Where there are mutual promises, and the mere promise, and not the performance thereof, is the consideration of the agreement, *(2)* there an action may be maintained by either party, *(k)* without averring performance of the agreement on his part: As where the declaration stated, that it was agreed that a race should be run between a horse of the plaintiff and one of J. S., *(l)* and in con-

(f) *Perry v. Williams*, 1 Moore, (C. P.) 498; 8 Taunt. 62, S. C.

(g) *De Medina v. Norman*, 9 M. & W. 820.

(h) Per Lord Abinger, C. B., S. C.

(i) *Jones v. Barkley*, Doug. 684, recognized in *Laird v. Pim*, 7 M. & W. 474.

(k) Hob. 106.

(l) *Martindale v. Fisher*, 1 Wils. 88.

(1) See *Dana v. King*, 2 Pick. 155.

(2) "Whether one promise be the consideration of another, or whether the performance, and not the mere promise, be the consideration, must be gathered from, and depends entirely upon, the words and nature of the agreement." Per *Lawrence, J.*, in *Glazebrook v. Woodrow*, 8 T. R. 373.

sideration that the plaintiff had agreed to deliver to the defendant a quantity of cloth, the defendant agreed to pay the plaintiff a sum of money in case J. S.'s horse should beat the plaintiff's horse, and then averred, that J. S.'s horse won the race. After verdict for the plaintiff, an exception was taken in arrest of judgment, because it was not averred in the declaration, that the cloth was delivered to the defendant; but the court overruled the exception, observing, that this was an action founded on mutual promises, and, therefore, it was not necessary for the plaintiff to make an averment of the delivery of the cloth; and *Denison, J.*, took this distinction,—“Where a plaintiff declares, that in consideration he would deliver to the defendant a piece of cloth, he, the defendant, should pay a sum of money for it, an averment of the delivery of the cloth is necessary; but if the plaintiff states an agreement, and then states that in consideration of such agreement, &c., in that case an averment is not necessary.”(1)

Having thus illustrated the nature of conditions precedent, concurrent acts, and mutual promises, it remains only to add, that there are not any technical words by which any of these considerations are constituted. The principal difficulty in the construction of agreements consists in discovering, whether the consideration be a condition precedent, a concurrent act, or a mutual promise. This, however, must be collected from the apparent intention of the parties to the agreement. The intention of the parties(*m*) is, or is assumed to be, the governing principle of all the determinations. When the nature of the consideration is ascertained, the rules respecting the averments before laid down invariably hold. If the reader wishes to pursue this subject further, he will find the cases relating to it fully collected and commented upon, in Mr. Serjeant Williams' edition of Saunders, vol. i. p. 320, n. 4; vol. ii. p. 352, n. 3. See also Mr. Durnford's note in Willes's Rep. p. 157, and *post*, tit. “Covenant.”(2)

(*m*) Per *Grose, J.*, in *Glazebrook v. Woodrow*, 8 T. R. 372; per Sir *J. Mansfield*, in *Smith v. Woodhouse*, 2 Bos. & Pul. N. R. 240.

(1) Mutual promises must be stated to have been made at the same time; for where the declaration stated an agreement to deliver and receive certain stock, and that in consideration the plaintiff had, at the defendant's request, promised to perform his part, the defendant, afterwards, to wit, on the same day, promised, &c., it was holden bad; the promises were mutual, and ought to have been stated to have been made at the same time; otherwise the one antecedently made would be without consideration, and, consequently, not sufficient to support the other. *Livingston v. Rogers*, 1 Caines' Rep. 583.

(2) Where the plaintiff agreed to work for the defendant a year, for a certain gross sum, but before the expiration of the year, voluntarily left his service without any fault on the part of the defendant, and against his consent, it was held, that the contract was entire, that the plaintiff was bound to perform the whole year's service as a condition precedent to his right to recover any thing under the contract, and that he could not renounce the contract and recover on a *quantum meruit*. *Stark v. Parker*, 2 Pick. 267. But where such contract was made by an *infant*, and, before the end of the year, he left the service of his employer voluntarily, and without the fault of the latter, it was held that the infant might recover on a *quantum meruit* for his services. *Moses v. Stevens*, Id. 332.

*IV. *Of the Pleadings.*

1. *In Abatement*, p. 121.
2. *Of the General Issue, and the New Rules relative to Pleadings in Assumpsit*, p. 121.
3. *Accord and Satisfaction*, p. 124.
4. *Infancy*, p. 128.
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1. *In Abatement.*

1. *In Abatement*.—By stat. 3 & 4 Will. IV. c. 42, s. 8, no plea in abatement for the nonjoinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea, that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea.

A plea in abatement⁽ⁿ⁾ of the coverture of the defendant is not a plea of nonjoinder within the meaning of the foregoing section; but it is a dilatory plea, requiring an affidavit of verification under the stat. 4 Anne, c. 16, s. 11.^(o) The following sections, *viz.*, 9, 10, and 11, of the statute 3 & 4 Will. IV. c. 42, lay further restrictions on pleas in abatement; but subject to these, parties are still entitled to the benefit of such pleas. And where parties have pleaded in abatement for nonjoinder of a defendant, the court of B. R. will not set aside the plea, or allow the writ to be amended, on the ground that the plaintiff is barred by the statute of limitations from bringing a fresh action.^(p) A plea of coverture is an issuable plea.^(pp)

2. *Of the General Issue, and the New Rules relative to Pleadings in Assumpsit.*

2. *General Issue*.—The general issue in this action is non assumpsit. If by mistake not guilty be pleaded, instead of non assumpsit, such plea will be bad on demurrer,^(q) but aided after verdict.^(r) Formerly, many grounds of defence might have been given in evidence under the general issue non assumpsit, and did not *require* to be pleaded specially; such as coverture at the time of making the contract, *infancy, and many more, for which the reader is referred to [*122] former editions of this work.⁽¹⁾ But now by R. G. H. T. 4

(n) *Jones v. Smith*, 3 M. & W. 526.

(o) *Lovell v. Walker*, 9 M. & W. 299.

(p) *Roberts v. Bate*, 6 A. & E. 778.

(pp) *Bush v. Leake*, 8 Scott's N. Rep. 66.

(q) *Marsham v. Gibbs*, 2 Str. 1022, and Ca. Temp. Hard. 173. Adjudged on special demurrer.

(r) *Elrington v. Doshant*, 1 Lev. 142; *Corbyn v. Brown*, Cro. Eliz. 470.

(1) Some portions of the last American edition of this work, relating to matters affected by the new rules of court, are inserted here in this edition. They are still useful in this country. (See next page.)

Will. IV. Pleadings I., in all actions of assumpsit, except on bills of exchange, and promissory notes, the plea of non assumpsit shall operate

"To a declaration in assumpsit consisting of several counts upon several promises, the defendant may plead non assumpsit generally. *Taylor v. Willes*, Cro. Car. 219.

The general issue may be pleaded, if there has not been any contract between the parties, or if the real contract be different from that on which the plaintiff has declared; *e. g.* if the contract was made with the plaintiff, and other persons not named in the action. Per *Raymond*, C. J., *Leglise v. Champante*, Str. 820. In an action on a tort, a different rule holds; for there, if one only of several persons, who ought to join, bring the action, the defendant can take advantage of it by plea in abatement only, although the defect appear on the face of the declaration. *Addison v. Overend*, 6 T. R. 766; 5 East's Rep. 407; except for the purpose of preventing the plaintiff from recovering any more than his share of the damages. *Nelthorpe v. Dorrington*, 2 Lev. 113. Indeed in assumpsit *against* one or more defendants, if any of the persons who ought to be *joined* are omitted, the defendant can only take advantage of it by a plea in abatement. *Rice v. Shute*, 5 Burr, 2611; *Abbot v. Smith*, 2 Bl. R. 947; *Germain v. Frederick*, B. R. T. 25 G. 3; 1 Saund. 291, c, Serjeant Williams's edit.; *Dixon v. Bowman*, Mich. 1776, there cited; *Evans v. Lewis*, Exchequer, E. 1774; 1 Saund. 291, b, S. P. The replication to this plea usually denies that the promises were made jointly. Upon this issue the counsel for the plaintiff begins, as it is incumbent on the plaintiff to prove his damages. *Robey v. Howard*, 2 Stark, N. P. C. 555. [But the joinder of improper parties, *i. e.* of more parties than are proved on the trial to have made the contract, may be taken advantage of under the general issue. *Tom v. Goodrich*, 2 Johns. Rep. 213.] Or if the contract was made with the plaintiff only, and the action is brought by the plaintiff and another. *Wilsford v. Wood*, 1 Esp. N. P. C. 182.

Under the general issue, everything may be given in evidence which disaffirms the contract; *Craig v. Missouri*, 4 Peters, 426; *Bierley v. Williams*, 5 Leigh, 700; *e. g.* the coverture of the plaintiff. But if the plaintiff take husband after the suing out of the writ, and before declaration, the defendant can take advantage of the coverture by plea in abatement only. *Morgan v. Painter*, E. 35 G. 3 B. R. 6 T. R. 265. Or defendant *at the time of making the contract*. Adm. in *James v. Fowks*, 12 Mod. 101, and daily practice at Nisi Prius. In like manner the defendant may give in evidence, in order to avoid the contract, gaming; Adm. by the Court in *Hussey v. Jacob*, Ld. Raym. 89; infancy; *Darby v. Boucher*, Salk. 279; *Season v. Gilbert*, 2 Lev. 144; *Wailing v. Toll*, 9 Johns. Rep. 141; usury; *Bernard v. Saul*, Str. 498, and Fort. 336, cited in Bull. N. P. 152. So he may give in evidence that the promise was for money won at gaming, contrary to the statute. *Murray v. Ware*, 1 Bibb, 614.

If the contract be good in law, and not performed, the defendant may, under the general issue, in certain cases, give in evidence some legal excuse for the non-performance of it, as accord with satisfaction; Adm. per *Holt*, C. J., in *Paramour v. Johnson*, 12 Mod. 376, Ld. Raym. 566, S. C.; a discharge before breach. A promise, before it is broken, may be discharged by a parol agreement, but after it is broken it cannot be discharged without deed, by any new agreement, without satisfaction. Per *Holt*, C. J., 12 Mod. 538, S. P. adm. in *Edwards v. Weeks*, 1 Mod. 262; foreign attachment; *Welles v. Needham*, Ld. Raym. 180; *Nathan v. Giles*, 5 Taunt. 558, S. P.; or a release; *Miller v. Aris*, Middlesex Sitings, after M. T. 41 G. 3 per *Kenyon*, C. J., MSS.; *Hawley v. Peacock*, 2 Camp. N. P. C. 558; S. P. *Dawson v. Tibbs*, 4 Yeates, 349.

Defendant may also show, under the general issue, that he offered to perform his part of the contract, but was prevented by the act or omission of the plaintiff. *Wilt v. Ogden*, 13 Johns. Rep. 56.

Matter of law, which amounts to the general issue, may be pleaded or given in evidence. *James v. Fowks*, 12 Mod. 101.

Payment before action brought, may be given in evidence, under the general issue. *Dingee v. Letson*, 3 Green, 259; *Craig v. Whips*, 1 Dana, 375.

By a former stat. of New York, 1 R. L. p. 515, (Sess. 36, ch. 56, s. 1,) it was provided, that, "it shall be lawful for any defendant or tenant, in any action in any court of record, to plead the general issue, and to give any special matter in evidence, which if pleaded would be a bar to such action, giving notice with the said plea of the matter, or several matters, so intended to be given in evidence."

A notice with the general issue forms no part of the record; an admission in it does not excuse the plaintiff from proving the matters charged in his declaration, and it will not help a defect in the declaration. *Vaughan v. Havens*, 8 Johns. Rep. 109.

only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law. *Ex. gr.* In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and, in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties. In actions against carriers and other bailees, for not delivering or not keeping goods, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach. In an action of indebitatus assumpsit for goods sold and delivered, the plea of non assumpsit will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money, and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff. 2. In all actions upon bills of exchange and promissory notes, the plea of non assumpsit shall be inadmissible.⁽¹⁾ In such cases, therefore, a plea in denial must traverse some matter of fact; *ex. gr.* the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note. 3. In every species of assumpsit, all matters of confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or *otherwise*, shall be specially pleaded; *ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law; drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.

A broad distinction is made in the first of these rules between actions of assumpsit on express contracts, and actions of assumpsit on implied contracts: non assumpsit putting in issue in actions on express contracts, the fact only of the contract, and in actions in implied *contracts the matters of fact from which the contract [*123] may be implied.^(s) The object of this rule is to confine the

^(s) Per *Tindal*, C. J., in *Martin v. Smith*, 4 Bingh. N. C. 436. See also *Taverner v. Little*, 5 Bingh. N. C. 686.

Matter of set-off is not considered as payment, but should be pleaded, or notice thereof given. *Drake v. Drake*, 11 Johns. Rep. 531.

In an action of assumpsit by an attorney for his fees, the defendant cannot give the negligence of the plaintiff in conducting the suit, (admitting that it would be a good defence,) in evidence under the general issue, but must plead, or give notice of it. *Runyan v. Nichols*, 11 Johns. Rep. 547."

(1) This rule is confined to cases where the action is *only* on the note, and on the promise to pay, contained in or implied by law from it: it is to be read as if it were worded thus:—"In all actions on bills of exchange and promissory notes *simpliciter*, without any other matter." Per *Parke*, B., in *Timmis v. Platt*, 2 M. & W. 721. See *post*, tit. "Bills of Exchange," "Pleading."

plea of non assumpsit, which had before operated as a denial of all the facts, and, indeed, of all liability to the action at the time it was brought, to a denial of the contract, expressed or implied, alleged in the declaration. A contract implies that there are two parties to it, and a denial of the contract alleged, is a denial of a contract with the plaintiff. An action on a policy is mentioned in the rules only as an example illustrating the general rule, and in such an action the plea of non assumpsit denies that the defendant ever contracted by such a policy with the plaintiff, and consequently puts in issue the fact that the plaintiff caused the policy to be made.(t)

A plea which, in answer to the contract declared on, sets up another contract inconsistent with it,(u) or a plea which qualifies the contract stated in the declaration, and introduces a new stipulation into it,(x) is bad as amounting to the general issue; for in effect, as to the contract declared on, the defendant says non assumpsit, the effect of the plea of non assumpsit being to deny the making of *such* a promise;(y) but a plea of subsequent agreement substituted for that declared on is good(z) by way of confession and avoidance.

In *Hemming v. Trenery*,(a) which was assumpsit on a guarantee, to which the only plea was non assumpsit, it appeared at the trial that the instrument had been interlined so as materially to alter its effect, and the jury found that the interlineation was made after the instrument was executed; it was holden, that the effect of the alteration being only to discharge or modify the original contract, it was a defence which required to be shown by confession and avoidance only, and could not be given in evidence under the general issue.

Evidence(b) of circumstances independent of the contract, the object of which evidence is to show that the consideration for the agreement was in fact a nullity, is inadmissible under the general issue: in this case (*Passenger v. Brookes*) the evidence tendered was for the purpose of showing that there was no consideration by setting up a prior [*124] agreement; that was collateral, and not a denial *of the consideration, but a sort of confession and avoidance.(c) In assumpsit(d) for goods sold, the defendant under the general issue may show that they were sold on a credit not expired.

Illegality of consideration, whether at common law or by statute,(e)

(t) Per Parke, B., delivering judgment of the court in *Sutherland v. Pratt*, 11 M. & W. 314.

(u) *Morgan v. Pebrer*, 3 Bingham N. C. 457; *Filmer v. Burnby*, 2 M. & Gr. 545; 2 Scott's N. R. 689.

(x) *Nash v. Breeze*, 11 M. & W. 352.

(y) Per Tindal, C. J., in *Filmer v. Burnby*, 2 M. & Gr. 545; 2 Scott's N. R. 689.

(z) *Taylor v. Hilary*, 1 Cr. M. & R. 743; 5 Tyr. 375.

(a) 9 A. & E. 926, 1 P. & D. 661; Parke, B., in *Davidson v. Cooper*, (11 M. & W. 787. affirmed in Exchequer Chamber,) observed, that all the authorities were considered in *Hemming v. Trenery*; and the decision of the court appeared to him to be correct.

(b) *Passenger v. Brookes*, 1 Scott, 560; 1 Bingham N. C. 587, referred to by Parke, B., in *Nash v. Breeze*, 11 M. & W. 355, as being correctly reported in 1 Scott, 560, but mistakenly in 1 Bingham N. C. 587.

(c) Per Parke, B., in *Bennion v. Davison*, 3 M. & W. 183; see *Bingham v. Stanley*, 2 Q. B. 117; 1 G. & D. 237.

(d) *Broomfield v. Smith*, 1 M. & W. 542; 1 Tyr. & Gr. 929, denying the authority of *Edmunds v. Harris*, 2 A. & E. 414.

(e) *Martin v. Smith*, 4 Bingham N. C. 436; 6 Scott, 268.

must be specially pleaded;(1) and not only where the express contract on which the plaintiff sues is illegal, but also where illegal services having been performed, no contract to pay for them can be implied.(f) A defendant cannot take advantage of an illegality to avoid a contract without an appropriate special plea, although the illegality becomes apparent in the course of the plaintiff's case, and without any evidence offered by the defendant.(g) In cases of contracts within the statute of frauds, the defendant may show, under the general issue,(h) that there was no contract in writing. But in an action of assumpsit for the price of a copyright bargained and sold, it was holden, that a defence on the ground that the copyright was not assigned in writing must be specially pleaded.(i)(2) An apothecary must prove his qualification under the 55 Geo. III. c. 194(3) as a condition precedent to his right of action, although the general issue only be pleaded;(k) for the necessity of proof by the plaintiff in such a case is imposed on the plaintiff by way of penalty, and therefore no omission on the part of the defendant to plead the statute will relieve the plaintiff from the necessity of giving that proof.(l)

3. *Accord and Satisfaction.*

3. *Accord and Satisfaction.*—*Accord with Satisfaction* is a good plea in bar to this action,(m) because damages only are recoverable; *and accord with satisfaction to one defendant is a [*125] bar to all.(n) This defence might formerly have been given in evidence under the general issue;(o)(4) but under the operation of the new rules, it must now be pleaded specially. An accord to make a

(f) *Potts v. Sparrow*, 1 Bingh. N. C. 594; 1 Scott, 578.

(g) *Fenwick v. Laycock*, 1 Q. B. 414; 1 G. & D. 27, recognized in *Daintree v. Hutchinson*, 10 M. & W. 85.

(h) *Buttmore v. Hayes*, 5 M. & W. 456, recognized in *Eastwood v. Kenyon*, 3 P. & D. 276; 11 A. & E. 438; and in *Leaf v. Tuton*, 10 M. & W. 393, [recognized in *Turnley v. Macgregor*, 6 Scott's N. R. 923.]

(i) *Barnett v. Glossop*, 1 Bingh. N. C. 633; 1 Scott, 621; but see *Johnson v. Dodgson*, 2 M. & W. 653.

(k) *Shearwood v. Hay*, 5 A. & E. 383; *Wills v. Langridge*, Ib., S. P., recognized with reluctance in *Wagstaffe v. Sharpe*, 3 M. & W. 521.

(l) Per *Patteson, J.*, in *Robinson v. Roland*, 6 Dowl. 271.

(m) *Dyer*, 75, b.

(n) 9 Rep. 79, b.

(o) 12 Mod. 376; Ld. Raym. 566.

(1) See *Wheeler v. Curtis*, 11 Wend. 654.

(2) See *Hemming v. Trenery*, 9 A. & E. 935; 1 P. & D. 661, where *Denman, C. J.*, in delivering the judgment of the court, observed, "That upon defences which arise as to matters of law, a difference of opinion seems to be entertained by different judges, whether such defences may be set up under the general issue, or must be specially pleaded."

(3) As to surgeons and assistant surgeons in the army and navy, see *Steavenson v. Oliver*, 8 M. & W. 234.

(4) "It is indulgence to give accord with satisfaction in evidence, upon *non assumpsit*, but it has crept in, and is now settled." Per *Holt, C. J.*, 12 Mod. 377. The time of the accord and satisfaction stated in a notice of special matter, is not material, and may be departed from in evidence. But if no time is stated in a plea of accord and satisfaction, it is bad on special demurrer. *Pence v. Smock*, 2 Blackf. 315; *Strong v. Holmes*, 7 Cowen, 224.

good plea must be perfect, complete, and executed; (p) for an accord executory is only substituting one cause of action for another, which might go on to any extent. Hence a plea of accord to do several things, (q) with an averment of performance of some only, and of an offer to perform the rest, is bad. So where to an assumpsit on a promissory note, the defendant pleaded an agreement (r) between the defendant and plaintiff, with other creditors of the defendant, that they would accept a composition in satisfaction of their respective debts, to be paid in a reasonable time, and then averred *a tender and refusal* on the part of the plaintiff of the composition: on demurrer, the plea was holden bad. But where a debtor being unable to meet the demands of his creditors, they signed an agreement (which was assented to by the debtor) to accept payment by his covenanting to pay a third of his annual income to a trustee of their nomination, and give a warrant of attorney as a collateral security; it appeared that the debtor was willing to perform his part, but the creditors did not appoint a trustee: it was holden, (s) that the agreement, though not properly an accord and satisfaction, was a good defence to an action by one of the creditors for his demand; inasmuch as it was a consent by the parties signing the agreement to forbear enforcing their demands, in consideration of their own mutual engagement of forbearance; and that each creditor was bound, in consequence of the agreement of the rest. Acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater. (1) To an action of *indebitatus assumpsit* for

(p) *Peytoe's case*, 9 Rep. 79, b.

(q) *Shephard v. Lewis*, T. Jones, 6.

(s) *Good v. Cheesman*, 2 B. & Ad. 328.

(r) *Heathcote v. Crookshanks*, 2 T. R. 24.

(1) But the acceptance of a security from a third person and payment upon it is a good accord and satisfaction, though for a less sum. *Le Page v. M'Crea*, 1 Wend. 164. *Boyd v. Suydam*, 20 Johns. 76. See *Booth v. Smith*, 3 Wend. 66; *Nave v. Fletcher*, 4 Littell, 242; *Burnsides v. Smith*, 5 Monroe, 464. A note by same party for a former one due is no satisfaction, but if by a different party, it may be pleaded as an accord and satisfaction. *Letcher v. Commonwealth*, 1 Dana, 84; *Bullen v. M'Gillienday*, 2 Dana, 20; *Kellogg v. Richards*, 14 Wend. 116. But a mere indorsement on the note by a third person, "I am to pay the within note," and a credit of same date still legible, though struck through with a pen, of a sum from such person, the note still remaining with payee, is no evidence of such accord. *Bruce v. Bruce*, 4 Dana, 530. A note payable *absolutely* is good accord and satisfaction for one for a larger amount payable on a contingency. *Winslow v. Harda*, 4 Dana, 543. Property placed by a debtor in the hands of his creditor is not to be considered as received in full discharge of the debt unless such plainly was the intention. *Perit v. Pittfield*, 5 Rawle, 166.

To constitute a good accord and satisfaction, the following particulars seem to be necessary:

1. The matter agreed to be received in satisfaction of the debt, must be something of legal value, to which the creditor before was not entitled.
2. Every part of the matter agreed to be received as satisfaction must be effectual, so that if a part fail, or do not take effect, the whole agreement is bad.

It seems from this, that the legal notion of accord is a new agreement on a new consideration, to discharge the debtor; and this agreement comes within the general principles of law, as to contracts: the consideration must have legal value, and every part of the alleged consideration must take effect.

3. The accord must be executed, and a mere executory agreement by the debtor can never be pleaded as an accord and satisfaction.

4. Another rule of no great practical value is, that the matter received in satisfaction

15*l.*(*t*) the defendant pleaded, that he gave the plaintiff a promissory note for 5*l.* in satisfaction, and that the plaintiff received it in satisfaction; the plaintiff put in an immaterial replication, to which the defendant demurred: after judgment for the plaintiff in C. B., it was objected on error in B. R. that the plea was ill, it appearing that the note for 5*l.* could not be a satisfaction for 15*l.*; and per *Pratt*, C. J., "We are all of opinion that the plea is not good; as the plaintiff had a good cause of action, it can only be extinguished by a satisfaction which he agrees to accept, and it is not his agreement alone that is sufficient, but it must appear to the court to be a reasonable satisfaction. If 5*l.* be (as is admitted) no satisfaction for 15*l.*, why is a simple contract to pay 5*l.* a satisfaction for another simple contract of three times the value? In the case of a bond, another bond has *never been [*126] allowed to be pleaded in satisfaction, (*u*) without a bettering of the plaintiff's case, as by shortening the time of payment." Judgment affirmed.(1) So where, in an action of *indebitatus assumpsit* for goods sold and delivered, (*x*) to which the defendant pleaded non assumpsit, it appeared that the defendant, prior to his insolvency, was indebted to the plaintiff in 50*l.* for goods sold and delivered; that the defendant, in consequence of his insolvency, had compounded with all his creditors, and paid them 7*s.* in the pound, and at the time of such payment to the plaintiff, promised to pay him the residue of his debt, when he should be of ability so to do, which he was proved to have been before action

(*t*) *Cumber v. Wane*, Str. 426. [See *Pritchard v. Hitchcock*, 6 Scott's N. R. 866.]

(*u*) *Manhood v. Crick*, Cro. Eliz. 716; Cro. Car. 85; and *Lovelace v. Cocket*, Hob. 68, 69, S. P.

(*x*) *Fitch v. Sutton*, 5 East, 230.

must be given by the debtor, and not by a stranger. *Clin v. Borst*, 6 Johns. 31; *Stark's Adm'r v. Thompson's Ex'rs*, 3 Monroe, 296.

These are the technical rules which relate to this plea, and the general principle to be deduced from them in regard to the present subject is, that anything of legal value, whether a chose in possession or in action, i. e., any legal interest or right which the creditor had not before, agreed to be received, and actually received in full satisfaction of the debt, is a good satisfaction, without regard to the comparative magnitude of the satisfaction with the original debt, and may be pleaded in bar, as accord and satisfaction. The matter given and received must have legal value and be of advantage to the creditor, (or a disadvantage to the other); that it must vest in the creditor an interest or right which he had not before; and hence giving what was really the creditor's own before, or giving a note of a third person, which, from the infancy of the person making it, is naught; or assigning accounts or orders on which an action is not maintainable; or where the assignment is not valid, is bad as an accord and satisfaction, because there is no valid consideration for the accord. *Keeler v. Neal*, 2 Watts, 424; *Davis v. Noaks*, 3 J. J. Marshall, 494; *Commonwealth for the use of Johnston v. Miller*, 5 Monroe, 205; *May v. Fletcher*, 4 Litt. 242; *Buddicum v. Kirk*, 3 Oranch. 293; 1 Smith's Lead. Cas. 383, 4th Amer. ed. For a thorough and exhausting discussion of this subject, see the elaborate note by Messrs. Hare and Wallace, to *Cumber v. Wane*, above cited in 5th Amer. ed. of Smith.

(1) Lord *Ellenborough*, C. J., in speaking of this case of *Cumber v. Wane*, in *Fitch v. Sutton*, 5 East, 232, observed, that though it had been said by him in argument, in *Heathcote v. Crookshanks*, 2 T. R. 26, to have been denied to be law, and in confirmation of that, *Buller*, J., afterwards referred to a case, (stated to be that of *Hardcastle v. Howard*, H. 26, Geo. III.,) yet he (Lord *Ellenborough*) could not find any case of that sort; on the contrary, the decision in *Cumber v. Wane* was directly supported by the authority of *Pinnel's* case, 5 Rep. 117, and it did not appear that *Pinnel's* case had ever been questioned. The case of *Cumber v. Wane* was recognized in the case of *Pritchard v. Hitchcock*, 6 Scott's N. R. 866-7; *Cooper v. Parker*, 14 C. B. 118.

brought : To meet this case, the defendant produced a receipt signed by the plaintiff for the composition of 7s. in the pound for his debt, which he acknowledged to be in full of all demands, and then insisted that this receipt was a discharge of the promise. A verdict having been found for the defendant, on a motion for a new trial, *Knight v. Cox*, Bull. N. P. 153, was cited for the defendant, where the creditor having accepted a composition and signed a release to the defendant, who in consideration thereof promised to pay him the entire debt, it was holden, that the release was a good defence to an *indebitatus assumpsit* for the original cause of action : But Lord *Ellenborough*, C. J., said, in that case the original contract was extinguished by the release ; but it could not be pretended that a receipt of part only, though expressed to be in full of all demands, must have the same operation as a release ; it was impossible to contend that an acceptance of 17l. 10s. was an extinguishment of a debt of 50l. He added, that there must be some consideration for the relinquishment of the residue,—something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement was *nudum pactum*.⁽¹⁾ But the mere promise to pay the rest when of ability, put the plaintiff in no better condition than he was in before. Rule for a new trial absolute. In [*127] *Thomas v. Heathorn*, *2 B. & C. 481, *Bayley*, J., says, “It is perfectly clear, that in point of law, payment of a smaller sum cannot be pleaded as a satisfaction for a larger.” And in *Down v. Hatcher*, 10 A. & E. 121, such a plea was holden bad after verdict. B. and C. being jointly indebted to A., A. sued B. alone, who did not plead in abatement ; but B.’s attorney wrote a letter stating the hardship of his client being compelled to pay the whole debt, and offering to pay a proportional share. This offer was accepted, and A. gave a receipt for debt and costs in this action. A. then commenced an action against C. for the balance. It was contended, that the debt was already discharged ; but the court^(y) were of a different opinion, observing, that the payment was not made in discharge of A.’s right against C. ; and the result of the whole was, that it did not operate as a release or matter which could have been pleaded as an accord and satisfaction, but amounted merely to an engagement not to sue B., which could only be pleaded by himself. If an action be brought on a quantum meruit, and the defendant agree to pay a less sum than the demand in full, that is a good consideration for a promise by the plaintiff to pay his own costs and proceed no further.^(z) The defendant may plead,^(a) that he was the payee of a promissory note, and that he indorsed it to the plaintiff on account of the debt sued for ; because though the promissory note is not a security of a higher nature than the simple contract debt sought to be recovered in the action of assumpsit, yet it gives the plaintiff the

(y) *Watters v. Smith*, 2 B. & Ad. 889.

(z) *Wilkinson v. Byers*, 1 A. & E. 106.

(a) *Kearlake v. Morgan*, 5 T. R. 513.

(1) In *Lynn v. Bruce*, 2 H. Bl. 317, it was holden, that an agreement to accept a composition in satisfaction of a debt was not a sufficient consideration to support a promise by the debtor to pay the composition. *S. P. Geiser v. Kershner*, 4 Gill & J. 305 ; *Sprunerbager v. Densley*, 4 Watts, 128 ; *Allen v. Rosevelt*, 14 Wend. 100.

advantage of holding a third person liable to him. In this case the security was given for the whole debt; and this seems necessary to entitle the party to plead it in bar; for where a debtor had compounded with his creditors, giving them the security of a third person for payment of *part* of the stipulated dividend, it was holden, that he was not discharged upon payment of that only, the residue continuing unpaid.^(b) And further, although if creditors simply agree to accept less from their debtor than their just demand, that will not bind them; yet if, upon the faith of such an agreement, a third person (also a creditor) be induced to become surety for any part of the debts, on the ground that the party will be thereby discharged, the agreement, though not under seal, will be binding: and a creditor, after the security given has been paid, cannot sue for the residue of his demand: for that would be a fraud on the surety.^(c)—N. It did not appear, in this case, that the plaintiff had induced any of the other creditors or the surety to sign the agreement. But where the plaintiff and other creditors of the defendant subscribed to resolutions for entering into a composition deed with the defendants, upon their property being assigned to trustees for the payment of their creditors; the defendants and their *trus- [*128] tees having refused to allow the plaintiff to come in as a creditor under the deed; it was holden,^(d) that the plaintiff, although he had subscribed the resolutions, might, notwithstanding, sue the defendants for the amount of his demand. If the creditors sign an agreement to give the debtor time for the payment of their respective demands, and to take his promissory notes for the amount, they cannot sue for the original cause of action, without proving that the agreement has been broken on the part of the debtor.^(e)(1) A plea, to an action of assumpsit for work and materials, &c., that the promises were made jointly with T. M., and that before action brought, the plaintiff for and on account of the sum due, and of the promises of the defendant and T. M., drew a bill on T. M. which he accepted and delivered to the plaintiff, who received the same for and on account of the said sum and of the said promises, was holden good, as raising a *prima facie* defence; and that it lay on the plaintiff to show that the bill was overdue and unpaid, or had been negotiated.^(f) An accord, with mutual promises to perform, is good, though the thing be not performed at the time of action, for the party has a remedy to compel the performance.^(g) “It appears by a long train of authorities, commencing with that in Dyer, 356, that a plea of accord, to be a good plea, must show an accord

(b) *Walker v. Seaborne*, 1 Taunt. 526.

(c) *Steinman v. Magnus*, 2 Campb. 124; 11 East, 390. See also *Bradley v. Gregory*, 2 Campb. 383; and *Wood v. Roberts*, 2 Stark, N. P. C. 417, Abbott, C. J.

(d) *Garrard v. Woolner*, 8 Bingham 258.

(e) *Boothbey v. Sowden*, 3 Campb. 175. But see *Cranley v. Hillary*, 2 M. & S. 122; and *Reay v. White*, 1 Cr. & Mee. 748.

(f) *Mercer v. Cheese*, 4 M. & Gr. 804; 5 Scott's N. R. 664.

(g) Com. Dig. Accord, B. 4, recognized *per Cur.* *Cartwright v. Cooke*, 3 B. & Ad. 701.

(1) See on this subject a note in Mr. Metcalfe's valuable edition of *Yelverton's Reports*, 11 a. note 1; Vide New Rule, sup. 121.

which is not executory at a future day, but which ought to be executed, and has been executed, before action brought."(*h*)

4. *Infancy.*

4. *Infancy.*—The defendant may plead that he was an infant at the time of making the promise.(1) This privilege of avoiding contracts, which the law confers on such as enter into them during their minority, that is, (by the law of England,) within the age of 21 years, is a personal(*i*) privilege, the benefit of which must be claimed by the infant, and which cannot be exercised for him by any other person.(2) The plea of infancy ought not to be pleaded by attorney, but by guardian; for an infant cannot appoint an attorney.(3) In cases where the contract declared on by the plaintiff has been made with the infant for necessities suitable to his estate and degree, the plea of infancy will not operate [*129] as a bar to the plaintiff's demand; for the law permits an infant to bind himself, either by simple contract or single bill, (*k*) for necessities, (*l*) (*viz.*) necessary meat, drink, apparel, necessary physic, proper instruction, and the like; and an infant is capable(*m*) of entering into a contract not merely for necessities for ready money, but into any reasonable contract for necessities, although he may have an income allowed to him sufficient to supply him with necessities. Hence it frequently becomes a question what are necessities.(4) In an action for goods sold and delivered, (*n*) it appeared that the goods in question were a livery for a servant of the defendant, who was a captain in the army, and cockades for some of the soldiers belonging to his company. The defendant relied on his infancy, insisting that the goods in question were not within the description of necessities; the judge left it to the jury to consider whether the livery was not suitable to the degree, and the cockades a necessary expense incidental to his situation; and the jury being of that opinion, found a verdict for the plaintiff. On a motion for a new trial, Lord *Kenyon*, C. J., said, that

(*h*) Per *Tindal*, C. J., delivering judgment in *Bayley v. Homan*, 3 Bingh. N. C. 920.

(*i*) Per *Eyre*, C. J., in *Keane v. Boycott*, 2 H. Bl. 515; and *Ellenborough*, C. J., in *Taylor v. Croker*, 4 Esp. N. P. C. 187.

(*k*) *Russell v. Lee*, 1 Lev. 86, 87.

(*l*) 1 Inst. 172, a.

(*m*) *Burghart v. Hall*, 4 M. & W. 727.

(*n*) *Hands v. Slaney*, 8 T. R. 578.

(1) Payment of money into court will not preclude a defendant from availing himself of his infancy, because the money may have been paid into court for necessities. Per *Buller*, J., in *Hitchcock v. Tyson*, 2 Esp. N. P. C. 481, n. In this country the defendant may, under the general issue, give infancy in evidence. See *Stansbury v. Marks*, 4 Dall. 130.

(2) See *Oliver v. Hondler*, 13 Mass. Rep. 237; *Smith v. Mayo*, 9 Id. 62; *Hussey v. Jarrett*, Ib. 100; *Voorhees v. Wait*, 3 Green, 343; *Rose v. Daniel*, 3 Brev. 438; *Burley v. Russell*, 10 N. Hamp. 184. Executors and administrators may avail themselves of it. *Jefford v. Ringold*, 6 Ala. 544; *Brown v. Caldwell*, 10 S. & R. 114; *Worcester v. Eaton*, 13 Mass. 371; *Nightingale v. Withington*, 15 Id. 272; *Van Bramer v. Cooper*, 2 Johns. 279; *Hartness v. Thompson*, 5 Id. 160. Tender made on behalf of an infant by an uncle, where there is no guardian, and the father is dead, although the mother is alive, is good. *Brown v. Dysinger*, 1 Rawle, 408.

(3) See *Sliver v. Shelbach*, 1 Dall. 165; *Moor v. M'Ewen*, 5 Serg. & R. 373.

(4) See Story on Contracts, § 77; Addison on Contracts, 24-86; 1 Parsons on Contracts, 244; 2 Greenl. on Evid. § 366.

the cockades could not be considered as necessities for the defendant, and ought not to have been included in the damages; but with respect to the livery, he could not say that it was not necessary for a person in the situation of defendant to have a servant;(1) and if it was proper for him to have one, it was necessary that the servant should have a livery. The chief justice added, that, however inclined he was in general to protect infants against improvident contracts, yet he thought this case fell within the fair liability which the law imposed on infants, of being bound for necessities, which was a relative term, according to their station in life.(2) The rule for a new trial was discharged, the plaintiff's counsel agreeing to strike out the amount of the cockades. All such articles(o) as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one, and for such matters an infant cannot be made responsible. But if they are not of this description, then the question arises whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, *and station of life in which he [*130] moved; if they were, for such articles an infant may be responsible: and it is for the jury to decide whether the articles are of such a description or not. Evidence is admissible, to show that the infant was already supplied with the articles in question.(p) Dinners, confectionary, or fruit, supplied to an infant, an under-graduate in the university, having lodgings in the town, without any explanation of the circumstances under which they were supplied, were holden not to be necessities.(q) Infancy is a good defence to an action on the warranty of a horse.(r) A copyhold estate devolved on the defendant,(s) when he was an infant of six years of age, whereupon he was admitted,(3) and a fine duly assessed. Two years after the defendant (who had continued in

(o) Per Parke, B., in *Peters v. Fleming*, 6 M. & W. 47, where the plaintiff recovered in an action for rings, watch-chains, &c.

(p) *Burckhart v. Angerstein*, 1 M. & Rob. 458, *Alderson*, B.

(q) *Brooker v. Scott*, 11 M. & W. 67.

(r) *Howlett v. Haswell*, 4 Campb. 118.

(s) *Evelyn v. Chichester*, 3 Burr. 1717. See stat. 11 Geo. IV. and 1 Will. IV. c. 65, s. 6.

(1) See the opinion of *Haughton*, J., 2 Roll. R. 271, "If an infant is the owner of houses, it is necessary to have them kept in repair, and yet the contract to repair them will not bind the infant; for no contracts are binding on infants, except such as concern their person."

(2) So in *Ford v. Fothergill*, 1 Esp. N. P. C. 212, Lord *Kenyon*, C. J., said, that the question of necessities was a relative fact to be governed by the fortune or circumstances of the infant, and that proof of these circumstances lay on the plaintiff. It has been held that a horse is not within the denomination of necessities for which an infant is liable. *Rainwater v. Durham*, 2 Nott & M'C. 524. An infant who lives with, and is properly maintained by her parents, cannot bind herself for necessities, and the presumption is, that she is properly maintained until the contrary be shown. *Connolly v. Hall*, 3 M'Cord, 6; *S. P. Guthrie v. Murphy*, 4 Watts, 80. See note 4, *supra*.

An infant may bind himself for necessities if the form of the contract is such that the consideration may be inquired into. *Stone v. Dennison*, 13 Pick. 1. And is liable although he has given a note for their amount, but not on the note. *McCrillis v. How*, 3 N. H. R. 348.

(3) In the report of this case in Bull. N. P. 154, it is stated that the defendant was admitted on coming of age.

possession from the time of his admission) came of age, an *indebitatus assumpsit* was brought for the fine, which the jury found to be reasonable. A question was made for the opinion of the court, whether this action would lie against the defendant, he being a minor at the time of the fine being assessed. The court were of opinion, that the action would well lie; and *Yates, J.*, said, that if assumpsit had been brought against the infant during his minority, he should have thought it maintainable; that an infant might contract for necessities, *à fortiori*, therefore, for a fine which was due on admission, without which, the infant could not have received the rents and profits. But in this case it was clear beyond doubt, for the defendant had confirmed the contract by his enjoyment of the estate two years after he came of age. In a recent case, it was holden, that an infant widow is liable upon a contract by her, for her deceased husband's funeral expenses, as such a contract may be considered as made for her personal benefit; "the ground of the decision in this case, arises out of the infant's previous contract of marriage; it will not therefore follow, that an infant child, or more distant relation, would be responsible upon a contract for the burial of his parent or relative."^(t)

If goods, not necessities, are delivered to an infant, who after full age ratifies the contract by a promise to pay, he is bound: (1) Per *Raymond, C. J.*, *Southerton v. Whitlock*, London Sitings, Str. 690. But see *Stone v. Wythipoll*, Cro. Eliz. 126, where it was holden, that the simple contract of an infant, not being for necessities, was merely void, and, consequently, that a promise by his executor to pay in consequence of forbearance was *nudum pactum*: And now by [*131] stat. 9 Geo. IV. c. 14, s. 5, no action shall be *maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract, unless such promise or ratification be by some writing signed by the party to be charged therewith. *Ashurst, J.*, speaking upon this point of subsequent promises by infants, in *Cockshott v. Bennett*, 2 T. R. 766, seems to confine their operations to *securities*. "A security given by an infant, which is only voidable, may be revived by a promise after he comes of age." (2) In such case he is bound in equity and conscience

(t) Per *Alderson, B.*, delivering the judgment of the court in *Chapple v. Cooper*, 13 Law J. (N. S.) Exch. 286.

(1) But an express promise after an infant comes of age, need not be shown for necessities furnished during infancy. *Gay v. Ballow*, 4 Wend. 403. How far acts of an infant are void or voidable. *Fonda v. Cauhorne*, 15 Wend. 631; *Tucker v. Moreland*, 10 Peters, 58. See next note.

(2) The rule that a contract clearly beneficial is binding upon an infant, that one clearly prejudicial is void, and that such as may be either beneficial or injurious are voidable, has been approved of in the courts of several states. *Vent v. Osgood*, 19 Pick. 572, 573; *Lawson v. Lovejoy*, 8 Greenl. 405; *Fridge v. The State, use of Kirk*, 3 Gill & Johns. 104, 115; *Kline v. Beebe*, 6 Conn. 494, 503; *Wheaton v. East*, 5 Yerg. 41, 61; *Langford, Adm'r, v. Frey, Ex'r*, 8 Humph. 443, 446; *M-Gan v. Marshall*, 7 Id. 121, 125. In some others it has been objected to, as unsatisfactory and liable to exceptions. *Fonda v. Van Horne*, 15 Wend. 631, 635. See the principles discussed at large in *Breckinridge's*

to discharge the debt, though the law could not compel him to do so ; but he may waive the privilege of infancy which the law gives him for the purpose of securing him against the impositions of designing persons ; and if he choose to waive his privilege the subsequent promise will operate upon the preceding consideration." It is clear, that if a bond be given by an infant during his minority, for the amount of a simple contract debt, not for necessities, the giving of the specialty will so extinguish the simple contract debt as not to leave a sufficient consideration for an express promise after full age to operate upon, and consequently an assumpsit upon the original cause of action cannot be maintained. *Tapper v. Davenant*, 3 Keb. 798, and Bull. N. P: 155. See further on this subject, *Williams v. Moor*, 11 M. & W. 256.(1)

Form of Replication.—A replication in a general form, that the articles provided were necessities suitable to the estate and degree of the defendant,(u) without stating how, or in what manner, they were necessities, will be sufficient to bar the plea of infancy. It is however essentially necessary, that it should appear on the face of the replication, that they were necessities *for the infant* ;(2) for where in

(u) *Huggins v. Wiseman*, Carth. 110.

Heirs v. Ormsby, 1 J. J. Marsh. 236 ; *Cheshire v. Barrett*, 4 M'Cord, 241 ; *Lester v. Frazer*, Riley's Chancery, 76, 86.

"Notwithstanding the respectability of the opinions which have given support to this rule, the rule seems to be neither sound nor practical. It does not suggest the most important distinction in the whole subject, that between the conveyance of an interest and the appointment of an attorney, the provision that all contracts clearly prejudicial are void, if on the one hand it be interpreted of the security only, would render void, bonds, recognizances, negotiable notes, (which, indeed, one court was led by a reliance on this rule to pronounce void, in *M'Minn v. Richmonds*, 6 Yerg. 9, 19,) the contract of a surety, (as the same court held in *Wheaton v. East*, 5 Id. 41, 61,) and many other obligations, all of which, undoubtedly, are voidable and not void. And if, on the other hand, it be construed with reference to the whole transaction, and the inducements which have led the infant to contract, it can have no practical application at all, for all contracts may be beneficial ; and in some cases, as where an infant gives a bond, or bond and warrant, for necessities which he cannot procure on any other terms, acts clearly voidable or void would require upon this view to be held binding. The rule quoted in *Tucker et al. v. Moreland*, from Peters, apparently embodies the true principle ; and is accordingly preferred in *Phillipps et ux. v. Green*, 3 Marsh. 7, 9. It would be sufficient, if properly understood ; but it does not teach its own application.

"The numerous decisions which have been had in this country, justify the settlement of the following definite rule, as one that is subject to no exceptions : The only contract binding on an infant, is the implied contract for necessities : the only act which he is under a legal incapacity to perform, is the appointment of an attorney ; all other acts and contracts, executed or executory, are voidable or confirmable by him at his election." 1 Amer. Lead. Cas. 251, 2nd ed., note to *Tucker v. Moreland*.

(1) In New York, an explicit acknowledgment of a debt contracted by an infant, will support a recovery. *Goodsell v. Meyers*, 3 Wend. 479. But in Massachusetts, an acknowledgment is not enough ; there must be an express promise. *Smith v. Mayo*, 9 Mass. 64 ; *Thompson v. Lay*, 4 Pick. 49. It must be made voluntarily, with a knowledge that the party is not liable in law, and not under the fear of an arrest. *Ford v. Phillipps*, 1 Pick. 203 ; *Curtin v. Patton*, 11 S. & R. 305. Nor after action brought. *Ford v. Phillipps*. The giving a note does not prevent such suit if for necessities. *McCrillis v. How*, 3 N. H. R. 348.

(2) Necessaries for an infant's wife are necessities for him ; but if provided in order for the marriage, he is not chargeable, though she uses them. *Turner v. Trisby*, per Pratt, C. J., London Sitings, E. 5 G. I. Str. 168. If an infant contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy, no more than if he had contracted for his own aliment or erudition. Bacon, Max. 18.

assumpsit against an executor for a farrier's bill, the defendant pleaded that the testator was an infant, (x) the plaintiff replied, that the demand was looking after the infant's horses, and that the work was necessary for the horses, on demurrer, the court held that the replication was bad; that it should have been a general replication, that the demand was for necessities for the infant, and the rest should have been left to evidence, where the circumstances of the defendant's health and fortune would be considered: and the court added, that in this case, though the work might be necessary for the horses, yet it did not appear that the horses were necessary for the infant. (1)

[*132] *A party may, after he attains his age of 21 years, ratify and so make himself liable on contracts made during infancy; and this may be done on a contract arising on an account stated (y) as well as on any other contract.

On a replication to this effect, viz. that the defendant, after he came of age, confirmed the promise, if the defendant rejoins that he did not, after he came of age, confirm the promise, it is sufficient for the plaintiff to prove the promise, and the defendant must prove infancy if he means to take advantage of it, because it will be presumed, that a person who contracts is of a proper age to contract, until the contrary be shown. (z) A replication of a new promise, after the defendant came of age, must be supported by evidence of an *express* promise; payment of part of the plaintiff's demand is not in this case tantamount to evidence of a new promise to pay the remainder, as it is to take a case out of the statute of limitations. Per *Kenyon*, C. J., in *Thrupp v. Fielder*, 2 Esp. N. P. C. 628. The promise also must be voluntary, and not extorted from the party under the terror of an arrest. Per Lord *Alvanley*, C. J., *Harmer v. Killing*, 5 Esp. N. P. C. 102. (2) And now by stat. 9 Geo. IV. c. 14, s. 5, (Lord Tenterden's act,) the promise or ratification must be made by some writing signed by the party to be charged therewith. See *ante*, p. 130. (3)

Contracts entered into by infants for the maintenance of their trade are not binding on them. This rule has been established for the protection of infants against improvident acts, and that they may not incur losses by trading. (4) Assumpsit for goods sold: (a) plea infancy; repli-

(x) *Clowes v. Brooks*, Str. 1101; *S. C.* by the name of *Brooks v. Crowse*, Andr. 277.

(y) *Williams v. Moor*, 11 M. & W. 256.

(z) *Borthwick v. Carruthers*, 1 T. R. 649, recog. in *Hartley v. Wharton*, 3 P. & D. 529; 11 A. & E. 934.

(a) *Whittingham v. Hill*, Cro. Jac. 494.

(1) But an action of *deceit* will lie against an infant on a warranty of a horse. *Wood v. Vance*, 1 Nott & M'C. 97.

(2) See *Ford v. Phillips*, 1 Pick. 202; *Barnaby v. Barnaby*, Ib. 221; *Thompson v. Lay*, 4 Id. 18; *Goodsell v. Myers*, 3 Wend. 479.

(3) Where infancy is given in evidence under the general issue, it is competent to the plaintiff to answer it by proof of any matter which might have been put on the record and pleaded by way of reply to the *plea* of infancy.

(4) But if goods are sold to an infant on credit, and he avoids payment on the ground of infancy, the vendor may reclaim the goods as if the property had never passed from him. *Badger v. Phinney*, 15 Mass. Rep. 359. And where an infant sells goods, and afterwards disaffirms the contract, he must restore the consideration. *Koff v. Stafford*, ?

cation, that the defendant bought the goods *pro necessario victu et apparatu et ad manutentionem familiae suae*; rejoinder, that the defendant kept a mercer's shop, and bought the goods in question to sell again. On demurrer, the court were of opinion, that this buying by the infant, though for the maintenance of his trade, by which he gained his living, should not bind him.(1) *So where the plaintiff [*133] declared against the defendants being merchants(b) according to the custom of merchants, upon a bill of exchange drawn by the defendants; one of the defendants(2) pleaded infancy. On demurrer, the plea was holden good, for the infant was a trader, and the bill was drawn in the course of trade, and not for any necessities. It has been holden, that an infant cannot bind himself even for necessities by his acceptance of a bill of exchange.(c)(3) So if an infant is living un-

(b) *Williams v. W. H. and R. Harrison*, Carth. 160.

(c) *Williamson v. Watts*, 1 Campb. 552.

Cowen, 179. But see the decision of the Court of Errors in this case, 9 Cowen, 627. So where an infant pays money or does work upon a contract, which he has disaffirmed, he cannot afterwards get back the money or recover compensation for his work. *M'Coy v. Huffman*, 8 Cowen, 84. So where he purchased a yoke of oxen and gave his negotiable note, and after coming of age converted them to his own use and received their avails, he is liable on the note. *Lawson v. Lovejoy*, 8 Greenl. 405; *Deason v. Boyd*, 1 Dana, 45. Or declared his intention to pay, and authorized an agent to do so, although the agent had done nothing. *Orvis v. Kimball*, 3 N. Hamp. R. 314. But the bare retention of the consideration, or the mere acknowledgment that he made the note, or submitting to arbitration, the question of his liability on it, is not enough. *Benham v. Bishop*, 9 Conn. 330.

(1) So in *Whyvill v. Champion*, Str. 1083, it was ruled by Lee, C. J., that tobacco sent to the defendant, who had set up a shop in the country, could not be recovered for as necessities, the defendant appearing to be an infant; for the law would not suffer him to trade, which might be his undoing. So where in an action for work and labor, to which the defendant pleaded infancy, (*Dilk v. Keighley*, 2 Esp. N. P. C. 480,) it appeared that the plaintiff was a writing painter, and the defendant a painter and glazier, and the work done by the plaintiff was painting and gilding letters for the defendant's customers; Lord Kenyon, C. J., said, the law would not allow an infant to trade, therefore an action could not be maintained against him for work done in the course of it. I am not aware of any decision at variance with the preceding, except an anonymous case in Buller's Nisi Prius, 154, where it is stated that Mr. Baron Clarke, in an action before him, where the defendant gave his non-age in evidence, it appearing he had been set up in a farm, and bought the sheep of the plaintiff in the way of farming, directed the jury to give a verdict for the plaintiff, and said he thought the law ought not to put it into the power of infants to impose upon the rest of the world.

(2) Where an action is brought against partners, and one of them pleads infancy, the plaintiff ought not to enter a *nolle prosequi* as to the infant, and proceed against the others, for if he does, he will be nonsuited. But see *Woodward v. Newhall*, 1 Pick. 500, where the Supreme Court of Massachusetts decided that a plaintiff under similar circumstances might enter a *nolle prosequi* as to the infant, and proceed against the others. And this was allowed also in *Hartness v. Thompson*, 5 Johns. Rep. 160. See *Walmsley v. Lindenberger*, 2 Rand. 478, where the Court of Appeals of Virginia, held that the action could not be maintained against the adult partner alone. And see *Cole v. Pennel*, Ib. 174; *Contra, Connolly v. Hull*, 3 M'Cord, 6. The proper method in this case is to discontinue the first action, and proceed *de novo* against the other partners. *Jaffray v. Fairbain and others*, 5 Esp. N. P. C. 47. Per Lord Ellenborough, C. J., recognizing *Chandler v. Parkes*, 3 Esp. N. P. C. 76, per Kenyon, C. J., S. P. See notes to *Salmon v. Smith*, 1 Saund. Rep. 206.

(3) But where the infant had indorsed a promissory note given to him for wages, and passed it to the plaintiff, for a valuable consideration, he knowing the indorser to be a minor, and afterwards, the father of the minor received the amount of the note from the maker, it was held that the plaintiff was entitled to recover the amount. *Nightingale v. Whittington*, 15 Mass. Rep. 272; Byles on Bills, 46, 47, 3d Am. ed.

der the roof of his parent, who provides every thing which in his judgment appears to be proper, the infant cannot bind himself to a stranger, even for such articles as might under other circumstances be deemed necessaries.^(d)(1) And in one case,^(e) where an infant during his residence at a coffee-house contracted a debt with a tailor for wearing apparel, Lord *Kenyon* expressed an opinion that it was the duty of the tradesman to inquire into the situation of the infant, and to learn from the parent whether the infant was in want of the articles ordered, or not; and unless the tradesman could show that he had made such inquiry, he was not entitled to recover. But although it is prudent in a tradesman to make such an inquiry, he is not bound to make it by any inflexible rule of law,^(f) nor is it a condition precedent to his right to recover; and the party who orders the goods may give such an appearance to things as to render inquiry unnecessary:^(g)thus, [*134] where an infant drove to the plaintiff's *shop accompanied by her mother, who waited in the carriage while the daughter purchased some goods, some of which she took home in the carriage, and others were delivered at the hotel where the mother and daughter resided; it was holden,^(h) that the jury might fairly infer that the whole had come under the mother's inspection, and that it was not necessary that the shopman should ask the mother whether she sanctioned by her words what she sanctioned by her conduct. In an action for goods sold to an infant, the issue being necessaries, if any part of the articles proved to have been furnished to the defendant, may fall within the description of necessaries, the evidence ought to be left to the jury.⁽ⁱ⁾(2) Infancy is a good bar to an action for money lent, although the infant has expended the money in the purchase of necessaries. In debt upon a single bill, the defendant pleaded his infancy;^(k) plaintiff replied that it was for necessaries, viz. part for clothes and part money lent for necessary support at the university. Rejoinder, that the money was lent defendant to spend at pleasure, traversing that it was lent for necessaries, and issue thereupon was found for plaintiff, who had judgment in C. B., which was reversed on error in B. R.; and *Parker*, C. J., said, that an infant might buy necessaries, but he could not borrow money to buy, for he might misapply the money, and therefore the law would not trust him but at the peril of the lender, who must lay it out for him, or see it laid out, and then it was his providing, and his laying out so much money [*135] in necessaries for him.⁽³⁾ If the action against an *infant

(d) Per *Gould*, J., *Bainbridge v. Pickering*, 2 Bl. R. 1325; per *Bailey*, J., *Borrinsale v. Grevile*, Somerset Sum. Ass. 1810, MS.; *Deale v. Leave*, C. B. London Sittings after H. T. 16 G. III. Sir *J. Mansfield*, C. J., S. P. MS.

(e) *Ford v. Fothergill*, Peake's N. P. C. 229; 1 Esp. N. P. C. 211, S. C.

(f) *Brayshaw v. Eaton*, 5 Bingh. N. C. 231.

(g) Per *Tindal*, C. J., in *Dalton v. Gib*, 5 Bingh. N. C. 199.

(h) *Dalton v. Gib*, 5 Bingh. N. C. 199.

(i) *Maddox v. Miller*, 1 M. & S. 738.

(k) *Earle v. Peale*, Salk. 386.

(1) *S. P. Guthrie v. Murphy*, 4 Watts, 80.

(2) See *Beeler v. Young*, 1 Bibb, 519.

(3) In *Darby v. Boucher*, Salk. 279, a question was made, whether, in the case of money lent to an infant, who employs it in paying for necessaries, the infant was liable, and *Holt*, C. J., was of opinion that he was not; for it was upon the lending that the

be grounded on a contract, the plaintiff cannot convert it into a tort, so as to charge the infant.⁽¹⁾ "If one deliver goods to an infant, on a contract,^(l) knowing him to be an infant, the infant shall not be charged for them in trover and conversion; for the law will not permit a plaintiff, by changing the form of action, to vary the liability of the infant." Hence, whatever be the form of the action which is commenced, if the act done by the infant is the foundation of an assumpsit, the plea of infancy will be a good bar: as where an infant hired a mare of the plaintiff to go a journey, in the course of which the mare was strained.^(m)⁽²⁾ The plaintiff having declared against the infant for this injury in tort, he pleaded infancy, which on demurrer was holden a good plea; and Lord *Kenyon*, C. J., said, that if it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants. Lord *Mansfield*, indeed, frequently said, that this protection was to be used as a shield, and not as a sword; therefore, if an infant commit slander, God forbid that he should not be answerable for it in a court of justice. But where an infant has made an improvident contract with a person, who has been wicked enough to contract with him, such person cannot resort to a court of law to enforce such contract; and the words "wrongfully, injuriously, and maliciously," introduced into the declaration, cannot vary this case.⁽³⁾ A single bill given,⁽ⁿ⁾ by an infant for

(l) 1 Sid. 129, *Manby v. Scott*.

(m) *Jennings v. Rundall*, 8 T. R. 335.

(n) *Russell v. Lee*, 1 Lev. 86, 87.

contract must arise, and after that time there could not be any contract raised to bind the infant, because after that he might waste the money; and the infant's applying it afterwards for necessaries would not by matter *ex post facto* entitle the plaintiff to an action; for, as was observed by the court in *Earle v. Peale*, 10 Mod. 67, the law does not recognize any contracts except such as are good or bad at the time when they were made, and their nature cannot be altered by any subsequent contingency. So in *Probart v. Knouth*, 2 Esp. N. P. C. 472, n., where to an action for money lent, the defence was infancy; *Buller*, J., would not permit the plaintiff to give in evidence that the money lent was laid out in the purchase of necessaries. But it is otherwise in equity; for if one lends money to an infant to pay a debt for necessaries, and in consequence thereof the infant does pay the debt, in equity the infant is liable, for there the lender of the money stands in the place of the person paid, *viz.* the creditor for necessaries, and shall recover in equity as the other should have done at law. Per Cur. *Marlow v. Pitfield*, 1 P. Wms. 558. The same rule of equity holds with respect to money lent to a feme covert, and afterwards applied to her use for necessaries. See *post*, tit. "Baron and Feme," s. 4.

(1) Wherever the substantive cause of action against an infant is contract, as well as where it is stated as inducement to a supposed tort, as when it is not, infancy is a bar. *Wilt v. Welsh*, 6 Watts, 1. An infant who hires a horse to go to one place but goes to another, and kills the animal by severe usage, is not liable on the contract of hiring. *Penrose v. Curren*, 3 Rawle, 351. Detinue lies against him for goods delivered on special contract for a specific purpose, after the contract is avoided. So also assumpsit for money embezzled. *Ib.*

(2) See *Schenck v. Strong*, 1 South. 87; *Homer v. Twining*, 3 Pick. 492.

(3) As in the cases of contract where the law has protected the infant against his liability, he cannot be prejudiced by the form of action in which he is sued; so in cases *ex delicto*, where he is responsible, he cannot derive any advantage from it. In *Bristow v. Eastman*, 1 Esp. N. P. C. 172, *Kenyon*, C. J., was of opinion, that money had and received, would lie against the defendant, to recover money which he had embezzled, notwithstanding the infancy of the defendant, on the ground that infants were liable to actions *ex delicto*, though not *ex contractu*; and though the action for money had and received was in form an action *ex contractu*, yet in this case it was in substance an action

der the roof of his parent, who provides every thing necessary for the infant's support, the infant cannot bring an action for the recovery of such articles as might under other circumstances be necessary. (d)(1) And in one case, (e) where a tradesman at a coffee-house contracted a debt for a parcel, Lord *Kenyon* expressed an opinion that it was for the tradesman to inquire into the situation of the parent whether the infant was in the habit of purchasing; and unless the tradesman could show that he had made such an inquiry, he was not entitled to recover. (f) And it is no part of any inflexible rule of law, (g) that a party who has paid money to recover; and the party who has received it is bound to show that the money was paid for the purpose of the action.

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money into Court, p. 140.

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payment before action brought.(6)

See also 1 Inst. 172, a.

See also *Hurst*, 1 T. R. 40. See also *Ingledew v. Douglas*,

W. 256.

(r) *Saunderson v. Marr*, 1 H. Bl. 75.

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er had been brought for the property embezzled, infancy would not be a defence; and as the object of the action for money had and received was the same rule of law ought to apply, and therefore that infancy ought not to be a defence.

Young v. Young, 1 Bibb, 519.

Woolfoos v. Jenkins, 12 S. & R. 403; *Curtin v. Patton*, 11 S. & R. 305; *Martin v. Jackson*, 11 Mass. Rep. 140; *Jackson v. Mayo*, 11 Mass. Rep. 147. *Whitney v. Dutch*, 14 Mass. Rep. 457.

Bennett v. Davis, 6 Cow. 393.

Benham v. Bishop, 9 Cow. 330.

Plea of payment may admit the contract, but not the amount of damages, which must be proved, if the suit is for damages for a breach. *Roop v. Brubacker*, 1 Rawle,

Plaintiff may show that a particular claim was withdrawn, or not included in the plea. *Croft v. Steele*, 6 Watts, 373. Payment in bills of a bank then actually insolvent,

is no satisfaction, although neither party knew it had stopped payment. *Ontario Bank v. Lightbody*, 13 Wend. 101; *S. C.* 11 Wend. 9; *Bayard v. Shunk*, 1 Watts & Serg. 92.

Nor is a check on a bank, although the drawer had funds, if the holder is guilty of no negligence. *Cromwell v. Lovett*, 1 Hall. 56. Nor is counterfeit money. *Keen v. Thompson*, 4 Gill & J. 463. An obligation to pay in notes of a specific bank requires that the payment should be in the very notes or their numerical value. *Edwards v. Morris*, 1 Ohio, 241. Payment after suit cannot be given in evidence under the general issue as a bar, but it may to reduce the damages. *P. Bank v. Brackett*, 4 N. H. R. 557.

A receipt in full is not conclusive evidence of payment. Such circumstances as would set aside a contract in equity, avoids a receipt at law. *Fuller v. Crittenden*, 9 Conn. 401.

When collateral security is received for a debt, and an amount collected sufficient to pay the debt, it is *ipso facto* paid. *Hunt v. Neven*, 15 Pick. 500. Payment to one non compos under guardianship is void. *Leonard v. Leonard*, 14 Pick. 280.

(6) Part payments to plaintiff, although not pleaded, may be given in evidence in reduction of damages. But this ground of defence, viz., payment before an action brought, may be, and generally is, given in evidence under the general issue. Payment, however, after action brought, must be introduced by plea. Vide *Bank v. Brackett*, 4 N. H. R. 577. But, in a case where defendant had paid debt and costs after action brought, and taken a receipt, and then pleaded the general issue, the judge would allow the plaintiff to take nominal damages only.

might have been given in evidence under the general issue, under the new rules (H. T. 4 Will. IV.,) be specially

fact., (t) payment shall not, in any case, be allowed in reduction of damages or debt, but shall be

plaintiff (in order to avoid the expense of giving credit in the particulars of his claim admitted to have been paid to the defendant to plead the payment of apply to cases where the plaintiff, demand, states that he seeks to recover giving credit for any particular sum.

and generally (x) to all the counts of a declaration contains an allegation that the payment was made action accrued, it is immaterial, that the day actually before the cause of action accrued.

plaintiff gives credit in his particulars of demand for payment whether made before or after action brought, and goes only for balance, a plea of payment is to be taken as pleaded to such balance; and if the defendant proves payments to that amount, independently of the sums credited in the particulars, he is entitled (y) to a verdict. Here, in an action in debt for 10*l.* 18*s.*, balance of a debt of 100*l.*, the plaintiff averred, that, although 89*l.* 2*s.* had been paid, yet that he had not been paid the sum of 10*l.* 18*s.*, and the defendant pleaded *nunquam indebitatus*, it was *holden that the plain- [*137]
tiff in order to recover must prove a debt exceeding the sum of 89*l.* 2*s.* (z)

Where a defendant pleads (a) payment of a sum, he may, upon affidavit that the plaintiff cannot safely go to trial without the particulars of the payment, be compelled to furnish them.

A person who is indebted to another on several accounts, may, at the time of payment, apply the money to whichever account he thinks proper; and his election so to do may be either expressed, or may be inferred from the circumstances of the transaction; (b) but if the party paying does not make such election, the receiver may apply it as he pleases; (c) (1) and the better opinion seems to be, that the application may be made by the receiver at any time. (d)

(t) 4 Bing. N. C. 816; 3 N. & P. 380; 8 A. & E. 280; 4 M. & W. 4.

(u) R. G. T. T. 1 Vict. *ubi sup.* See *Morris v. Jones*, 1 G. & D. 13; 1 Q. B. 397, 400, and 403; *Green v. Smithies*, 1 Q. B. 796; 1 G. & D. 395.

(x) *Beesley v. Dolley*, 6 Bingh. N. C. 37.

(y) *Eastwick v. Harman*, 6 M. & W. 13.

(z) *Price v. Rees*, 11 M. & W. 577.

(a) *Ireland v. Thompson*, 4 Bingh. N. C. 716.

(b) *Newmarch v. Clay*, 14 East, 239, agreed per Cur. *Peters v. Anderson*, 5 Taunt. 596; *Shaw v. Picton*, 4 B. & C. 715.

(c) *Bowes v. Lucas*, B. R. M. 11 Geo. II. Andr. 55; *Goddard v. Coz*, Str. 1194. See 2 Vern. 607, S. P., per Lord Cowp. Ch., and *Peters v. Anderson*, 5 Taunt. 596; *Hall v. Wood and Wife*, before Lord Mansfield, C. J., Middlesex Sitings, Hil. 1785; S. P., 14 East, 243, n.

(d) *Mills v. Powkes*, 5 Bingh. N. C. 455. See also *Devaynes v. Noble*, 1 Merivale, 606, 7.

(1) The defendant owed money on two bonds, and paid money on account, but gave
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A creditor receiving money, without any specific appropriation by the debtor, will be permitted in a court of law to ascribe the receipt to the discharge of a prior and purely equitable debt,^(e) and sue him at law for a subsequent legal debt. But where one demand arises out of a lawful contract, and another out of an unlawful contract, the law^(f) will appropriate a payment not specifically appropriated to the lawful contract. A party, however, to whom two sums are due, the one for spirituous liquors supplied in quantities not amounting to 20s. at a time, the other for meat, &c., may apply^(g) payments made generally, to the account for spirituous liquors.

"It seems most consistent with reason, that where payments are made upon one entire account, such payments should be considered in discharge of the earlier items." Per *Bayley, J., Bodenham v. Purchas*, 2 B. & A. 45. "In the case of a banking-account, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into account. Presumably it is the first sum paid in, that [*138] *is first drawn out. It is the first item on the debit side of the account, which is discharged by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other." Per Sir *W. Grant, M. R., Clayton's case*, 1 Mer. 572. See further on this subject, *Devaynes v. Noble*, 1 Mer. 608; *Pease v. Hurst*, 10 B. & C. 122; and *Taylor v. Kymer*, 3 B. & Ad. 333, where the court thought the rule laid down in *Devaynes v. Noble*, did not apply. See *Tomlinson v. Copland*, 2 Clarke & Finelly, App. Cas. 681; *Williams v. Griffith*, 5 M. & W. 300.⁽¹⁾

There can be no appropriation^(h) by the receiver, where the debtor has not had the means or opportunity of exercising any election as to the application.

Security having been given by a surety for goods to be supplied to his principal, and not in respect of a previously existing debt, goods were subsequently supplied, and payments were from time to time made by the principal, in respect of some of which discount was allowed for prompt payment; it was holden, that it was to be inferred in favour of

^(e) *Bosanquet v. Wray*, 6 Taunt. 597. See *Arnold v. Mayor of Poole*, 5 Scott's N. R. 777; 4 M. & Gr. 897.

^(f) *Wright v. Laing*, 3 B. & C. 165.

^(g) *Cruickshanks v. Rose*, 1 Moody & Rob. 100; *Philpott v. Jones*, 2 A. & E. 41, S. P.

^(h) *Waller v. Lacy*, 1 Man. & Gr. 70.

no directions to which he would have it applied; and upon a case reserved, it was determined, that the plaintiff had the election. *Bloss v. Cutting*, cited in 2 Str. 1194.

See *Harker v. Conrad*, 12 S. & R. 305. But if the interest of third persons be affected by the result of a particular appropriation of a payment, by the receiver, it will not be permitted. *Ib. Westmoreland Bank v. Rainey*, 1 Watts, 26. See 3 Am. Law Reg. 705, Article "Appropriation of Payments."

(1) As to the right of appropriating payments, vide *Seymour v. Vanslyck*, 8 Wend. 403. *Backhouse v. Patton*, 5 Pet. 160; *Clark v. Burdett*, 1 Hall, 197; *Michell v. Dall*, 4 Gill & J. 361. *White v. Turnbull*, 3 Green, 314. Appropriation by debtor is only in case of voluntary payments. *Blackstone Bank v. Hill*, 10 Pick. 129. And there is no election where only one debt is due at the time of payment. *Donally v. Wilson*, 5 Leigh, 329, 3 Am. Law Reg. 705.

the surety that all these payments were intended in liquidation of the latter account.(i)

The mere production of a bill of exchange from the custody of the acceptor is not presumptive evidence of payment, unless it be shown that the bill was once in circulation after being accepted.(k)(1) Nor is payment to be presumed from a receipt indorsed on the bill, unless it can be shown that the receipt is in the handwriting of a person entitled to demand payment.(l) Where defendant being indebted to plaintiffs for goods sold, and C. being indebted to defendant, plaintiffs, with consent of defendant, drew a bill on C. payable at two months, which C. accepted, but afterwards dishonoured; it was holden,(m) that defendant was not entitled to notice of the dishonour, his name not being on the bill, and that the bill was not to be esteemed a complete payment of the debt, under stat. 3 & 4 Ann. c. 9, s. 7. In this case the person insisting on the want of presentment was not a party to the bill. In an action for the price of goods, it appeared that the goods were sold in the morning at York, on Saturday the 10th Dec. 1825, and on the same day, at 3 o'clock in the afternoon, the vendee delivered to the vendor, as and for payment of the price, promissory notes of the bank of D. & Co. at Huddersfield, payable to bearer on demand. D. & Co. had stopped payment on the same day at 11 o'clock in the morning, and never afterwards resumed their payments; but neither of the parties knew of the stoppage, or of the insolvency of D. & Co. The vendor never circulated the notes, or presented them to the bankers for payment; but on Saturday, the 17th December, he required the *vendee to take back the notes, and to pay him the amount, which the vendee refused. It was [*139] holden, that the vendor was guilty of laches in not giving notice to the vendee of non-payment and insolvency of the bankers within a reasonable time; and consequently that the notes operated as a satisfaction(n) of the debt. The rule as to all negotiable instruments is, that if they are taken in payment of a pre-existing debt, they operate as a discharge of that debt, unless the party who holds the instruments does all that the law requires to be done in order to obtain payment of them.(o)(2) It is perfectly clear, that a bill of exchange will operate as a satisfaction of a preceding debt, if the holder makes it his own by laches, as by not presenting it for payment when due.(p) So where the vendor of goods, having been paid for them by a bill drawn by the vendee on a third person, after the bill had been accepted, altered it in a material part, viz. the time of payment; it was holden,(q)

(i) *Marryatts v. White*, 2 Stark, N. P. C. 101, Lord Ellenborough, C. J.

(k) *Pfiel v. Vanbatenberg*, 2 Campb. 439.

(l) *S. C.*

(m) *Swynyard v. Bowes*, 5 M. & S. 62.

(n) *Camidge v. Allenby*, 6 B. & C. 373. See *Rogers v. Langford*, 1 Cr. & M. 637; 3 Tyrw. 654.

(o) Per Bayley, J., in *Camidge v. Allenby*, 6 B. & C. 382.

(p) Per Lord Tenterden, C. J., 3 B. & Ad. 663.

(q) *Alderson v. Langdale*, 3 B. & Ad. 660.

(1) Orders for goods in the hands of drawee are *prima facie* evidence of goods sold to drawer and delivered to payee. *Aliter* of orders for money. *Alvord v. Baker*, 9 Wend. 323.

(2) See *infra*, 412, note (1).

that the vendor thereby made the bill his own as against the vendee, and caused it to operate as a satisfaction of the debt for which it was originally given. An order on a banker to give credit on a future day is not payment(r) until the day arrives.

Where the holder of a bill of exchange, upon its being dishonoured, received part payment, and for the residue another bill of exchange drawn and accepted by persons not parties to the original bill, and afterwards sued the drawer and acceptor upon the original bill: it was holden,(s) that it was sufficient for him to prove presentment of the substituted bill to the acceptor for payment, and that it was dishonoured, without proving that he gave notice of the dishonour to the drawer of the substituted bill. If a creditor refer a third person to his debtor for payment, intending the third person to take payment in money, and the third person, instead of taking payment in money, takes payment in any other way, he does it at his peril.(t) Although a creditor has a right,(u) to insist on payment to himself or his appointee, yet having once given an order for the payment of his debt to a third person, he has no right to revoke that order, provided there be a pledge by the person to whom the authority is given that he will pay the debt according to the authority. When to a declaration on a guarantee by defendant for goods to be supplied to S., with an averment that plaintiff supplied S. with goods amounting to the sum of 78*l.*, that S. did not pay, nor did defendant after notice; it was pleaded, that S. did pay the sum in the declaration mentioned, in full satisfaction and discharge, &c., and that plaintiff received the same. Plaintiff replied that S. did not pay, nor did plaintiff receive the same sum in the declaration mentioned in full satisfaction and discharge; it was holden, that the pleadings did not confine the plaintiff in his proof to the 78*l.*; but that after proof by defendant that S. had paid 78*l.*, plaintiff might, without having new assigned, give evidence of a balance unpaid beyond the 78*l.*(uu)

The general rule of Trinity Term, 1 Vict. (stated *ante*, p. 136), that the defendant need not plead payment of any sums, for the payment of which credit is given in the plaintiff's particulars of demand, [*140] does not apply to set-off. Where payments are admitted *in the plaintiff's particulars, he can recover only for the amount by which the claims proved by his witnesses exceed such payments.(x)

When the defendant pleads that he paid, and plaintiff accepted moneys in full satisfaction, a replication alleging that the plaintiff did not accept the moneys in full satisfaction, puts the payment as well as the acceptance in issue.(y)

(r) *Pedder and others v. Watt and another*, B. R. H. 36 Geo. III., L. P. B. 98, Dampier, MSS., L. I. L.

(s) *Bishop v. Rowe*, 3 M. & S. 362.

(t) Per Bayley, J., in *Smith v. Ferrand*, 7 B. & C. 24.

(u) *Hodgson v. Anderson*, 3 B. & C. 842, recognized by Alderson, J., in *Crowfoot v. Gurney*, 9 Bingh. 312.

(uu) *Moses v. Levey*, 4 Q. B. 213.

(x) *Rowland v. Blaksley*, 1 Q. B. 403; 2 G. & D. 734.

(y) *Ridley v. Tindall*, 7 A. & E. 134.

Payment of Money into Court.—By stat. 3 & 4 Will. IV. c. 42, s. 21, it shall be lawful for the defendant in all personal actions, (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching plaintiff's daughter or servant,) by leave of any of the superior courts where such action is pending, or a judge of any of the said superior courts, to pay into court a sum of money by way of compensation, in such manner and under such regulations, as to the payment of costs and the form of pleading, as the said judges, or such eight or more, shall by rule direct. By R. G. T. T. 1 Vict.(z) when money is paid into court, such payment shall be pleaded in all cases, and, as near as may be, in the following form, *mutatis mutandis*:—

" C. D. } The day of
 ats. } The defendant, by his attorney, [or, in person,
 A. B. } &c.] says, [or in case it be pleaded as to part only, add, 'as
 £ , being part of the sum in the declaration, or count men-
 tioned,' or 'as to the residue of the sum of £ '], that the plaintiff
 ought not further to maintain his action, because the defendant now
 brings into court the sum of £ , ready to be paid to the plaintiff;
 and the defendant further says, that the plaintiff has not sustained
 damages, [or, in actions of debt, that he never was indebted to the
 plaintiff,] to a greater amount than the said sum of, &c., in respect of
 the cause of action in the declaration mentioned, [or 'in the intro-
 ductory part of this plea mentioned'], and this he is ready to verify;
 wherefore he prays judgment if the plaintiff ought further to maintain
 his action thereof."

In assumpsit,(a) for breach of an agreement to keep premises in repair, the court would not allow defendant to pay money into court as compensation under the foregoing statute, upon pleas of payment of money into court and of tender.(1)

When money is paid into court, under the general *indebitatus* counts, such payment operates only as an admission that the plaintiff is entitled to recover, in respect of some contract, to the extent of the money so paid in: but where the plaintiff declares on a special contract, *a payment into court admits the contract as declared [*141] on.(b) Debt for rent on a demise for years, with an *indebitatus* count for fixtures sold; the plaintiff claimed by his particulars 5*l.* 5*s.* for rent, and 12*l.* for fixtures. The defendant paid 11*l.* 5*s.* into court, on the whole declaration, and pleaded *nunquam indeb. ultra*. It was holden to be no admission of the defendant's liability in respect of

(z) 4 Bingham N. C. 814; 3 Nev. & P. 380; 8 A. & E. 278; 4 M. & W. 3.

(a) *Dearle v. Barrett*, 2 A. & E. 82.

(b) Per Tindal, C. J., in *Archer v. English*, 1 M. & Gr. 873; 2 Scott's N. R. 156, recognizing *Seaton v. Benedict*, 5 Bingham 28; *Kingham v. Robins*, 5 M. & W. 94; *Stapleton v. Nowell*, 6 M. & W. 9; and see *Attwood v. Taylor*, 1 Scott's N. R. 640; 1 M. & Gr. 279; *Stevenson v. Corporation of Berwick*, 1 Q. B. 154; 4 P. & D. 546, and *Cooper v. Blick*, 2 Q. B. 915; 2 G. & D. 295.

(1) As to payment of money into court in actions against carriers, vide *Fall v. Pickford*, 2 B. & P. 234; *Hutton v. Bolton*, 1 H. Bl. 299, n. (b); *Date v. Hall*, 1 Wilson, 281; *Clark v. Gray*, 6 East, 570; *Yate v. Willan*, 2 Id. 128.

fixtures, to a greater amount than had been paid into court.(bb) Hence, where in an action against two, money is paid into court by both defendants, with a plea of payment into court under this rule of T. 1 Vict., the plaintiff, in order to recover damages beyond the sum paid in, must show, not only that his demand, in respect of which the money is paid into court, exceeds the amount paid in, but that the defendants are joint contractors.(c)

Proceedings by Plaintiff after Payment of Money into Court.—By R. G. T. T. 1 Vict.,(d) the plaintiff, after delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty, in that case, to tax his costs of suit, and in case of non-payment thereof, within 48 hours to sign judgment for his costs of suit so taxed; or the plaintiff may reply “that he has sustained damages (or, that the defendant was and is indebted to him, as the case may be,) to a greater amount than the said sum;” and, in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit. Under this rule, where money paid into court is taken out in satisfaction of part only of the plaintiff’s demand, there being other issues upon which the parties are proceeding to trial, the plaintiff is not entitled to tax his costs.(e)

6. Release.

6. *Release.*—Defendant may plead a release after promise, and before action brought.(1) The usual replication to a plea of release is *non est factum*.(2) A release, upon performance of the promise in part(f) *quoad hoc*, will not discharge the promise for the residue. If after the last continuance the plaintiff give the defendant a release, he may plead it in bar:(g)(3) such plea is called a plea *puis darrein continuance*.(4) By R. G. H. T. 4 Will. IV. No. 2, it is provided that in all cases in which a plea *puis darrein continuance* is now by law pleadable in Banco, or at Nisi Prius; the same defence may be pleaded with an allegation, that the matter arose after the last pleading, or the

(bb) *Goff v. Harris*, 5 M. & Gr. 573.

(c) *Archer v. English*, ubi sup.

(e) *Cauty v. Gyll*, 4 M. & Gr. 907; 5 Scott’s N. R. 819.

(f) 2 Roll. Abr. 413, l. 2, adjudged.

(d) Ubi sup.

(g) Bull. N. P. 309.

(1) See the form, “Clerk’s Assist.” 257, 258; 2 Rich. Pr. B. R. 43, third edition. *Miller v. Aris*, ante, 106; *Hawley v. Peacock*, 2 Campb. N. P. C. 358, S. P.

(2) 2 Rich. Pr. B. R. 44. A release in New York can be avoided for *fraud* only, in its execution, not the consideration. In the latter case the remedy is in chancery. *Belden v. Davies*, 2 Hall, 433. A release not accepted has no effect. *Buck v. Saunders*, 1 Dana, 189.

(3) Or in this country, give it in evidence under the general issue. A release after suit brought, may be given in evidence under *non assumpsit*, and it is not necessary it should be pleaded *puis darrein continuance*. *Lyon v. Marclay*, 1 Watts, 275.

(4) *Form of Plea*. “And now at this day, to wit, on the ——— day of ———, in the ——— year of the reign of our Sovereign Lord George the Third, by the grace of God, &c., before A. B. and C. D., justices of our Lord the now king, appointed to take the assizes in and for the county of G. aforesaid, at ———, in the county of G. aforesaid, comes the said H. J., by J. S. his counsel, and says that the said E. F. ought not further to maintain his action against the said H. J., because he says that after the making the

issuing of the jury process, as the case may be. Provided, that no such plea shall be allowed, unless accompanied by *an [*142] affidavit that the matter thereof arose within eight days next before the pleading such pleas, or unless the court or a judge shall otherwise order.

A plea *puis darrein continuance* must in all cases be accepted by a judge at *Nisi Prius*, even after the jury are sworn, provided it be tendered in due form and accompanied with the usual affidavit that the subject-matter of it arose within eight days of the time of its being pleaded; but it would seem that such affidavit is unnecessary where the subject-matter of the plea arose at the trial in the presence of the judge.^(h)

A plea that before any breach, plaintiff, on such a day, at such a place, *exoneravit eum* of the said promise, was held good on demurrer, on the ground that a promise by words might be discharged by words before breach, "*eodem modo quo oritur, eodem modo absolvitur.*" *Langden v. Stokes*, Cro. Jac. 620; and this decision has been recognized in *King v. Gillett*, 7 M. & W. 55; in which case, to a declaration in assumpsit founded on mutual promises to marry within a reasonable time, defendant pleaded that after the promise, and before any breach thereof, plaintiff absolved, exonerated, and discharged defendant from his promise and the performance thereof: on demurrer, the plea was holden good.

7. Statutes.

1. Of Limitations.

2. Of Set-Off, p. 154.

1. *Statute of Limitations*.(1)—By stat. 21 Jac. I. c. 16, s. 8, all

(h) *Todd v. Emly*, 9 M. & W. 606.

said several supposed promises and undertakings in the said declaration mentioned, and after the last continuance of the aforesaid plea, that is, after the (the day of the return of the *venire facias*,) ——— day of ———, in Mich. Term next (unless the justices of our Lord the King assigned to hold the assizes of our Lord the King in and for the county of G. should first come on the ——— day of ———, at ———, in the said county of G.) the action aforesaid is continued, to wit, on, &c., (the defendant must allege precisely the very day, time, and place; Per Cur. Yelv. 141,) at, &c., the said E. F. by his deed, dated, &c., did release," and to show the particular matter, and conclude, "And this he is ready to verify, wherefore he prays judgment if the said E. F. ought *further* to maintain this action against him, &c."

It is the constant experience at the assizes to put the party to verify a plea *puis darrein continuance*, (Per Cur. in *Martin v. Wyvil*, Str. 493,) before it is allowed; and if the party does not give some evidence of the truth of it, the judge will reject it, and go on with the cause.

The same certainty is required in this, as in other pleas. Doct. Pl. 297. A plea *puis darrein continuance* requires extreme certainty. *Vicary v. Moore*, 2 Watts, 451. And whether ever allowed after demurrer, doubted; see *Bauer v. Roth*, 4 Rawle, 92.

A plea *puis darrein continuance* may be pleaded at *Nisi Prius*, although there has been time to plead it in banc since the last continuance. *Prince v. Nicholson*, 5 Taunt. 333. If it be verified by an affidavit which refers to the plea, and the plea is in the cause, the affidavit is sufficient, though not specially entitled in the cause. Ib.

If the jury be not taken at the day of *Nisi Prius*, a release is pleadable after the last continuance at the day in banc; Doct. Pl. 300; although it be not offered at *Nisi Prius*; but otherwise it is, if the jury be taken.

(1) The statute of limitations does not run against the commonwealth. *Bagley v. Wallace*, 16 S. & R. 245; Angell on Lim. § 37, and cases cited. Nor against a suit for legacy. *Thompson v. M. Graw*, 2 Watts, 161. But see *App v. Dreisback*, 2 Rawle, 287.

This statute is a good defence to an action by a landlord for rent, against one who had once been his tenant from year to year, but who [*144] had not, within the last six years, occupied the premises, *paid rent, or done any act from which a tenancy could be inferred, although the tenancy had not been determined by a notice to quit.(r)(1)

To the plea of *non assumpsit infra sex annos* the plaintiff may tender an issue,(s) that defendant did promise within six years, and this issue will be supported by evidence of an express promise made by defendant within six years before action brought: for it has been holden, that this statute does not extinguish the plaintiff's right of action, but suspends the remedy only, and that this suspension is capable of being removed by a subsequent promise on the part of the defendant within the limited time.

In an action for money had and received, to recover the consideration of an annuity, void on the ground of a defect of a memorial, but which had been treated by the grantor as a subsisting annuity for several years, and then set aside; it was holden,(t) that the statute of limitations did not begin to run until the grantor had made his election to avail himself of the defect in the memorial. Declaration, that the defendant delivered his promissory note, payable on demand with interest, to the plaintiff, but neglected to pay, except interest, which he paid up to a day within six years. A plea that the cause of action did not accrue within six years was holden(u) sufficient; for the allegation, that interest has been paid is only evidence towards taking the case out of the statute, but is not conclusive.

Not only an express promise, but a mere acknowledgment of the debt, as existing, will be sufficient to support this issue; but it must be an acknowledgment whence a promise to pay may be inferred.(2)

An acknowledgment by one of several makers of a joint and several

(r) *Leigh v. Thornton*, 1 B. & A. 625.

(s) *Dickson v. Thomson*, 2 Show. 126.

(t) *Cowper v. Godmond*, 9 Bingh. 748, recognized in *Churchill v. Bertrand*, 3 Q. B. 568; 2 G. & D. 548.

(u) *Hollis v. Palmer*, 2 Bingh. N. C. 713.

(1) When a joint purchaser is responsible for moiety of instalments paid by his co-purchaser, the statute runs from each payment. *Brady v. Colhoun*, 1 Penns. 140. It runs from time work is to be completed, not from the time of actual damage, on a contract to do work. *Rankin v. Woodworth*, 3 Penn. Rep. 48. Runs only from discovery of fraud. *Pennock v. Freeman*, 1 Watts, 401. Actual fraud bars the operation of the statute; constructive fraud does not. *Farnam v. Brooks*, 9 Pick. 212. On a contract to pay company instalments, from the time of legal demand. *Sinkler v. India Co.*, 3 Penn. 149. *Jones v. Trimble*, 5 Rawle, 381. If property be given or sold with condition that it shall revert on a contingency and if the reservation be valid, the statute does not run against reversioner till the happening of the contingency. *Betty v. Moore*, 1 Dana, 236. The statute does not run till death of husband, where money has been lent him by wife out of her separate estate. *Towers v. Hagner*, 3 Whart. 48.

(2) *Sluby v. Champlin*, 4 Johns. Rep. 461; *Dean v. Pitts*, 10 Id. 35. In *Lord v. Harvey*, 3 Conn. Rep. 370, it was held that a general acknowledgment of indebtedness is sufficient to take the case out of the statute. But in *Clarke v. Dutcher*, 9 Cowen, 674, it is said that the acknowledgment must relate to the identical debt or demand. See *Tichenor v. Colfax*, 1 South. 153; *Robbins v. Otis*, 1 Pick. 368; *Perley v. Little*, 1 Greenl. 97. A promise to the holder of a chose in action taking a case out of the statute, is available to a subsequent holder. *Soulden v. Van Rensselaer*, 9 Wend. 293.

promissory note was holden(*x*) sufficient to take it out of the statute against the others, and that such an acknowledgment might be given in evidence in a separate action against any of the others. The circumstance of one of the defendants being a surety only, (*y*) who had not made any acknowledgment, made no difference. Where one of two makers of a joint and several promissory note became a bankrupt, (*z*) and the payee received several dividends under the commission on account of the note, and an action having been brought (within six years after the receipt of the last dividend) against the other maker for the remainder of the money due on the note, it was adjudged, that the payment of the *dividends was such an acknowledgment [*145] of the debt as took the case out of the statute. So in an action against A. on the joint and several promissory note of himself and B. ; it was holden, that a letter written by A. to B., "desiring him to settle the money," took the case out of the statute. (*a*) So payment of interest (*b*) by one of the makers of a joint and several promissory note, though made more than six years after it became due, is sufficient to take the case out of the statute, as against the other maker. The foregoing authorities establishing the doctrine, that a payment by one partner after the six years had expired, but within six years before action brought, will take the case out of the statute as against the rest, have been recognized very lately in a case (*c*) where the party paying was about to be a bankrupt, and the jury found that he had made the payment in fraud of his partners, and in expectation of immediate bankruptcy, and in concert with the plaintiffs. But where A. and B. made a joint and several promissory note, A. died, and ten years *after his death* B. paid interest upon the note ; in an action brought upon the note against the executors of A. it was holden, (*d*) that the payment of interest by B. did not take the case out of the statute, so as to make A.'s executors liable ; for at the time when such payment was made, the joint contract had been determined by the death of A. (*1*) So where interest had been paid by executor of deceased. (*e*) So where one of two joint drawers of a bill of exchange became bankrupt, and under his commission the indorsees proved a debt (beyond the amount of the bill) for goods sold, &c., and they exhibited the bill as a security they then held for their debt, and afterwards received a dividend ; it was holden, in an action by the indorsees against the solvent partner that the statute of limitations was a good defence, although a dividend had been paid within six

(*x*) In *Whitcomb v. Whiting*, Doug. 652, recognized in *Wyatt v. Hodson*, 8 Bingh. 309 ; and *Channell v. Ditchburn*, 5 M. & W. 494, *post*, p. 145.

(*y*) *Perham v. Raynal and others*, 2 Bingh. 306, recognized in *Whitcomb v. Whiting*, *ante*.

(*z*) *Jackson v. Fairbank*, 2 H. Bl. 340, recognized in *Burleigh v. Stott*, 8 B. & C. 36.

(*a*) *Halliday v. Ward*, 3 Campb. 32.

(*b*) *Channell v. Ditchburn*, 5 M. & W. 494.

(*c*) *Goddard v. Ingram*, 3 Q. B. 839 ; 3 G. & D. 46.

(*d*) *Atkins v. Tredgold*, 2 B. & C. 23 ; see *Scholey v. Walton*, 12 M. & W. 510.

(*e*) *Slater v. Lawson*, 1 B. & Ad. 396.

(1) It would have been otherwise if the payment had been made in the lifetime of A. *Burleigh v. Stott*, 8 B. & C. 36.

years; inasmuch as the proof was for goods sold and delivered, and the payment of the dividend did not amount to an actual or virtual acknowledgment(*f*) that there was any money due on the bill. So where, in assumpsit for money due on an accountable receipt, plaintiff, in order to take the case out of statute of limitations, called a witness, who proved that he called on defendant, and showed him the receipt, and asked him if he knew any thing of it, to which defendant answered that he knew all about it; witness then asked him for the amount, to which he answered, it was not worth a penny; he should never pay it; [*146] that it was his *signature, but that he never had and never would pay it, "and besides," he added, "it is out of date, and no law shall make me pay it;" it was holden, (*g*) that this evidence was insufficient to charge the defendant with it, for there was not any acknowledgment, but the contrary, that the debt ever existed.(1) Where the acknowledgment proved was, "I cannot pay the debt at present, but I'll pay it as soon as I can," it was holden that such an acknowledgment, without proof of any ability, would not take the case out of the statute.(2) That the cases proceed upon the principle, that, under the ordinary issue on the statute, an acknowledgment is only evidence of a promise to pay; and unless it is conformable to and maintains the promises in the declaration, though it may show to demonstration that the debt has never been paid, and is still subsisting, it has no effect; in this case, the promises in the declaration were absolute and unconditional, to pay when thereunto afterwards requested; the promise proved was, "I'll pay as soon as I can:" and there was no evidence of ability to pay, so as to raise that which in its terms was a qualified promise, into one that was absolute and unqualified. Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, and accompanies it with an express declaration, to prevent any such implication, why shall not the rule *expressum cessare facit tacitum* apply? *Tanner v. Smart*, 6 B. & C. 603.(*h*) Since this case, many of the older cases on this subject cannot be sustained; *Tindal*, C. J. 2 Bingh. N. C. 244, 5: *Linsell v. Bonsor*, in which it was holden, that it was properly left to the jury to consider whether the acknowledgment was one from which a promise to pay could be implied.(3) See

(*f*) *Brandram v. Wharton*, 1 B. & A. 463.

(*g*) *Rowcroft v. Lomas*, 4 M. & S. 457.

(*h*) See *Irving v. Veitch*, 3 M. & W. 90.

(1) Where the maker of a promissory note declared that the signature in his name was a forgery, but declared at the same time if it could be proved that he signed it, he would pay the note, this was held to be a sufficient acknowledgment. *Seaward v. Lord*, 1 Greenl. 163.

(2) See *Danforth v. Culver*, 11 Johns. Rep. 146; *Lawrence v. Hopkins*, 13 Id. 288.

(3) The construction of a doubtful document given in evidence to defeat the statute of limitations, is for the court, and not for the jury; if it be explained by extrinsic facts, they are for the consideration of the jury. *Morrell v. Frith*, 3 M. & W. 402. Whether an acknowledgment is sufficient is a question for the court, if there is no dispute about the facts, otherwise for the jury. *Read v. Hand*, 7 Wend. 408. A promise by a party to pay all he owes to another, accompanied by an express denial that he owes anything, will not support an action. *Porter v. McClure*, 15 Id. 187. Where a letter is given in

Acourt v. Cross, 3 Bingh. 329, and *Ayton v. Bolt*, 4 Bingh. 105; *Haydon v. Williams*, 7 Bingh. 163, recognizing *Tanner v. Smart*.(1)

evidence to avoid the statute, plaintiff must take it as it is. *Rogers v. Waters*, 2 Gill & Johns. 64. It is immaterial whether an acknowledgment was made *before* or after the statute attached. It operates from the time when made. *Austin v. Bostwick*, 9 Conn. 496. A promise by husband and wife during coverture, to pay a debt due *dum sola*, does not revive it as against wife after husband's death. *Kline v. Guthart*, 2 Penn. 490. Nor will acknowledgment and promise by a *spendthrift* under guardianship. *Manson v. Felton*, 13 Pick. 206. But acknowledgment by the guardian will, as against the ward. *Ibid.* Admission that an account is *right* is no acknowledgment, for it may be *right* though paid. But an admission that it is *just*, takes it out of the statute. *Ditto v. Ditto*, 4 Dana, 505. Declaration of one of two defendants that he had paid enough of the other defendant's debts, is not sufficient. *Gold v. Whitcomb*, 14 Pick. 188. Nor is the declaration of one of two joint makers of a note, that he thought he was a witness and not maker, but admitting the note and saying that he did not know it had been paid, but presumed it had been. *Canbridge v. Hobart*, 10 Id. 232. A *conditional* promise does not avail unless the condition is complied with. *Farmers' Bank v. Clarke*, 4 Leigh, 603. An offer of compromise by defendant not accepted, does not take case out of the statute. *Atwood v. Coburn*, 4 N. H. R. 315. Nor that he owed the debt but was unable to pay it, and that he determined to do it. *Ib.* And see *Rice v. Wilder*, 4 Id. 336. The acknowledgment must be unqualified and unaccompanied by any intimation that the debt would not be paid. *Gleim v. Rice*, 6 Watts, 44. So precise as to exclude hesitation about its meaning. *Berghaus v. Calhoun*, 6 Id. 219; *Hancock v. Bliss*, 7 Wend. 267; *Patterson v. Choate*, 7 Id. 441; *Deforest v. Hunt*, 8 Conn. 179; *Moore v. Bank of Columbia*, 6 Peters, 86; *Belles v. Belles*, 7 Halst. 339; *Allen v. Webster*, 15 Wend. 284; *Stafford v. Richardson*, *Ib.* 302; *Grayford v. Van Loan*, *Ib.* 308. Any declaration at the time of promise inconsistent with it, destroys the promise. *Church v. Felcrow*, 2 Penn. 301; *Gallagher v. Milligan*, 3 Id. 177.

"In the Supreme Court of the United States, in the year 1814, it was declared by Chief Justice *Marshall*, that the decisions with respect to an acknowledgment of a debt had gone full as far as they ought to be carried, and that that court was not inclined to extend them; the statute of limitations being entitled to the same respect as other statutes, and should not be explained away. *Clemenston v. Williams*, 8 Cranch, U. S. R. 72. In this case, one partner who was sued, said, "the account was due, and that he supposed it had been paid, but had not paid it himself, and did not know of its being ever paid." These words were not considered a sufficient admission from which to infer a promise. "It is not sufficient," said the learned judge, "to take the case out of the act, that the claim should be proved, or he acknowledged to have been originally just; the acknowledgment must go to the fact that it is still due." *Wetzell v. Busard*, 11 Wheat. U. S. R. 309. The subject came before the Supreme Court of the United States, at the January term, 1828, in the case of *Bell v. Morrison*, 1 Pet. U. S. R. 351, which has ever since been regarded as a leading case, the decision coming from high authority, and the opinion accompanying it being positive, and too lucid and conclusive to be questioned. Mr. Justice *Story*, who gave the opinion of the court, commenced by observing, in relation to the plea of the statute, that it had been matter of regret in modern times, that in the construction of the statute of limitations the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that the statute, instead of being viewed in an unfavorable light, as an unjust and discreditable defence, it had received such support as would have made it what it was intended to be, emphatically a statute of repose. It was a wise, he said, and a beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or the removal of witnesses. It had a manifest tendency, he thought, to produce speedy settlements of accounts, and to suppress those prejudices which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them. His opinion was, that the English decisions upon the subject had gone great lengths, greater than in the judgment of the court, any sound interpretation of the statute would warrant, and, in some instances, to an extent which was irreconcilable with any just principles. He acknowledged that there had been a disposition on the part of the English courts to retrace their steps, and to bring back the doctrine to sober and rational limits; and that the American courts had evinced a like disposition. He adhered to the rule that the acknowledgment must

(1) For note (1), see next page but one.

The various questions as to the proof and effect of acknowledgments and promises, agitated in some of the cases, induced the legislature to

show positively that the debt is due either wholly or in part, and must be unqualified. If the bar, he said, is sought to be removed by a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate. And if there be no express promise, and a promise is to be raised by implication of law from the acknowledgment of the party, such an acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. On the contrary, he held, if there be accompanying circumstances which repel the presumption of a promise or intention to pay, if the expression be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways,—he thought they ought not to go to a jury as evidence of a new promise to revive the cause of action. And he declared his opinion expressly, that any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the dangers of being entrapped in careless conversations and betrayed by perjuries; and it was far from being certain, he said, that if the early interpretation of the statute had been adhered to, namely, that nothing but an express promise should take a case out of the statute, it would not have generally been in promotion of justice. These views were recognized as sound, and the authority of the case was confirmed in the subsequent case in the same court, of *Moore v. Bank of Columbia*, 6 Peters, R. 85.

"The number of occasions upon which this subject has, at different times within the last half-century, been presented for the consideration and judgment of the judicial tribunals of Pennsylvania, is remarkable; and the decisions consequent to the attention given it by the judges in that state are alike distinguished for consistency with each other, and an accordance with the now prevailing construction. *Smith v. Freel*, Add. R. 29. In *Murray v. Tilley*, at *Nisi Prius*, in 1811, where a defendant said on demand of payment being made, that if the note had been presented to him in time, he would have paid it; but that he knew the statute of limitations would now bar the claim, and he would not pay it, it was ruled that a new promise ought not to be inferred. Stated by the court in *Tries v. Boisselin*, 9 Serg. & Rawle, R. 128. In the District Court for the city and county of Philadelphia, in the same year, the demand of the plaintiff was for goods sold; and to a plea of the statute he replied, a new promise within six years. The evidence was, "that the defendant, after the expiration of six years, acknowledged the receipt of the goods, but said he thought he paid for them, and should rely on the statute." Per Curiam: "After an action has been barred by the statute of limitations, a promise has been deemed sufficient to revive it. An acknowledgment, a very slight acknowledgment, may be considered evidence of a promise; but then it must be such an acknowledgment as is consistent with a promise to pay, for the promise is implied from the acknowledgment. The defendant said that he had received the goods, but thought he had paid for them, and would rely on the statute. How is it possible, from this, to imply a promise to pay? He had a right to rely on the statute; and although its provisions may sometimes bear hard upon individuals, we feel ourselves bound by the law of the land, as expressed by the legislature, in opposition to which no man has a right to set up his own private opinion." *Jones v. Moore*, 5 Binn. 573, decided by the Supreme Court of Pennsylvania in 1813, has been regarded, in *Guier v. Pearce*, 2 Brown, 35, as a return in that state to the doctrine that the statute was an act of the legislature, and as such ought to be carried fully into effect. The views expressed by Chief Justice *Tilghman*, in 5 Binn. 573, are clearly expressive of the law as it is now generally understood to be. He says: "If six years elapse after the cause of action accrued, there can be no recovery, although the debt is not extinguished. It remains due in conscience, and is a good consideration for a new promise. It remains in some respects due in law, too; for, if the defendant omits to plead the act of assembly, he is considered as having waived the benefit of it, and the plaintiff may recover against him. The letters of the defendant are said to contain an acknowledgment of the debt, which, as the plaintiff's counsel contends, is sufficient, *per se*, to take the case out of the statute; not because it is evidence of a new promise, but because it revives the debt. Per *Houston, J.*, in *Man v. Warner*, 4 Whart. R. 479. There is some confusion, and perhaps some inconsistency, in the cases on this subject; but it appears to me, from the reason of the thing and from a review of all the cases, that an acknowledgment of the debt can only be considered as evidence of a new promise, or what is pretty much the same thing in substance, as a circumstance from which the law will imply a new promise. To consider this matter on principle, when the defendant pleads *non assumpsit infra sex annos*, and the plaintiff re-

interfere; and in order to prevent them, it was enacted, by stat. 9 Geo. IV. c. 14, s. 1, that in actions of debt, or upon the case, grounded upon

plies *assumpsit infra sex annos*, how can the issue be found for the plaintiff without proof of a promise, express or implied, within six years? It is the very point, and the only point, in issue. I cannot comprehend the meaning of reviving the old debt in any other manner than by a new promise." *Yeates, J.*, observed: "My judgment is not yet prepared to go to the extent of some of the cases decided on this subject. We are told in the books, that an acknowledgment of a debt is only evidence of a promise to pay it. Where it is accompanied by circumstances or declarations that the party means to insist on the benefit of the statute, no promise to pay can possibly be implied without violating the truth of the case." The views expressed by these two learned judges, lie at the foundation of the modern decisions in England, and of those of the Supreme Court of the United States. In *Fries v. Boisselin*, 9 Serg. & Rawle, R. 128, the defendant's words were wholly inconsistent with a promise to pay.

"The above construction has ever been tenaciously maintained in Pennsylvania, and has been, if possible, more clearly defined and illustrated. In giving the opinion of the court in *Gleim v. Rise*, in the Supreme Court of Pennsylvania, 6 Watts, R. 44, *Huston, J.*, in reference to the loose construction at one time given to the statute in respect to acknowledgments, observed, that some twenty years ago that court began to retrace its steps; and that its latest decisions say, that, in order to take a case out of the operation of the statute, it must be proved that the defendant admitted the debt to be still due; and that if any declaration be made by the party at the time inconsistent with a promise to pay, the court is bound to instruct the jury that there is not sufficient evidence from which to infer a new promise. By Chief Justice *Gibson*, in giving the opinion of the Supreme Court of Pennsylvania, in *Berghaus v. Calhoun*, 6 Watts, Penn. R. 219, the doctrine of acknowledgment, as understood by this court, is thus laid down: An acknowledgment of indebtedness, though not itself a promise, is held to be evidence of it. In this we see a remnant of that judicial repugnance to the statute of limitations, which had at one time nearly abolished it. It follows neither necessarily nor naturally, that the acknowledged existence of a debt, barred only so far as regards the means of its enforcement, implies a promise to pay it; and an express promise it is not pretended to be. It is but the connection of a fact which the plaintiff might prove as effectively by any other evidence, for it is a postulate of the doctrine that the statute which takes away the remedy, leaves the existence of the duty untouched. Were the fact of indebtedness, therefore, the efficient cause of the promise, the statute would be a dead letter, for the plaintiff would make out a case to recover in consistence with it by making out his original demand. But a naked duty or moral obligation, though a sufficient consideration for an express promise, raises no presumption by implication of law; consequently, though we might accurately suppose the recognition of a debt to be evidence of consideration, we might not, agreeably to admitted analogies, suppose it to be evidence of a promise because it is equally consistent with a declared determination not to pay. It is established, however, by decisions we dare not shake, that it may by legal intendment be evidence of a promise; yet to avoid the uncertainty and insensible encroachment on the statute that would ensue did we attempt to shape our course by the lights and shadows of former precedents, we may require the acknowledgment of the demand as a debt of legal obligation to be so distinct and palpable in its extent and form, as to preclude hesitation." *Angell on Lim.* 264, 3d ed. These late cases in Pennsylvania are supported by other late cases. *Magee v. Magee*, 10 Watts, Penn. R. 112; *Hogan v. Bear*, 5 Id. 41; *Thompson v. Hopper*, 1 Watts & Serg. 468; *Hay v. Kramer*, 2 Id. 137; *Haydock v. Tracy*, 3 Id. 503; *Brown v. Bridges*, 2 Miles, R. 424. And in still later cases the language of the court is, that "the acknowledgment of a debt ought to be plain, unambiguous, express, and so distinct and palpable in its extent as to preclude hesitation. *Gylkison v. Larus*, 6 Watts & Serg. 218; *Allison v. James*, 9 Id. 380; *Ang. on Lim.* §§ 212, 213; *Cowan v. Magowan*, Wallace, R. 66; *Bell v. M'Call*, 1 Browne, R. 123; *Hudson v. Carey*, 11 Serg. & Rawle, R. 13; *Bailey v. Bailey*, 14 Id. 197; *Brown v. Campbell*, 1 Id. 176; *Miles v. Moodie*, 3 Id. 211; *Scull v. Wallace*, 15 Id. 231; *Eckart v. Wilson*, 12 Id. 393; *Patton's Adm'r v. Ash*, 7 Id. 116; *Gallagher v. Milligan*, 3 Penn. 177; *Church v. Feterow*, 2 Id. 301; *Brown v. Bridges*, 2 Miles, 424; *Thompson v. Hopper*, 1 W. & S. 468; *Haydock v. Tracy*, 3 Id. 507; *Burr v. Burr*, 2 Casey, 284; *Horter v. The Cum. Valley R. R.*, 11 Harris, 371; *Suter v. Sheeler*, 10 Harris, 308.

(1) If the defendant promise to pay a debt, barred by the statute of limitations, in certain specific articles, the promise is conditional, and the plaintiff is bound to show

any simple contract, no *acknowledgment* or *promise* by words only shall be deemed sufficient evidence of a new or continuing contract, whereby

that he offered, and was ready to accept the specific articles. *Bush v. Barnard*, 8 Johns. Rep. 407.

An acknowledgment by one of the partners, after the dissolution of the partnership, of a partnership debt, will take it out of the statute. *Smith v. Ludlow*, 6 Johns. Rep. 267. *S. P. Patterson v. Choate*, 7 Wend. 441. So also in New Hampshire. *Greenleaf v. Quincy*, 3 Fairf. 11. And in Connecticut. *Coit v. Tracy*, 9 Conn. 1, S. C. 8 Conn. 268; *Austin v. Bostwick*, 9 Id. 496; *Johnson v. Beardslee*, 15 Johns. Rep. 3; *Smith v. Ludlow*, 6 Johns. Rep. 267; *White v. Hale*, 3 Pick. 291. *Contra. Thompson v. Peter*, 12 Wheat. 565; *Peck v. Botsford*, 7 Conn. Rep. 172. So, the acknowledgment of one joint debtor of the existence of the debt, is sufficient to take it out of the statute; and this principle applies to the case of executors, heirs, and devisees, as well as to every other case. A partial payment on a note by the principal promisor will take the debt out of the statute as to the surety. *Hunt v. Bridgham*, 2 Pick. 581, and see *Porter v. Blood*, 5 Pick. 54. But in *Gardiner v. Nutting*, 5 Greenl. 140, it was held that an acknowledgment by the maker of a note did not affect the right of a collateral guarantor to plead the statute. It was, however, holden, in Massachusetts, that the promise of an administrator did not take the demand out of the statute. *Daves v. Shed*, 15 Mass. Rep. 6. And it has been held in that state that an administrator cannot revive a debt due to himself by the intestate, which at his death was barred by the statute. *Richmond's case*, 2 Pick. 567. And see *Heath v. Wells*, 5 Pick. 140; *Hord v. Lee*, 4 Monroe, 37. An executor is not bound by acknowledgment. *Fritz v. Thomas*, 1 Whart. 66. Vide *Christ v. Garner*, 2 Penn. 251. Where an administrator said he thought the debt paid, and that he could produce the receipt; if he could not, and it was correct, it should be paid, it is not sufficient acknowledgment. *Kent v. Wilkinson*, 5 Gill & J. 499; *Fry v. Kirk*, 4 Gill & J. 509. To bind an administrator, it must be shown he was such at time of acknowledgment. *Larason v. Lambert*, 7 Halst. 247; *Bishop v. Harrison*, 2 Leigh, 532. On a joint and several note, a partial payment by administrator of one does not take the case out of the statute as against survivor. *Hathaway v. Haskell*, 9 Pick. 42. And the Supreme Court of the United States have said, that the decisions, taking cases out of the statute of limitations by evidence of an acknowledgment, have gone full as far as they ought to be carried, and the court were not inclined to extend them. An acknowledgment must be unqualified and unconditional to revive the original cause of action; if it be conditional it may amount to a new assumpsit; but the performance of the condition must be shown. *Wetzel v. Bussard*, 11 Wheat. 309. See *Ellis v. Jarvis*, 3 Mason, 457, and this doctrine was repeated in *Bell v. Morrison*, 1 Peters, Sup. Ct. 362. Thus, where an action of assumpsit was brought against J. C., and the statute of limitations was pleaded in bar, a witness testified, that he presented to J. C. a certain account against J. C. and J. W., partners in trade, under the firm of J. C. & Co., in favor of the plaintiff; and that J. C. stated that the amount was due, and that he supposed it had been paid by his partner, J. W.; but that he had not paid it himself, and did not know of its being ever paid; Held, that this was not sufficient evidence to take the case out of the statute. In this case there was no promise, conditional or unconditional; but a simple acknowledgment, which went to the original justice of the action. But this was not enough. The statute was not made to protect persons from claims fictitious in their origin; but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence may be lost. It is not sufficient to take a case out of the statute, that the claim should be proved, or acknowledged to have been originally just; the acknowledgment must go to the fact that it is still due. The acknowledgment of J. C. was, that he had not discharged the account presented to him, but he does not say that it was not discharged. His partner might have paid it without the knowledge of J. C., and, consequently, his declaration that he had not himself paid it, and that he did not know whether his partner had paid it or not, was no proof that the debt remained due, and was, therefore, not such an acknowledgment as will take the case out of the statute of limitations. *Clementson v. Williams*, 8 Cranch, 72. In *Sands v. Gelston*, the Supreme Court of New York stated the amount of the defendant's admission to be, "that the plaintiff had never received what he claimed as a debt; and that, if the defendant believed that he had a claim in law, or equity, he would submit the matter to reference, or compromise it; but that, in his opinion, the plaintiff had no such claim; and that he was not entitled to it in law or equity, and therefore, he would neither submit nor compromise it." The court observed, "that it would be doing violence to this admission, to say that there is evidence from which a promise may be inferred, to pay a

to take any case out of the operation of the statute, or to deprive any party of the benefit thereof, unless such acknowledgment or

demand, the justice and equity of which, as well as the defendant's liability to pay it, is utterly denied," and "that if, at the time of the acknowledgment of the existence of the debt, such acknowledgment is qualified in a way to repel the presumption of a promise to pay, then it will not be evidence of a promise sufficient to revive the debt, and take it out of the statute." *Sands v. Gelston*, 15 Johns. Rep. 511; *Danforth v. Culver*, 11 Johns. Rep. 146; *Lawrence v. Hopkins*, 13 Johns. Rep. 288.

The courts of Pennsylvania, at a comparatively early period, expressed their doubts of the propriety of the decisions under the statute of limitations, and led the way to a construction of acknowledgments, more consistent with the intention of the legislature than that of the English courts. In *Guier v. Pearce*, 2 Browne, 35, it was held that an acknowledgment must be such as is consistent with a promise to pay. And this doctrine was recognized and enforced in *Jones v. Moore*, 5 Binn. 573; in *Miles v. Moodie*, 3 S. & R. 211, and again repeated by C. J. Tilghman, in *Fries v. Boisselin*, 9 S. & R. 131; in *Hudson v. Carey*, 11 S. & R. 13; in *Bailey v. Bailey*, 14 S. & R. 197, and in several other cases. In *Eckert v. Wilson*, it was said by *Duncan, J.*, that the acknowledgment must be an unqualified one of a present existing debt; and if it be qualified in a way to repel the presumption to pay, it is not evidence of a promise. The principal cases in Pennsylvania, in which the acknowledgments have been held sufficient, are *Miles v. Moodie*, 3 S. & R. 211; *Henwood v. Cheeseman*, 3 S. & R. 500; *Patton v. Ash*, 7 S. & R. 116. Those in which the acknowledgments have been held to be insufficient, are *Guier v. Pearce*, *Bailey v. Bailey*, *Fries v. Boisselin*, *Hudson v. Carey*, *ut supra*. *Browne v. Campbell*, 1 S. & R. 176; and *Scull v. Wallace*, 15 S. & R. 231, in which it was held that the declaration of one of two administrators, defendants, that he had no doubt that the estate was indebted to the plaintiff, but that his co-administrator was determined to plead the statute, and he would leave the matter to her, and would have nothing to do with it, did not take the case out of the statute. And in *Levy v. Cadet*, 17 S. & R. 126; *S. P. Seavright v. Craighead*, 1 Penns. Rep. 135, it was held, in opposition to the New York decisions, that the acknowledgment of one partner, made after the dissolution of the partnership, did not prevent the other from using the statute as a bar: And the decision is the same in the Supreme Court of the U. S. *Bell v. Morrison*, 1 Pet. S. C. 373. See *Ward v. Howell*, 5 Har. & J. 60, *contra*. See preceding note.

In the State of Maine, it is now held, that "nothing short of an absolute promise, or a conditional promise accompanied by proof of a performance of the condition, or an unambiguous acknowledgment of the debt as existing, and due at the time of such acknowledgment, will save a case from the operation of the statute." *Porter v. Hill*, 4 Greenl. 42; *Deshon v. Eaton*, *ib.* 413; *Perley v. Little*, 3 Greenl. 97; Ang. on Lim. § 216.

The same doctrine now prevails also in Massachusetts. *Bangs v. Hall*, 2 Pick. 368, where the cases are reviewed and the rules laid down by Judge *Putnam*. But in a later case, (*Whitney v. Bigelow*, 4 Pick. 110,) it was said by C. J. *Parker*, that "direct and positive proof of an acknowledgment or promise in any set form of words is not required. It may be inferred from facts without any words; as from payment of part," &c. And it was held, that if there are words of acknowledgment without declared reference to the debt in question, the jury may infer from the circumstances, that the particular debt was acknowledged. Ang. on Lim. § 215.

In Connecticut in a late case (*Marshall v. Dalleber*, 5 Conn. Rep. 486,) the Supreme Court expressed their disinclination to make further inroads upon the statute, and laid down the rule that there must be either an express promise to pay the debt, or an acknowledgment that it is *due*. In that case, the defendant had said, that the note upon which the action was brought, had been paid in a particular way, which the plaintiff disproved on the trial; but it was held, that this was not sufficient to prevent the bar of the statute. And in a very recent case, it was decided that a promise by an executor, did not take the case out of the statute. *Peck v. Botaford*, 7 Conn. Rep. 172; Ang. on Lim. § 217.

In North Carolina, it is held that the acknowledgment must be of a *subsisting* debt. *Billews v. Bogan*, 1 Hayw. 13; *Ferguson v. Taylor*, *ib.* 50; Ang. on Lim. § 223. It has been held also in that state, that an acknowledgment by one partner made after the dissolution of the partnership, will take the case out of the statute. *M'Intire v. Oliver*, 2 Hawks, 209. The rule is the same in South Carolina. *Beitz v. Fuller*, 1 M'Cord, 441; *Briggs v. Stark*, 2 Rep. Con. Ct. 111; *Veat v. Hassan*, 3 M'Cord, 278. The cases in that state seem to give greater effect to admissions of a defendant, than in most others. See *Burden v. M'Elhenny*, 2 Nott & M'C. 60; *Davis v. Verdier*, 1 M'Cord, 320; *Lee v.*

[*147] promise shall be made or contained by or *in some writing to be signed by the party chargeable thereby ;(1) and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, &c., shall lose the benefit of the statute, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them : provided always, that nothing therein contained shall alter or take away or lessen the effect of any payment(2) of any principal or interest(3) made by any person : provided also, that in actions

Perry, 3 M'Cord, 552. In *Azson v. Blakely*, 2 M'Cord, 5, it was held that a promise by a wife after marriage to pay a debt contracted by her previous to the marriage, did not take the case out of the statute. Ang. on Lim. § 224.

In Kentucky, however, the decisions seem to be uniformly in favor of such a construction of acknowledgments, as to give full effect to the statute. *Bell v. Rowland*, Hard. 301 ; *Harrison v. Handly*, 1 Bibb, 443 ; *Ormsby v. Letcher*, 3 Bibb, 269 ; *Hard v. Lee*, 4 Monroe, 36 ; Ang. on Lim. § 225.

In New Jersey, it has been held, that an acknowledgment of the debt, though accompanied by an allegation that it was barred by the statute, is sufficient to take it out of the statute. *Cadmus v. Dumon*, Coxe, 176 ; Nixon's N. J. Dig. 433, and notes, p. 438, 439.

In *Oliver v. Gray*, 1 Har. & Gill, 204, Ch. Justice *Buchanan*, of the Court of Appeals of Maryland, after reviewing the authorities, laid down the following general rules, derived (as he supposed) from them. 1st. That the suit ought to be brought on the original cause of action, and not on the new promise or acknowledgment. 2d. That the acknowledgment need not be absolute and unconditional, but a conditional promise is sufficient ; and in such case, it is incumbent on the plaintiff, to show at the trial, either a performance of the condition or a readiness to perform it. 3d. The acknowledgment must be of a present subsisting debt, unaccompanied by any qualifications or declarations which, if true, would exempt the defendant from a moral obligation to pay. 4th. An acknowledgment with a naked refusal to pay, or a refusal accompanied with an excuse for not paying it, which in itself implies an admission that the debt remains due, and furnishes no real objection to the payment of it, is sufficient. 5th. Any unqualified acknowledgment of a present subsisting debt, or acknowledgment with no other excuse for not paying it, than a reliance on the bar created by the act of limitations, is sufficient to take it out of the act. 6th. The acknowledgment of the debt may be in whole or in part. 7th. It is sufficient if it be after bringing of the suit. 8th. An admission that the sum claimed has not been paid is not sufficient, without some further admission or other proof, that the debt once existed. 9th. The acknowledgment need not be made to the plaintiff, but may be made to anybody else. 10th. What kind of promise or acknowledgment is sufficient, is for the court to decide ; and the evidence offered to prove such promise or acknowledgment is proper to be submitted to the jury as in other cases under the direction of the court. It was also laid down, that an acknowledgment must be taken together, and that no evidence can be received to turn a denial of the existence of a debt into an acknowledgment of a subsisting liability, by proving that the defendant was mistaken in supposing it to have been paid. See further as to what acknowledgments will be sufficient. *Bradley v. Field*, 3 Wend. 272 ; *Purdy v. Austin*, Ib. 187 ; *Soulden v. Van Rensselaer*, Ib. 472 ; *Rogers v. Rogers*, Ib. 503 ; *Stafford v. Bryan*, Ib. 532. See the authorities fully collected in Angell on Limitations, §§ 208-285, both text and notes, to which the reader is referred for more extended inquiries.

(1) Signature by the agent of the debtor will not suffice. *Hyde v. Johnson*, 2 Bingh. N. C. 776. Where the fair import of the writing is not to render the party signing chargeable, but only refers to others by whom the debt is to be paid, it is not sufficient to bring the case within this act. *Whippy v. Hillary*, 3 B. & Ad. 399, recognized in *Routledge v. Ramsay*, 3 Nev. & P. 319 ; 8 A. & E. 224.

(2) Delivery of goods by agreement between debtor and creditor in reduction of demand, operates as payment within this statute. *Hooper v. Stephens*, 4 A. & E. 71.

(3) Payment of interest within six years by one of two joint and several contractors, takes the debt out of the statute as to both. *Wyatt v. Hodson*, 8 Bingh. 309 ; *Bealy v. Greenslade*, 2 Cro. & J. 61, S. P. on note dated in 1817. So also the giving a new note for interest due on one barred by the statutes. *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267. So also payment of interest by principal as against surety. *Sigourney v. Drury*, 14 Pick. 387.

to be commenced against two or more such joint contractors, &c., if it shall appear at the trial or otherwise, that the plaintiff, though barred by the statute of limitations or this act, as to one or more of such joint contractors, &c., shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff. And by sect. 2, if any defendant in any action on any simple contract shall plead any matter in abatement, to the effect that any other persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said statute of limitations, or this act, be maintained against the other persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same. And by sect. 3, no indorsement or memorandum of any payment written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the statutes.⁽ⁱ⁾ And by sect. 4, the statute of limitations and this act shall be deemed to apply to the case of any debt on simple contract alleged by way of *set-off on the part of any defendant, either by plea [*148] or otherwise. This act took effect 1st January, 1829.

“This statute did not intend to make any alteration^(k) in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof.” The acknowledgment need not specify the amount of the debt,^(l) which may be shown by extrinsic evidence. Hence a general promise in writing, not specifying the amount, but which can be made certain as to the amount by extrinsic evidence, is sufficient;^(m) but a promissory note improperly stamped is not.⁽ⁿ⁾ There must be an absolute acknowledgment that some debt is due,^(o) and this acknowledgment must be before action brought.^(p)

Where two parties meet and go through an account in which there are items on both sides and strike a balance, this is evidence of an agreement that the items of one account should be set off against the earlier items of the other, whence arises a new consideration for the payment of the balance, and the case is taken out of the operation of the statute of limitations.^(q)

Since this statute it has been holden, that where the written promise

(i) See *Purdon v. Purdon*, 10 M. & W. 562.

(k) Per *Tindal*, C. J., delivering judgment in *Haydon v. Williams*, 7 Bingh. 163.

(l) *Lechmere v. Fletcher*, 3 Tyrwh. 450, recognized in *Waller v. Lacy*, 1 M. & Gr. 54; 1 Scott's N. R. 186.

(m) *Bird v. Gammon*, 3 Bingh. N. C. 888; 5 Scott, 213, recognized in *Hartley v. Wharton*, 3 P. & D. 532; 11 A. & E. 934; *Gardner v. McMahon*, 3 Q. B. 561; 2 G. & D. 593.

(n) *Jones v. Ryder*, 4 M. & W. 32.

(o) *Spong v. Wright*, 9 M. & W. 629.

(p) *Bateman v. Pinder*, 3 Q. B. 574; 2 G. & D. 790, recognizing *Tanner v. Smart*, ante, p. 146.

(q) *Ashby v. James*, 11 M. & W. 542; [*Clark v. Alexander*, 8 Scott's N. R. 165.]

has been lost, (r) oral evidence may be given of its contents. A verbal acknowledgment (s) of part payment of a debt is not sufficient (within the proviso in the 1st section of this statute) to take the case out of the statute of limitations; for this statute (9 Geo. IV. c. 14) must be construed as containing a general provision that in no case should an acknowledgment or promise by words *only* be sufficient to take the case out of the statute of limitations, whether such acknowledgments were of the existence of the debt or of the fact of part payment; and the proviso must be considered as leaving to the fact of part payment if properly proved, that is, not by an acknowledgment *only*, the same effect which it had before the statute. (t) Hence evidence of oral declarations, although not sufficient to prove a payment, may be received to corroborate other proofs of that fact. (u)

Defendant, by a deed, reciting that he was indebted to plaintiff and others, assigned his property to plaintiff and others in trust to [*149] *pay all such creditors as should sign the schedule of debts annexed, with a proviso, that if all the creditors whose debts amounted to a certain sum did not sign by a fixed day, the deed should be void; the plaintiff never executed the deed, nor was the amount of his debt anywhere stated; this was holden not (x) to be a sufficient acknowledgment: but it has since been holden, (y) that the amount of the debt need not be expressed; and that a written promise to pay a debt contracted during infancy, is sufficient under 9 Geo. IV. c. 14, although it neither contains the name of the creditor, the amount due, nor the date; and that parol evidence is admissible to supply these particulars.

Since the passing of Lord Tenterden's Act, 9 Geo. IV. c. 14, s. 1, the existence of items in an open account within six years, will not operate to take the previous portion of the account, out of the statute of limitations. (z) In *Cotes v. Harris*, Bull. N. P. 149, *Denison, J.*, held that where all the items are on one side, as in an account between a tradesman and his customer, the last item which happens to be within six years, shall not draw after it those that are of a longer standing. Per *Denison, J.*, in *Cotes v. Harris*, Bull. N. P. 149. (1) And in this case the same learned judge held, that the clause in the statute about merchants' accounts, extended only to cases where there were mutual accounts and reciprocal demands between two persons. See *Williams v. Griffiths*, 2 Cr. M. & R. 364. And in *Webber v. Tivill*, 2 Saund. 124, it was holden, that this clause extended only to accounts current between merchants, and not to accounts stated between them. See

(r) *Haydon v. Williams*, 7 Bingh. 163.

(s) *Willis v. Newham*, 3 Y. & Jer. 518, recognized in *Bayley v. Ashton*, 12 A. & E. 493; 4 P. & D. 204; *Maghee v. O'Neil*, 7 M. & W. 531; and see *Eastwood v. Saville*, 9 M. & W. 615. [*Clark v. Alexander*, ubi sub.]

(t) See *Waters v. Tomkins*, 1 Tyr. & Gr. 137; 2 Cr. M. & R. 723; *Trentham v. Deverill*, 3 Bingh. N. C. 397.

(u) *Bevan v. Gething*, 3 Q. B. 740; 3 G. & D. 59.

(x) *Kennett v. Milbank*, 8 Bingh. 38.

(y) *Hartley v. Wharton*, 3 P. & D. 529; 11 A. & E. 934.

(z) *Cottam v. Partridge*, 4 M. & Gr. 271; 4 Scott's N. R. 819.

(1) *S. P. Ingram v. Sherrard*, 17 S. & R. 347; *Bennett v. Davis*, 1 New H. 19; *Davis v. Smith*, 4 Greenl. 337.

further on this clause, *Welford v. Liddel*, 2 Ves. 400.(1) In *Inglis v. Haigh*, 8 M. & W. 769, the Court of Exchequer seem to have decided that the exception in the statute of limitations as to merchants' accounts, applies only to cases where an action of account, or an action on the case for not accounting, will lie, but not to an action of *indebitatus assumpsit*; and in *Cottam v. Partridge*, 4 M. & Gr. 284, *Tindal*, C. J., thought that the exception was not applicable, where an action of account cannot be maintained. An open account between two tradesmen for goods sold by each to the other without any agreement that the goods delivered on the one side shall be considered as payment for those delivered on the other, does not constitute such an "account as concerns the trade of merchandise between merchant and merchant," within the exception of the 3rd sect. of the statute of limitations, 21 Jac. I. c. 16.(a)

In the case of *Robinson v. Alexander*,(b) which was a case of merchants' accounts, in which there had been no item on either side for much more than six years previous to the filing of the bill *in Chancery; the defendant by his answer insisted on the sta- [*150] tute of limitations, as a bar to the account sought by the bill, but the House of Lords held the case to be within the exception of the statute.

Plaintiff declared as executor on a promise to the testator;(c)(2) defendant pleaded *non assumpsit infra sex annos*; and upon the trial it appeared that there was a new promise made within six years, but it was made to the plaintiff and not to the testator. Per *Cur.*, he should have declared accordingly. And in *Sarell v. Wine*, 3 East, 409, in the case of an action brought by an administrator on promises to the intestate, where the evidence was an acknowledgment to the administrator within six years, it was holden insufficient on the authority of the preceding case.(3) So where an action was brought by an executor on promises made to the testator,(d) the defendant pleaded *non assumpsit infra sex annos*, and the plaintiff replied a subsequent promise to him-

(a) *Cottam v. Partridge*, ubi sub.

(b) 8 Bligh, N. S. 352, cited by *Parke*, B., in *Inglis v. Haigh*, 8 M. & W. 781.

(c) *Deane v. Crane*, Salk. 28.

(d) *Hickman v. Walker*, Willes, 27.

(1) Accounts between merchants in the character of principal and factor, are not within the act. *Stiles v. Donaldson*, 2 Dall. 264; S. C. 2 Yeates, 105. See *Murray v. Coster*, 5 J. C. R. 522; 20 Johns. 576; Ang. on Lim. § 145, and notes. And where the usage of a bank was at the end of every month to balance the bank book of a depositor, and make the balance the first item of a new account, and to restore to the depositor the checks drawn by him during the month, it was held that the statute began to run as to such balance from the time of so stating the account. *Union Bank v. Knapp*, 3 Pick. 96. In *Bass v. Bass*, 6 Pick. 362, it was held, that merchants' accounts were within the statute, although there was no item within six years. Such, also, was the opinion of Chancellor *Kent*, in *Coster v. Murray*, 5 J. C. R. 522. In *Mandeville v. Wilson*, 5 Cranch, 15, however, the Supreme Court of the U. S. maintained a contrary doctrine. See *Tucker v. Ives*, 6 Cowen, 193. And such has been the decision of the Court of Appeals of Kentucky. *Lansdale v. Brashear*, 3 Monroe, 330. See also, *Patterson v. Brown*, 6 Monroe, 10; Ang. on Lim. §§ 152, 165.

(2) See *Beard v. Cowman's Executor*, 3 Harris & M'Hen. Rep. 152.

(3) *Contra. Burnell v. Roby*, 3 N. Hamp. 467; *Butcher v. Hexton*, 4 Leigh, 519.

self, the replication was adjudged a departure in pleading, and therefore bad.(1)

A party suing, and seeking to avail himself of the law of a particular country, must take the law as he finds it. Hence, where in an action of debt it was averred that, before the making the obligation thereafter mentioned, the plaintiffs carried on business in Scotland, and that one A. B. and the defendant were resident and domiciled therein; and that by a certain obligation, (set out,) the said A. B. and the defendant became bound, jointly and severally, to pay to the plaintiffs a sum of money: that, by the law of Scotland, the time for instituting any legal proceeding, upon the obligation, and the cause and right of action accruing thereon, had not yet elapsed; that is, by the said law the plaintiffs had the right of suing thereon, at any time with forty years from the making thereof. A plea, that the cause of action did not accrue within six years, was holden(e) on demurrer to be a sufficient answer to the action.(2)

A direction for the payment of debts in a will of personal estate will not stop the running of the statute of limitations, for such a direction is merely inoperative so far as the personal estate is concerned. If time has once begun to run against a debt in the debtor's lifetime, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative to him is constituted.(f)

Replication.—The replication must state that the *cause of action* accrued within six years next before the suing forth of the writ; for where, in assumpsit, by an executor, on promises to the testator, the defendant pleaded the statute, and the plaintiff replied, that the writ was sued out on such a day,(g)(3) and within six years before

(e) *The British Linen Company v. Drummond*, 10 B. & C. 903.

(f) *Freak v. Cranefeldt*, 3 My. & Cr. 499, *Cottenham, C.*, recognizing *Scott v. Jones*, as decided in D. P. 1838, 4 Cl. & Fin. 382, reversing the judgment of *Brougham, C.*, in *Jones v. Scott*, 1 Russ. & M. 255.

(g) *Hickman v. Walker*, Willes, 27.

(1) In an action against defendant, as carrier, he pleaded the statute of limitations; and it was holden, that plaintiff could not give a subsequent promise in evidence to take it out of the statute, the action being founded in tort. *Gallagher v. Hollingsworth*, 3 Harris & M'Hen. Rep. 122.

(2) The statute of limitations is a bar to an action on a contract made in another state, and on which, by the law of that state, the time of limitation had not yet expired. *Nash v. Tappen*, 1 Caines, Rep. 402; *Pearsall v. Dwight*, 2 Mass. Rep. 84. *Byrne v. Crowningshield*, 17 Mass. Rep. 55; *Medbury v. Hopkins*, 3 Conn. Rep. 472; and see *Decouche v. Savetur*, 3 J. O. R. 217; *Le Roy v. Crowningshield*, 2 Mason, 151; *Jones v. Hook*, 2 Rand. 303. The *lex fori* governs as to limitations, and not the *lex loci contractus*. *Lincoln v. Battelle*, 6 Wend. 475; *McClure v. Silliman*, 3 Pet. 276. Even where the parties were both subjects of a foreign country, where the debt accrued and was barred. *Bulger v. Roche*, 11 Pick. 36. So, to a set-off of demands arising in another state. *Ruggles v. Keeler*, 3 Johns. Rep. 263. The statute of limitations is a good plea to set-off. *Alsopp v. Nicholls*, 9 Conn. 359.

(3) In New York it has been held that a *capias* to save the statute may be delivered to the sheriff with instructions to return it *non est*. *Beekman v. Satterlee*, 5 Cowen, 519. But it is indispensable that the writ should be returned. *Baskins v. Wilson*, 6 Cowen, 471. To prevent the running of the statute by process and continuances, the issuing and return of the first process must be shown, and the process on which the defendant is arrested must be produced, so as to be connected with the first, by continuance

the suing out thereof, *letters testamentary were granted to [*151] the plaintiff; on special demurrer, assigning for cause, that the plaintiff had not alleged positively that the *cause of action* accrued within six years before the suing forth of the writ, the replication was holden bad; the court observing, that the time of limitation must be computed from the time when the action first accrued to the testator, and not from the time of proving the will; that the proving the will did not give any new cause of action, and consequently the time when it was done was immaterial. So where, to assumpsit brought by the assignee of a bankrupt, (h) defendant pleaded the statute of limitations; the plaintiff replied the bankruptcy and assignment, and that the cause of action arose within six years next before the assignment: on demurrer, the replication was holden bad; the court observing, that the statute would be defeated as to all simple contracts, if an assignment, at the end of five years and a half, was to set all at large again.

By stat. 21 Jac. I. c. 16, s. 4, it is enacted, "That if judgment be given for the plaintiff and reversed by error, or the judgment be arrested, or if the defendant be outlawed, and the outlawry reversed; the plaintiff, his heirs, executors, or administrators, may commence a new action or suit from time to time *within a year* after such judgment given or outlawry reversed." (1)

It has been said, that within the equity of the preceding section, the courts have permitted an executor or administrator *within a year* (2)

(h) *Gray v. Mendez*, 1 Str. 556.

on the record. *Davis v. West*, 5 Wend. 63; *Jackson v. Brooks*, 14 Id. 649. A writ against two, served on one, and an *alias* served on both, does not avoid the statute. *Magan v. Clark*, 6 Watts, 528.

(1) It is not a sufficient replication to a plea of the act, that the plaintiff commenced a previous action within the period allowed by the act, and after the expiration of the period was nonsuited by order of the court. *Harris v. Dennis*, 1 S. & R. 236. It is no answer to a plea of the statute to an action on an express verbal agreement, that a suit has been commenced within time, and discontinued because misconceived. *Sherman v. Barnes*, 8 Conn. 138.

(2) I am not aware of any case in which this point has been *expressly* decided, or in which it has been holden, that an executor or administrator *must* bring his action within a year. In Buller's N. P. 150, is the following position;—"If an executor take out proper process *within a year* after the death of his testator, if the six years were not lapsed before the death of the testator, though they be lapsed within that year, yet it will be sufficient to take it out of the third section of the statute of limitations by the equity of the fourth section." The authority cited for this position is *Cawer v. James*, probably the same case as is reported in Willes, 255, by the name of *Karver v. James*; but in Willes Report, the position, as laid down by Buller, seems rather to have been admitted than expressly determined. In like manner, in *Wilcocks v. Huggins*, Str. 907, and Fitzg. 170, 289, it seems to have been taken for granted. From the language, however, of *Lee, J.*, in the last-mentioned case, it may be inferred that at that time no fixed period, within which the executor or administrator might bring the action, had been established. His words are, (Fitzg. 172,) "In the contingency that has happened, the statute does not limit any time for the executor to bring his action; but there is a clause that provides (where a judgment is reversed, after the six years) one year after the reversal for the plaintiff to bring a new action, which *may* be a direction with regard to the reasonableness of the time to be allowed an executor or administrator in the present contingency." It is observable also, that in *Wilcocks v. Huggins*, Fitzg. 171, a case (*Lethbridge v. Chapman*,) was cited, where an administrator brought his action *fourteen* months after the intestate's death, and recovered: and in *Wilcocks v. Huggins*, (where the action was brought by the executor of an executor in right of the first testator more than four years

after the death of the testator or intestate, to renew a suit commenced by the testator or intestate.(1)

Exceptions in the Case of Infancy, &c.—By the 7th section [*152] of stat. 21 Jac. I. c. 16, "If any person entitled to *such action of trespass, detinue, trover, replevin, actions of account, debt, trespass for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, shall be, at the time of such cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas,(2) such person shall be at liberty to bring the same actions within such times as are before limited after their being of full age, discoverd, of sane memory, at large, and returned from beyond the seas." By stat. 3 & 4 Will. IV.

after the death of the first executor,) it was admitted by the court, that if the second executor had been retarded by suits about the will or administration, it would have altered the case, because then the neglect would have been accounted for. Perhaps the only rule that can be laid down with safety is, that the executor or administrator must bring his action within a *reasonable* time. This rule receives some sanction from the following observations of the judges in *Wilcocks v. Huggins*, Fitzg. 290. *Raymond*, C. J.: "It might be too harsh a construction to say, that the debt becomes irrecoverable by an abatement of the action, after the six years elapsed, by the plaintiff's death; but then the executor, to bring his case within the equity of the statute, must make a recent prosecution, as to which the clause in the statute that provides a year after the reversal of a judgment, &c., may be a good direction." *Page*, J.: "Such a recent prosecution is to be made as will show the party came as early as he might. If there had been a contest about the will or right of administration, that should have been pleaded in excuse of the delay." *Probyn*, J.: "Nothing hath been disclosed to show why the action was not brought sooner. If a reasonable cause had been shown, it might bring the action within the notion of a recent prosecution, *though it had been brought after the year.*" *Lee*, J.: "I think that it should be in the nature of Journeys Accompts, *which is a taking up and pursuing the old action in a reasonable time*, which is to be discussed by the discretion of the justices, 6 Co. *Spencer's* case; and, by the same rule, I think what is or is not a recent prosecution, in a case of this nature, is to be determined by the discretion of the court from the circumstances of the case, but generally the year in the statute is a good direction." A similar clause to that in the text will be found in stat. 3 & 4 Will. IV., c. 42, s. 6. The foregoing case of *Wilcocks v. Huggins* was much commented upon in *Rhodes v. Smethurst*, 4 M. & W. 47.

(1) A suit within six years after cause of action, and abated by death of plaintiff, may be renewed within a year by executor. *Schermerhorn v. Schermerhorn*, 5 Wend. 513.

(2) In Pennsylvania it is held, that the words "*beyond sea*," in the act of 1713 (which closely resembles the British statute) must be taken to mean "*out of the limits of the United States.*" *Ward v. Hallam*, 2 Dall. 217; *S. C.* 1 Yeates, 329; *Thurston v. Dawes*, 9 S. & R. 288. So in Missouri and Michigan. Ang. on Lim. §§ 201-207. A similar decision is to be found in an early case in Connecticut. *Gustine v. Brattle*, Kirby's Rep. 299. In the Supreme Court of the United States, however, the same expressions in a statute of Virginia have received a different construction. "*Beyond sea*," and "*out of the state*," were said to be analogous expressions. *Faw v. Roberdeau*, 3 Cranch, 177; *S. P. Murray v. Baker*, 3 Wheat. 541; *Shelby v. Guy*, 11 Wheat. 361; Ang. on Lim. § 200, and cases there cited. The rule in Maryland, is the same. *Brent v. Tasker*, 1 Har. & M'Hen. 89; *Pancoast v. Addison*, 1 Har. & J. 350. So in South Carolina; *Forbes v. Foot*, 2 M'Cord, 331; *S. P. Richardson v. Richardson*, 6 Ohio, 125. So in Kentucky, the expressions "*out of the country*," have been held to mean "*out of the state.*" *Mansell v. Israel*, 3 Bibb, 110. See *Sleight v. Kane*, 1 Johns. Cas. 76.

The plaintiff, if he wishes to bring himself within any of the exceptions, must so reply, and cannot otherwise avail himself of it on the trial. *Witherup v. Hill*, 9 S. & R. 11. And if the plaintiff reply that he resides beyond sea, he must also aver that he has not been in the state within the period of limitation. *Thurston v. Dawes*, 9 S. & R. 288. See also *James v. Henry*, 3 Litt. 48; *Sheed v. Hall*, 2 Marsh. 21; *Ormsby v. Letcher*, 3 Bibb, 269; *Crocker v. Arey*, 4 Am. Law Reg. 462.

c. 42, s. 7, no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, *Al- [*153] derney, and Sark, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be beyond the seas within the meaning of this act or of the act of 21 Jac. I. c. 16. Ireland, notwithstanding the act of Union and the foregoing 7th sect. of the stat. 3 & 4 Will. IV. c. 42, is still beyond the seas⁽ⁱ⁾ within the stat. 4 Ann. c. 16, s. 19.

The lapse of time is a bar in the body of the stat. of limitations (21 Jac. I. c. 16), and the exceptions are confined to the persons therein enumerated, and do not extend to persons impeded by the obstruction of justice,^(k) or otherwise. So it is not any answer to a plea of the statute, that after the cause of action accrued, and after the statute had begun to run,^(l) the debtor within the six years died, and that (by reason of litigation as to the right of probate,) an executor of his will was not constituted until after the expiration of the six years, and that the plaintiff sued such executor within a *reasonable* time after probate granted. But an action of assumpsit, although it is not expressly mentioned, is within the equity of the preceding clause^(m) of the statute of James.⁽¹⁾ If the plaintiff is a foreigner, living beyond sea at the time when the cause of action accrues, and doth not come to England for fifty years, he still has six years after his coming to England to bring an action of assumpsit; and if he never comes to England, his right of action is not barred either against him, or his executors or administrators after his death. Hence a replication⁽ⁿ⁾ (to a plea of the statute of limitations) that the plaintiff was beyond sea at the time when the cause of action accrued, and that he hath ever since been, and still is, abroad, was holden good, on demurrer.⁽²⁾ If the plaintiff be in England when the cause of action accrues^(o) the time of limitation begins to run, and a subsequent departure from the kingdom and going beyond the seas, will not entitle the plaintiff or his representative to maintain an action after the expiration of the limited time.⁽³⁾

(i) *Lane v. Bennett*, 1 M. & W. 70.

(k) *Benyon v. Evelyn*, Bridgman's Judgments from Hargrave's MSS., by Bannister, p. 324. The inconveniences which would arise from an equitable construction of the statute are painted in strong colours in this judgment. See p. 362, 3.

(l) *Rhodes v. Smithurst*, 4 M. & W. 43, affirmed on error in Exch. Ch. 6 M. & W. 351.

(m) *Chandler v. Vilett*, 2 Saund. 120, and *Rochtschilt v. Leibman*, 2 Str. 836, and Fitzgib. 81.

(n) *Strithorst v. Græme*, 2 Bl. R. 723.

(o) *Smith v. Hill*, 1 Wils. 134; [*Peck v. Randall*, 1 Johns. Rep. 165; *Jackson v. Wheat*, 18 Id. 40.]

(1) See *Reed v. Zelligan*, 1 Miles, 204; S. C. 2 Whart. 152.

(2) S. P. *Faw v. Roberdeau*, 3 Cranch, 174; *Thurston v. Dawes*, 9 S. & R. 288; *Doe v. Harrow*, 3 Bibb, 446; *Den v. Mulford*, 1 Hayw. 311; *Pearce v. House*, 2 Taylor, 305; Anon., 1 Hayw. 459.

(3) So when a disability is once removed, and the statute has begun to run, no subsequent disability will stop the running. See the opinion of Lord Kenyon, C. J., in *Doe dem. Duroure v. Jones*, 4 T. R. 311, where that learned judge speaks of the uniform construction of all the statutes of limitation in this respect. See also *Gray v. Mendez*, Str. 556; *Doe d. Griggs v. Shaen*, B. R. M. 28 Geo. III. MS.; S. P. *Rhodes v. Smithurst*, 4 M. & W. 42. And see *Jackson v. Johnson*, 5 Cowen, 74; *Hudson v. Hudson*, 6 Munf. 352; *Den v. Mulford*, 1 Hayw. 311; *Ib.* 416; *Pearce v. House*, 2 Taylor, 305; *Faysoux v.*

[*154] So if there are several partners, (*p*) and some are in *England at the time when the cause of action accrues, and others beyond the seas, the action must be brought within six years next after the cause of action accrues, notwithstanding the absence of the partners beyond the seas.

Before the statute of Anne hereinafter mentioned, it was holden that the exception in the 7th section of the stat. 21 Jac. I. c. 16, as to persons being beyond the seas, extended only to the case of plaintiffs so absent, (*q*) and not to that of defendants; 1st, because plaintiffs only are mentioned in the statute of James; and 2ndly, because the plaintiffs might have filed an original, and outlawed the debtor, which would have prevented the bar of the statute. But now, by stat. 4 Ann. c. 16, s. 19, (*r*) "If any person, *against* whom there is any cause of action for seaman's wages, or of action upon the case, shall be, at the time of such cause of action accrued, beyond the seas, the person entitled to the action may bring the same against such person *after* his return from beyond the seas, within the time limited by the 21 Jac. I. c. 16." (1) To a plea of the statute it is sufficient to reply that the defendant was in the East Indies at the time the cause of action accrued, and that the plaintiff commenced his suit against the defendant within six years next after his return to this kingdom; and it is no answer to this replication to say, that the defendant remained more than six years in India after the cause of action accrued there, and within the jurisdiction of the supreme court at Calcutta in that country. (*s*) (2)

2. *Statute of Set-off*.—At common law, if the plaintiff was indebted to the defendant, in as much or even more than the defendant owed to him, yet the defendant had not any method of setting off such debt in the action brought by the plaintiff for the recovery of his debt, and consequently the defendant was driven to a cross action. (3) To obviate

(*p*) *Perry and others v. Jackson*, 4 T. R. 516.

(*q*) *Hall v. Wybourn*, Carth. 136, and *Cheveley v. Bond*, Ib. 226.

(*r*) Several other actions are mentioned in this statute.

(*s*) *Williams v. Jones*, 13 East, 439.

Prather, 1 Nott & M'C. 296; *Adamson v. Smith*, 2 Rep. Con. Ct. 269; *Cook v. Wood*, 1 M'Cord, 139; *Machir v. May*, 4 Bibb, 43; *Fewell v. Collins*, 1 Const. Rep. 202; *M'Collough v. Speed*, 3 M'Cord, 455; Ang. on Lim. § 196.

(1) As to Ireland being still beyond seas within this clause of the statute of Ann. see *ante*, p. 153, *Lane v. Bennett*.

(2) The saving of actions, in the statute of limitations of New York, against persons out of the state, extends to foreigners, or those who have resided altogether out of the state, as well as to citizens of the state who may be absent for a time. *Ruggles v. Keller*, 3 Johns. Rep. 263.

The saving is only against defendants absent from the state, and does not, like the English statutes, extend in favor of plaintiffs thus absent. As to Pennsylvania, see *Nathan v. Bingham*, 1 Miles, 164; and Pamph. Laws, 1842, p. 456, § 27.

Where the defendant has come into the state publicly, so that the creditor, with ordinary diligence, and due means, might have arrested him, it is a return into the state, within the meaning of the proviso in the fifth section of the statute of New York, and the statute begins to run, from the time of such return. *Fowler v. Hunt*, 10 Johns. Rep. 464. But it is otherwise if the return from abroad be clandestine, and with an intent to defraud the creditor, by setting the statute in operation, and then departing.

(3) The right of set-off at common law is limited to cases of mutual connected debts, and does not extend to debts unconnected with each other. *Hurlbert v. Pac. Ins. Co.*,

this inconvenience, and to prevent circuitry of action, or a bill in equity, it was enacted by stat. 2 Geo. II. c. 22, s. 13, (made perpetual by stat. 8 Geo. II. c. 24, s. 4,) "That where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may be set against the other." And by stat. 8 Geo. II. c. 24, s. 5, it was enacted and *declared*, "that by virtue of the preceding clause, mutual debts might be set against each other, notwithstanding that such debts *were [*155] deemed in law to be of a different nature; unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty; and in all cases where either the debt for which the action shall be brought, or the debt intended to be set against the same, shall accrue by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shown how much is justly due on either side; and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be justly due to the plaintiff, after one debt being set against the other as aforesaid."

As to the cases in which a set-off is allowed under the preceding statutes, it must be observed:

1. That the debts sued for, and the debts intended to be set off, must be *mutual*,^(t) and due in the same right.⁽¹⁾ Hence a joint debt cannot be set against a separate demand, nor a separate debt^(u) against a joint demand,⁽²⁾ but a debt due to the defendant, as surviving partner, may be set against a demand on defendant in his own right;^(x) and *e converso*, a debt due from the plaintiff, as surviving partner, may be set against a debt due from defendant to the plaintiff in his own right.^(y)⁽³⁾ A defendant, sued as executor or administrator,⁽⁴⁾ cannot set off a debt

(t) See *Morley v. Inglis*, 4 Bingh. N. C. 58.

(u) *France and Hill v. White and Williams*, 6 Bingh. N. C. 33. See *Stackwood v. Dunn*, 3 Q. B. 822; 3 G. & D. 115.

(x) *Slipper v. Stidstone*, 5 T. R. 493.

(y) *French v. Andrade*, 6 T. R. 582.

2 Sumner, 471. The rule as to set-off in questions arising exclusively under the U. S. laws cannot be influenced by local law or usage, and should be uniform in the different states. *United States v. Robeson*, 9 Pet. 319. Mutual demands extinguish one another by operation of law without actual defalcation by act of party. *Comst. v. Clarkson*, 1 Rawle, 291; 1 Trou. & Haly's Pr. 404, 3d ed.

(1) The holder of a joint and several note is not bound to set it off against a claim by one of the makers. *Culver v. Barney*, 14 Wend. 161. Defendant may set off against a claim for goods sold a judgment against plaintiff by a third person to defendant's use. *Bell v. Cowgill*, 1 Ashm. 8; *Metzgar v. Metzgar*, 1 Rawle, 227. Or a debt due by assignor of goods or book debts transferred to the defendant as a security therefor, where the property is afterwards attached by domestic attachment. *Ankrum v. Woodward*, 4 Rawle, 345. See *post*, p. 155, note 3.

(2) *Wasson v. Gould*, 3 Blackf. 18; *Ladue v. Hart*, 4 Wend. 583; *Elder v. Lasswell*, 2 Blackf. 349; *McKinney v. Bellows*, 3 Id. 31; *Ross v. Knight*, 4 N. H. R. 236; *Palmer v. Green*, 6 Conn. Rep. 19; *Porter v. Nekervis*, 4 Rand. 359.

(3) See *Lewis v. Culbertson*, 11 S. & R. 48; *Jackson v. Robinson*, 3 Mason, 138.

(4) A joint debt cannot, at law, be set off against a separate demand, independent of the bankrupt statutes. *Stewart v. Coulter*, 12 S. & R. 252; *Childerston v. Hammond*, 9 Id. 68; *Henderson v. Lewis*, *Id.* 379. But under the bankrupt law of the United States of 1800, c. 173, [xix.] s. 42, which is the same with the statute 5 Geo. II., c. 30, a joint

due to the defendant personally, nor can a person who is sued for his own debt set off what is due to him as executor or administrator.(1) The statute 2 Geo. II. c. 22, s. 13, says, if either party sues or is sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other.(2) This part of the statute is confined to cases where the party sues or is sued as executor or administrator. Hence where an executor sues for a cause of action arising after the death of the testator, the defendant cannot set off a debt due to him from the testator: A. having been appointed by B., his attorney, to receive his rents,(z) did, after his death, receive rent arrear in B.'s lifetime; the executrix of B. brought an action against A. for the money *in her own name*, not naming herself executrix; the defendant gave notice to set off a debt due to him from the testator, which was not allowed at the trial, because the suit not being as executor, the case is not within the statute. The court of C. B., on a case made, concurred in opinion with the judge who tried the cause. The same rule holds where the plaintiff declares *as executor*, if the cause of action arose after the death of the testator. In assumpsit by the plaintiff, as executor,(a) for goods sold and delivered to the defendant by the plaintiff, as executor, the defendant pleaded a set-off for a debt due from the testator to the defendant. On demurrer, the court held the plea bad: for to allow a set-off in this case would be altering the course of distribution.(b)(3) A guaranty cannot be the subject of set-off.(c)

(z) *Shipman v. Thompson*, Willes, 103, and Bull. N. P. 180.

(a) *Kilvington, Executor, v. Stevenson*, cited by Erskine from Yates' MSS. in *Teggetmeyer v. Lumley*, post, p. 155, n. 3.

(b) Durnford's note, Willes, 264.

(c) *Crawford v. Stirling*, 4 Esp. 207, recognized in *Morley v. Inglis*, 4 Bingh. N. C. 72.

debt may be set off against the separate claim of the assignees of one of the partners. And as this section of the bankrupt law of the United States was almost entirely copied from the English statute, the English adjudications upon it may be considered as having been adopted with the text they expounded. *Tuckers v. Oxley*, 5 Cranch, 34.

An executor cannot at law or equity set off a demand, purchased after the death of testator, against a claim due from the estate of testator. *Mead v. Merritt*, 2 Paige, 403. Defendant cannot set off a private claim against one of the two executors, suing as such. *Minich v. Cozier*, 2 Rawle, 111. But one of two defendants may set off a debt due from testator to him in an action against them by executor. *Crist v. Brindle*, 2 Rawle, 121. See 2 Wms. on Exr's. 1596, 1664, 1743, 4th Am. ed.

(1) See *Roberts v. Jones*, 1 Murph. 353; *Barton v. Hoomes*, 1 Marsh. 19.

(2) See *Murray v. Williamson*, 3 Binn. 135; *Mayhew v. Flake*, 2 Nott & M'C. 398.

(3) So if the cause of action arises partly in time of testator and partly in time of executor, although the plaintiff declares as executor, yet defendant cannot set off a debt due from the testator to him. In covenant by plaintiffs as executors, for rent arrear in the lifetime of testator, and also since his death, the defendant at the trial before Lord Mansfield, at the sitting after Easter term, 25 Geo. III. set off a debt due from the testator to him; and the plaintiffs were nonsuited. Erskine moved for a new trial, on the ground that this debt could not be set off in this case, and cited *Shipman v. Thompson*, Bull. N. P. 180; *Kilvington, Executor, v. Stevenson*, from a MS. of Yates, J., and *Redout and another, Assignees, v. Brough*, Cowp. 133. Lord Mansfield, C. J., said that he was satisfied on the point on the authority of *Kilvington v. Stevenson*, and made the rule absolute. S. P. *Wolfsberger v. Bucher*, 10 S. & R. 10; *Waln v. Anthony*, 5 Id. 468; *Teggetmeyer and another, Executors, v. Lumley*, B. R. T. 25 Geo. III., reported in Durnford's note to *Hutchinson v. Sturges*, Willes, 264. The words "mutual debts" in the English statute of set-off, and "dealing together and being indebted to each other," in the statute of the state of

2. A debt barred by the statute of limitations cannot be set off. If such debt be pleaded in bar to the action, the plaintiff may reply the statute of limitations.(d)(1)

3. Where either of the debts accrues by reason of a penalty, the debt intended to be set off must be pleaded in bar, and the defendant in his plea must aver what is really due.(e)

4. The court, under the statutes of set-off, can take notice of an interest at law(f) only.(2)

Under the operation of the new rules, a set-off must now be pleaded specially, and cannot, as formerly, be given in evidence under a notice of set-off; for although it was argued (in *Graham v. Partridge*),(g) that the judges had no power to make the rule they did on this subject, it was determined that the proviso in stat. 3 & 4 Will. IV. c. 42, s. 1, (which restrains the judges from making any rule which shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case wherein he now is or hereafter shall be entitled to do so by virtue of any act of parliament,) did not apply to the defence under the statute of set-off, which (unlike the cases in which the legislature have afforded protection to magistrates and other persons acting in the discharge of public duties) applies generally to all the queen's subjects.

By R. G. T. T. 1 Will. IV. No. 6, particulars (if any) of defendant's set-off shall be annexed by plaintiff's attorney *to [*157] record at the time it is entered with judge's marshal.

(d) *Remington v. Stevens*, Str. 1271.

(e) Stat. 8 Geo. III. c. 24, s. 5.

(f) Per *Littledale, J.*, (denying the authority of *Bottomley v. Brook*, 1 T. R. 622,) in *Tucker v. Tucker*, 4 B. & Ad. 751.

(g) *Graham v. Partridge*, 1 M. & W. 395.

New York, are expressions of the same import, and the decisions of the former will equally apply to the latter. *Gordon v. Bowne*, 2 Johns. Rep. 155.

In an action by the indorser against the maker on a promissory note, the maker cannot set off a debt due to him from the payee, where the note was indorsed before it became payable. *Prior v. Jacocks*, 1 Johns. Cas. 169. But see *Moody v. Towle*, 5 Greenl. 415. And it lies on the defendant to show that the note was transferred after it became due, or for the purpose of defrauding the maker of his set-off. *Hendricks v. Judah*, 1 Johns. Rep. 313.

In an action on a policy of insurance, brought by an agent, who had the insurance effected in his own name, but for the benefit of a third person, which circumstance was known to the insurer, he cannot set off a debt due him from the plaintiff. *Gordon v. Church*, 2 Caines' Rep. 299.

So if a person purchase goods of a factor, knowing him to have made the sale in that capacity, in an action by the factor for the price of the goods, the defendant cannot set off a demand which he may have against the plaintiff. *Bowne v. Robinson*, 2 Caines' Cases in Error, 341.

When a suit by A. against B., and one by B. against A. and C., are referred, the referees set off a balance found for the plaintiff in the one suit, against a balance found for the plaintiff in the other, the report will be set aside. *Lyle v. Clason*, 1 Caines' Rep. 323. Under the statute of New York, it has been held, that in an action by a trustee, the defendant cannot set off a debt due to him by the *cestui que trust*. *Wheeler v. Raymond*, 5 Cowen, 231; *S. C.* in error, 9 Id. 295; *S. P. Johnson v. Bridge*, 6 Id. 693. See note 2, p. 157.

(1) See *Williams v. Gilchrist*, 3 Bibb, 49; 3 Marshall, 236. It has been held in North Carolina, that a set-off is not barred by the statute, if the statute be not replied. *Stanley v. Green*, Martin, 60; *Alsop v. Nicholls*, 9 Conn. 359.

(2) Under the New York statute, a set-off cannot be pleaded, but must be given in evidence with notice. *Williams v. Crary*, 5 Cowen, 368. Under the code, see 1 N. Y. Code, 158; 2 Id. 87 Voorhies' 3d. ed. 1852.

An insurance-broker is only entitled to receive for the assured, from the underwriter, a payment in money: hence in the settlement of a particular loss, a custom to set off the general balance due from the broker to the underwriter cannot be supported.^(h) The averment of what is really due, in cases where the debt accrues by reason of a penalty, has been holden to be traversable.⁽ⁱ⁾ If an agreement is entered into for the performance of covenants, with a penalty, and the covenants are broken, the *penalty* cannot be set off: (1) To assumpsit for money lent,^(k) the defendant pleaded articles of agreement with mutual covenants in a penalty for performance, and showed a breach whereby the penalty became due, and offered to set off the same; on demurrer, the court held this plea not within the statute; Lord *Mansfield*, C. J., observing, that it was contrary to the intention of the acts, that the penalty should be admitted to be set off, when perhaps a very small sum was due for such damages as the defendant had actually sustained. A set-off reducing the plaintiff's demand under 40s. will not affect the jurisdiction of the superior court, so as to entitle the defendant to enter a suggestion on the roll, in order to obtain costs, either under stat. 3 Jac. I. c. 15, s. 4,^(l) or under stat. 23 Geo. II. c. 33, s. 19,^(m) if it appear that a sum exceeding 40s. was due at the time of action brought.⁽²⁾ With respect, however, to inferior courts, it is a general rule, that every part of the cause of action should appear to be within the jurisdiction of the court.⁽ⁿ⁾ Where, therefore, part of the cause of action ap-
[*158] pears to have arisen out of such jurisdiction, the court *will not allow^(o) a suggestion to be entered.

(h) *Todd v. Reid*, 4 B. & A. 210.

(i) *Symmons v. Knox*, 3 T. R. 65.

(k) *Nedriff v. Hogan*, 2 Burr. 1024, and Bull. N. P. 180.

(l) *Pitts v. Carpenter*, Str. 1191, and 1 Wils. 19.

(m) *Gross v. Fisher*, 3 Wils. 48.

(n) See *ante*, p. 107.

(o) *Thom v. Chinnoek*, 1 M. & Gr. 216; 1 Scott's N. R. 138.

(1) See *Burgess v. Tucker*, 5 Johns. Rep. 105.

(2) The language of the two statutes is different. By the statute of James, if it appear to the judge that the debt *to be recovered* does not amount to 40s. the defendant shall have costs. By the statute of George, the defendant shall recover double costs, *if the jury, upon the trial of the cause, find the damages for the plaintiff under 40s.*, unless the judge certify that, 1, the freehold, or 2, the title of the plaintiff's land, or 3, an act of bankruptcy, principally came in question. It does not appear that the court, in *Gross v. Fisher*, adverted to this difference. N. Under the Court of Requests Act, for Southwark, 22 Geo. II., c. 47, s. 6, if the debt which was originally above 40s. be reduced below 40s., by part-payment before action brought, the defendant will be permitted to enter a suggestion. *Clark v. Askew*, 8 East, 28. So under the London Court of Requests Act, if the debt be reduced by part-payment below 5*l.* before action brought, the defendant will be permitted to enter a suggestion. *Horn v. Hughes*, 8 East, 347. To allow of a set-off, the plaintiff's cause of action must be specific and certain, and of such a nature that it could be set off by defendant, if it existed against him. Hence, no set-off is admissible in an action on an open policy of insurance, although the demand be for a total loss, as the damages are uncertain and unliquidated. *Gordon v. Bowne*, 2 Johns. Rep. 150; *Hepburn v. Hoag*, 6 Cowen, 613. But see *Roussel v. Ins. Co. N. Am.*, 1 Binn. 429. In *assumpsit* for use and occupation, the defendant cannot set off an independent claim for goods sold. *Guss v. Scovill*, 5 Day, 113.

A demand, to be set off, must have existed at the time of the commencement of the suit, *Carpenter v. Butterfield*, 3 Johns. Cas. 145; *Morrison v. Moreland*, 15 S. & R. 61; *Marshall v. Sheridan*, 10 S. & R. 268; and if the defendant, after process was issued,

As to the replication in set-off, when part of the money attempted to be set off has been paid into court in another action, see *Briscoe v. Hill*,

but before the arrest, knowing that the process had been issued, takes an indorsement of a promissory note made by the plaintiff, he cannot set it off.

Unliquidated damages cannot be set off. *Brown v. Cummings*, 2 Caines' Rep. 13. So it has been held that a claim recoverable only by action of account or bill in equity, cannot be set off at law. *Sherman v. Ballou*, 8 Cowen, 304. It was laid down in an early case in Pennsylvania, that unliquidated damages in covenant, sounding in tort, could not be set off under the plea of payment to debt on bond. *Kachlin v. Mulhallon*, 2 Dall. 237; 1 Yeates, 571. And the rule has been since recognized in *Carroll v. Green*, 10 S. & R. 14. So it has been held that a claim for damages arising from the misconduct of the plaintiff, as factor, cannot be set off. *Gorbier v. Emery*, 2 W. C. C. R. 413. In *Armstrong v. Brown*, 1 W. C. C. R. 43, the drawer of a protested bill, who had paid the 20 per cent. damages, was not allowed to set them off against the acceptor of the bill, on the ground that they were unliquidated: Yet it was held by the same court, that damages arising from a failure to insure for the defendant, might be set off. *De Tastet v. Crousillat*, 1 W. C. C. R. 504. It has also been held in several cases, that a defendant may give evidence of acts of nonfeasance or misfeasance by the plaintiff, where these acts are immediately connected with the plaintiff's cause of action; though the evidence has been said to be admissible, not by way of set-off, but for the purpose of defeating in whole or part, the plaintiff's action. *Beck v. Spence*, 4 S. & R. 249; *Gogel v. Jacoby*, 5 S. & R. 117. See *Steigleman v. Jefferies*, 1 S. & R. 477; *Harper v. Kean*, 11 S. & R. 280; *Shaw v. Badger*, 12 S. & R. 275; *Light v. Stoeve*, 12 S. & R. 431. In *Massachusetts*, it has been held, that a claim for damages, arising from negligence or unfaithful management of merchandise consigned to the plaintiff for sale, could not be set off under the statute of that state. *Adams v. Manning*, 17 Mass. Rep. 178. The rule as to unliquidated damages, holds also in New Jersey. *Smock v. Worford*, 1 South. 306; *Edwards v. Davis*, 1 Halsted, 394. In South Carolina, it has been held, under the provisions of the statute of that state, that a defendant may set off unliquidated damages, arising from the non-performance, by the plaintiff, of a contract for building a house, against the plaintiff's demand for work and labor. *Cook v. Rhine*, 1 Bay, 16; and see *Farron v. Hays*, 1 Nott & M'C. 312; *Parquhar v. Collins*, 3 Marsh. 32. In New Jersey, it is said, that unliquidated damages cannot be set off, although they might be recovered in *indebitatus assumpsit*. *Edwards v. Davis*, 1 Halst. 104; *Smock v. Worford*, 1 South. 306. In Virginia, the rule is the same both at law and in equity. *Webster v. Couch*, 6 Rand. 519. Unliquidated damages cannot be set off. *Butts v. Collins*, 13 Wend. 139; *Sickells v. Fat*, 15 Id. 559; *Colvin v. Carter*, 4 Ohio, 356. See *Bayne v. Gaylord*, 3 Watts, 301. Nor can there be a set-off if the claim sued for be such as could not be the subject of set-off. *Osborn v. Etheridge*, 13 Wend. 339. But a plaintiff cannot deprive defendant of his right of set-off by declaring specially when the general count would answer. *Downs v. Eggleston*, 15 Wend. 51. A bond debt may be set off in *indebitatus assumpsit*. *Ib.* Demands ascertained, or dependent on mere computation, may be set off. Not so where proof is necessary. The same rule holds as to demands against which there may be a set-off. *Hanna v. Pleasants*, 2 Dana, 269. A tavern bill being prohibited by statute cannot be set off. *Evernghim v. Ensworth*, 7 Wend. 326. One who has neither a general nor special property in goods placed by him with a manufacturer for finishing, on refusal to redeliver them, cannot set off their value against a claim for work and labor on other goods. *Collins v. Butts*, 10 Wend. 399. A debt for which a suit is pending on appeal, under the statute regulating arbitrations, cannot be set off. *Good v. Good*, 5 Watts, 116. If one pays a debt against which he has a set-off, chancery will not interfere. *Adams v. Dunlap*, 1 Dana, 584. See *Blackwell v. Oldham*, 4 Id. 197.

A note made by an insolvent and purchased by the defendant after it became due, cannot be set off in an action brought by the assignees of the maker. *Johnson v. Bloodgood*, 1 Johns. Ca. 51. And in an action brought by the assignees of a bankrupt, the defendant cannot set off a check issued by the bankrupt, payable to bearer, and dated before the bankruptcy, unless he prove further that the check came into his hands before the bankruptcy. *Ogden v. Cowley*, 2 Johns. Rep. 274. See *Ritcher v. Selin*, 8 S. & R. 425; *Wilmarth v. Mountford*, *Ib.* 124.

In several suits between the same parties, if the defendant has judgment in some, and the plaintiff recover damages in others, the costs on the judgments for the defendants may be set off against the damages recovered by the plaintiff, but not against the costs. *Cole v. Grant*, 2 Caines, Rep. 105; *Derry v. Bowyer*, 3 Johns. Rep. 247.

Where the plaintiff, in the Supreme Court, recovers less than fifty dollars, the

10 M. & W. 735. On a replication to a plea of set-off, in an action of debt, that plaintiff never was indebted in manner and form, &c., the plaintiff cannot prove payment; to let in such proof he must reply that he was not nor is indebted.(p)

8. Tender.(1)

8. *Tender*.—To an action of assumpsit, the defendant may plead non assumpsit as to part of the plaintiff's demand, and a tender before the commencement of the plaintiff's suit as to the rest; but the defendant will not be permitted to plead non assumpsit to the whole declaration, and a tender as to part;(q) because, if the general issue should be found for the defendant, it would then appear on the record, that nothing was due, although the defendant by his plea of tender had admitted something to be due. A tender may be pleaded to a *quantum meruit*, although the demand is uncertain.(r)(2)

(p) *Stockbridge v. Sussams*, 3 Q. B. 239; 2 G. & D. 591.

(q) *Dowgall v. Bowman*, C. B. M., 11 Geo. III.; 3 Wils. 145, and 2 Bl. Rep. 723; Anon. C. B. M. 40 Geo. III. MSS.; *Maclellan v. Howard*, 4 T. R. 194, S. P.

(r) *Johnson v. Lancaster*, Str. 576.

defendant may set off his costs against the amount recovered. *Spence v. White*, 1 Johns. Cas. 102; *Porter v. Lane*, 8 Johns. Rep. 357.

A judgment in the Common Pleas may be set off against a judgment in the Supreme Court. *Schermerhorn v. Schermerhorn*, 3 Caines, Rep. 190. In Pennsylvania, one judgment may be set off against another, although not in the same court. See *Hazlehurst v. Bayard*, 3 Yeates, 132; *Dunkin v. Calbraith*, 1 Browne, 48. See *Green v. Hatch*, 12 Mass. 195. But in New York, a judgment obtained by attachment in a justice's court without the appearance of the defendant, cannot be set off. *People v. Judges of Delaware Co.*, 6 Cowen, 598. And see *Gilman v. Van Slyck*, 7 Cowen, 469; *Satterlee v. Ten Eyck*, Id. 480; *Ewen v. Terry*, 8 Cowen, 128; *Novle v. Howard*, 2 Hayw. 14; *Davidson v. Geoghagan*, 3 Bibb, 233; *Carlisle v. Long*, 1 Marsh. 486; *Williams v. Evans*, 1 M'Cord, 203; *Duncan v. Bloomstock*, Id. 318; *Story v. Patten*, 3 Wend. 331. Such equitable right is allowed only where it works no injustice. *Ramsey's Appeal*, 2 Watts, 228; *M'Williams v. Hopkins*, 1 Whart. 275; *Poorman v. Goswiler*, 2 Watts, 69; *Hennis v. Page*, 3 Whart. 275. See 1 Troub. & Haly's Pr. 404, 3d ed.

(1) The plea of tender and paying the money into court, is such an admission of plaintiff's cause of action as stated in his declaration, as precludes an objection to the form of action. *Baily v. Boucher*, 6 Watts, 74. And under the plea of "covenants performed," evidence may be given of a tender of the amount due before suit brought. *M' Cormick v. Crall*, 6 Id. 207.

(2) Where a note is payable in ponderous articles, (e. g. in lumber) at a day certain, without specifying any place, in order to make a valid tender, the promisor ought to seek the promisee before the day, and know of him where he will have the articles delivered; and if a reasonable place be appointed, he ought to offer the articles there; and the articles ought not to be tendered in bulk, mixed and undistinguishable from others of the same kind, but separate, so that the promisee may know what to take. *Barns v. Graham*, 4 Cowen, 452. And it does not alter the rule as to inquiring of the promisee, that he resides out of the United States. *Bixby v. Whitney*, 5 Greenl. 192. See *Wilmouth v. Patton*, 2 Bibb, 280, where the law seems to be laid down differently. *Powell v. Coward*, 2 Tenn. Rep. 326. See *Lobdell v. Hopkins*, 5 Cowen, 516. On a plea of tender, if the property is not cumbrous, it must be produced. *Contra*, if cumbrous, or if it is the tender of a *third person*, which is pleaded. *Harris v. Campbell*, 4 Dana, 588; *Bermont v. Smith*, 15 Wend. 493. Tender of specific articles at the time and place, is a satisfaction of the contract; and the right of action is not revived by subsequent demands and refusal. It vests the property in the creditor. *Mitchell v. Merrill*, 2 Blackf. 87; *Lamb v. Lathrop*, 13 Wend. 95; *Case v. Green*, 5 Watts, 262; *Kemble v. Wallis*, 10 Wend. 374. But the tender of such articles is waived by an agreement at the time of tender, to pay at a future day in money. *Veazy v. Harmony*, 7 Greenl. 91. If

What shall be a good Tender.—A tender must be(s) of a specific sum on a specific account, and if it be upon a condition to which the creditor has a right to object, it is not a good tender. Thus an offer to pay a sum of money with a condition that it shall be accepted as the whole balance due, when a larger sum is claimed, does not amount to a legal tender of the sum offered to be paid.(t) Where the words used in making the tender were, "I am come with the amount of your bill," and the plaintiff refused the money, saying, "I shall not take that—it is not my bill;" it was holden, that the tender was sufficient, and entitled the defendant to a verdict on a plea of tender.(u) In order to sustain a plea of tender, it is not necessary in all cases to prove the actual production of money, in moneys numbered; it will be sufficient to show that the defendant was in a present condition to substantiate his offer,(x) and that the plaintiff dispensed with the production of the money;(1) but there must be either an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor.(2) Where there is a dispute as to the amount of the demand, the plaintiff, by objecting to the quantum, may dispense with a tender of the specific sum; *there [*159] should, however, be an offer to pay by producing the money, unless the plaintiff dispenses with the tender, by expressly saying, that the defendant need not produce the money, for he would not accept it; for though the plaintiff might refuse the money at first, yet if he saw it produced, he might be induced to accept it.(y) If a man tender more than he ought to pay, it is good, for *omne majus continet in se minus*, and the other ought to accept so much of it as due to him.(z)(3)

(s) Per Maule, B., in *Bevans v. Rees*, 5 M. & W. 306.

(t) *Evans v. Judkins*, 4 Campb. 156. See *Strong v. Harvey*, 3 Bingham 304; *Foord v. Noll*, 2 Dow. N. S. 617.

(u) *Henwood v. Oliver*, 1 Q. B. 409; 1 G. & D. 25.

(x) *Thomas v. Evans*, 10 East, 101.

(y) Per Kenyon, C. J., *Middlesex Sitings*, 4 Esp. N. P. C. 68. See also *Finch v. Brook*, 1 Bingham N. C. 253.

(z) Third resolution in *Wade's case*, 5 Rep. 115, a, recognized per Cur. in *Dean v. James*, 4 B. & Ad. 547. See also *Bevans v. Rees*, 5 M. & W. 306.

part of a larger quantity they should be separated from the mass. *Ib.*; *Wyman v. Winslow*, 2 Fairf. 398. On a written contract, defendant may show under the general issue, that he had the articles ready at the time and place, and no one came to receive them; or at a different place, if so agreed on by parol; or that plaintiff accepted part of them. But it is no tender if they were left to be delivered only in case plaintiff gave up the written contract. *Robinson v. Batchelder*, 4 N. H. R. 40. When a sum is to be paid in specific articles, at the appraisement of two persons, both must appraise; and if the amount at which they are appraised exceed the sum due, the creditor is not bound to accept and pay the difference. *Lamb v. Lathrop*, 13 Wend. 95.

(1) When an agent took out of his pocket book a blank check to fill up, and was told by the creditor to let it be done to-morrow, assigning as a reason a wish to be indemnified on another account as surety for the principal. Held, not to amount to a tender. *Durham v. Jackson*, 6 Wend. 22. An actual production of the money is necessary unless waived by the party. *Bakeman v. Pooler*, 15 Wend. 637. To constitute a good tender the offer must be unconditional, and the money or article produced, unless dispensed with by creditor. *Brown v. Gilmore*, 8 Greenl. 107; *Benson v. Carmel*, 8 Id. 110; *Estrana v. Longshaw*, 1 N. & M'C. 194.

(2) See *Blight v. Ashley*, 1 Pet. C. C. R. 24.

(3) A demand of more than is actually due does not excuse the necessity of a tender.

being drawn at the commencement of the suit, steps taken by the plaintiff, in contemplation only of an action before tender made, will not deprive the defendant of the benefit of his tender, if such tender was made before the actual commencement of plaintiff's suit. Hence it is not any answer to a plea of tender before the exhibition of the plaintiff's bill,⁽ⁿ⁾ that the plaintiff had before such tender retained an attorney, and instructed him to sue out a writ against the defendant, and that the attorney had accordingly applied for such writ, before the tender, which writ was afterwards sued out.⁽¹⁾

Of the Form in which a Tender must be pleaded.—Where the money is due and payable immediately by the agreement,^(o) the party pleading a tender must show that he was "always ready," from the time when the cause of action accrued.⁽²⁾ Hence to an action of *indebitatus assumpsit*,^(p) where defendant pleaded that before the action, viz. on such a day, he tendered a certain sum of money, and that he was always afterwards ready, and then was ready: on demurrer the plea was holden bad; for per *Cur.*, it is not enough that he was always ready since the tender; the money was due before, and the neglect of payment was a delay, a breach of contract, and a cause of action. So where, to an action by the indorsee of a bill of exchange,^(q) the defendant pleaded, that after the expiration of the time appointed for the payment of the bill, and before action brought, he, the defendant, tendered the *whole* money then due upon the bill, with interest, in respect of the damages sustained by the non-performance of the promise; and that he always, *from the time of making the tender*, had been, and still was, ready to pay, &c. On demurrer, the plea was holden bad: Lord *Ellenborough*, C. J., observing, that in *Giles v. Hartis*,^(r) it was expressly decided, that an averment of *tout temps prist* was necessary in the plea of tender, and that it was one of those landmarks in pleading which ought not to be departed from.⁽³⁾ A plea that the defendant is ready, and has always been ready, with a *profert in curia*,^(s) but not averring a tender, will be bad on general demurrer. It is not necessary that a plea of tender to an action of *indebitatus assumpsit* should answer a special request laid in the declaration^(t) on a day subsequent to the day on which the promise is laid: because such request is surplusage, and therefore the day on which it is made is wholly immaterial.

(n) *Briggs v. Calverly*, 8 T. R. 629. Personal actions must now be commenced by writ of summons, 1 & 2 Vict. c. 110, s. 2.

(o) *Giles v. Hartis*, Ld. Raym. 254.

(p) *Sweatland v. Squire*, Salk. 623.

(q) *Hume v. Peploe*, 8 East, 168.

(r) Ld. Raym. 254, and vide *Wood v. Ridge*, Fort. 376.

(s) *French v. Watson*, C. B. 2 Wils. 74.

(t) *Giles v. Hart*, Salk. 622, and Carth. 413.

(1) See *Hubbard v. Chenango Bank*, 8 Cow. 88.

(2) But where the agreement is to pay at a certain time, tender at that time, "and always ready," is a good plea. Per *Holt*, C. J., in *Giles v. Hart*, Salk. 622. See *Pool v. Tumblebridge*, 2 M. & W. 223.

(3) See *Savary v. Goe*, 3 Wash. C. C. R. 140.

Of the Replication.—To a plea of tender the plaintiff may reply a subsequent demand and refusal.

The usual form of this replication is, that “after the making of the tender mentioned in the plea, and before the commencement of the action, the plaintiff demanded the said sum (the sum tendered,) but that the defendant refused to pay the same,” &c. Issue being joined on the fact of this demand, it will be incumbent on the plaintiff to prove that he demanded the precise sum before tendered. Proof of a demand of a larger(*u*) sum than that which was originally tendered will not support the issue. The demand ought to be made by some person authorized to give the debtor a discharge. Hence, in a case where the demand had been made by the clerk to the plaintiff’s attorney,(*x*) who had never seen the defendant before going upon this errand, Lord *Ellenborough* held the demand insufficient; admitting, however, that the demand by the attorney himself might have done. If to the plea the plaintiff reply a latitat,(*y*)(1) and that the tender was not made before the suing out the latitat, the defendant may rejoin, that plaintiff had not any cause of action at the time of suing it out; because the plaintiff by the replication makes the latitat the commencement of the suit; therefore it may be considered in the nature of an original writ, and *defendant ought to have the same advantage of it as the [*163] plaintiff. The same observation which was made at the conclusion of the cases relating to the plea of set-off applies here, viz. that if by the plea of tender being found for the defendant, the balance proved on the non-assumpsit is under 40s.; yet, if that, added to the sum tendered, exceed 40s. the jurisdiction of the superior court will not be affected,(*z*) and the defendant will not be permitted to enter a suggestion on the roll in order to obtain his costs.(*a*)

(*u*) *Spybey v. Hide*, 1 Campb. 181, *Ld. Ellenborough*, C. J.; *Rivers v. Griffiths*, 5 B. & A. 630, S. P. These cases were both recognized in the case of *Brandon v. Newington*, 3 Q. B. 915; 2 G. & D. 194, in which the authority of two cases in the Exchequer, viz., *Cotton v. Godwin*, 7 M. & W. 147; and *Tyler v. Bland*, 9 M. & W. 338, was denied.

(*x*) *Coles v. Bell*, 1 Campb. 478, n.

(*y*) *Wood v. Newton*, B. R. 1 Wils. 141.

(*z*) *Heaward v. Hopkins*, Doug. 448.

(*a*) Middx. Court of Conscience, stat. 23 Geo. II. c. 33, s. 19.(2)

(1) *Denison*, J., doubted whether the replication of a latitat was good, because it was not material when the process issued. This was upon a supposition that the latitat was only process. 1 Wils. 148. Indeed when the issuing out of a latitat is not replied to the statute of limitations, or to avoid a tender, or given in evidence to support a penal action, it is considered but as process, and not as the commencement of the suit. *Foster v. Bonner*, Cowp. 454. It is in the election of the plaintiff to consider the memorandum, or the actual suing out of the writ, as the commencement of the suit; this is the rule, subject to the exception that in penal actions and in cases on the statute of limitations the defendant may always resort to the real time. *Pugh v. Martin*, 3 Doug. 347. But now by R. G. H. T. 4 Will. IV. No. 1, every pleading, as well as the declaration, shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date, and every declaration and other pleading shall also be entered on the record made up for trial and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the court or a judge. See also 1 & 2 Vict. c. 110, s. 2.

(2) But see the words of the statute, by which it is enacted, “that if any action of

V. *Damages.*—*Judgment*, p. 164.

WHERE an action is brought for not delivering *goods* upon a given day, the true measure of damages is the difference between the contract price,^(b) and that which goods of a similar quality and description bore on or about the day, when the goods ought to have been delivered.⁽¹⁾ Contract for a quantity of oil at a certain price, to be delivered at a future day; in an action for not accepting and paying for the oil, the proper measure of damages^(c) is the difference between the price contracted for and the market price at the time when the contract ought to have been completed. Where A. contracted for the purchase of wheat “to be delivered at B. as soon as vessels could be obtained for the carriage thereof,” and subsequently (the market having fallen) A. gave the seller notice that he would not accept it, if it were delivered, the wheat being then on its transit to B., it was holden,^(d) in an action against A. for not accepting the wheat, that the proper measure of damages was the difference between the contract price and the market price on the day when the wheat was tendered to A. for acceptance at B. and refused; and not on the day when the notice was received by the seller. But in an action for not replacing *stock*,^(e) the highest value as it stood either when it ought to have been replaced, or at the time of trial, is to be taken, but not any higher price^(f) to which the stock may have risen at any intermediate time.⁽²⁾ In an action for [*164] not accepting **railway shares*, it was holden that the proper measure of damages, is the difference of the prices on the day when they ought to have been accepted, and on the day when they were resold by the vendor, such resale being within a reasonable time.^(g)

(b) *Gainsford v. Carroll*, 2 B. & C. 624.

(c) *Boorman v. Nash*, 9 B. & C. 145.

(d) *Phillpotts v. Evans*, 5 M. & W. 475, recognizing *Leigh v. Paterson*, 2 Moore, 588.

(e) *Shepherd v. Johnson*, 2 East, 211.

(f) *M^rArthur v. Ld. Seaforth*, 2 Taunt. 257.

(g) *Stewart v. Cauty*, 8 M. & W. 160.

debt or assumpsit shall be commenced in any of the king's courts at Westminster, and the defendant shall live or reside in Middlesex, and the jury upon the trial of such cause shall find the damages for the plaintiff under 40s., unless the judge shall in open court certify on the back of the record, that, 1, the freehold or title to the plaintiff's land, or 2, an act of bankruptcy principally came in question, &c., the defendant shall recover double costs." See also *Clark v. Askeu*, 8 East, 28; *Nightingale v. Barnard*, 4 Bingh. 169. But see stat. 5 & 6 Vict. c. 97, s. 2, *post*, tit. "Imprisonment."

(1) *Marshal v. Campbell*, 1 Yeates, 36; *Lewis v. Canaden*, *Ib.* 37; *Bush v. Canfield*, 2 Conn. Rep. 485; *Wells v. Abernethy*, 5 Id.; see *Hopkins v. Lee*, 6 Wheat. 109. In assumpsit on a note payable in specific articles, the measure of damages is the highest market price of those articles, at any time between the period at which the note fell due and the trial. *West v. Beach*, 3 Cow. 82. See *Gleason v. Pinney*, 5 Id. 152, 411. In *Clark v. Pinney*, 7 Id. 681, the Supreme Court reconsidered the principle adopted in *West v. Beach*, and decided that if the price be paid at the time of making the contract, or at any time anterior to that fixed for the delivery, the vendee is not confined to the value of the articles on the day when they should have been delivered. See 2 Greenl. on Evid. §§ 253-278.

(2) In assumpsit to recover back money paid on a consideration which had failed, the sum paid must form the measure of damages, and the jury cannot give vindictive damages. *Neal v. Dean*, 1 Nott & M'C. 210. See this subject very thoroughly discussed, and all the American cases cited, in 3 Amer. Law Jour. 537, and 4 Id. 61.

Where an agreement contains several stipulations, some of them touching matters of great importance to the parties, and others matters of little or no importance, a stipulation for liquidated damages, *generally*, upon any violation of the agreement, shall not be carried^(h) into effect; but otherwise, if the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined.

Where the contract was for *about* 300 quarters (*more or less*) of foreign rye, shipped on board a particular vessel coming from Hamburg; the vessel brought 345 quarters, and the sellers refused to deliver any part, unless the purchasers would accept the whole. It was holden,⁽ⁱ⁾ that they were not bound to accept the whole: *Ld. Tenterden*, C. J., and *Littledale*, J., being of opinion, that by the words "about" and "more or less," the parties could not have contemplated so large an excess as 45 over 300 quarters; and *per Parke*, J., and *Patteson*, J., "It lay on the sellers to show that such an excess was contemplated; and if from the obscurity of the contract they were unable to do so, their defence failed." In this case evidence was received, that the words "more or less," in a contract for grain, according to the custom of merchants, does not require the purchaser to accept so large an excess. The judge, however, gave leave to move; the court did not decide on its admissibility; *Littledale*, J., expressed a doubt. N. He said also, When land is described in conveyances, it is often mentioned as containing so many acres and roods, "be the same more or less," but it is always understood that the excess bears a very small proportion to the quantity named, a much smaller proportion than that of 45 to 300 quarters.⁽¹⁾

(h) *Kemble v. Farren*, 6 Bingh. 141, recognized in *Horner v. Flintoff*, 9 M. & W. 678.

(i) *Cross v. Eglin*, 2 B. & Ad. 106.

(1) Where a drover is sued for cattle taken to market for an employer, the highest sum, according to the evidence, may be allowed if he refuses to show the price at which they sold. *Clark v. Miller*, 4 Wend. 628. On refusal to deliver an article contracted but not paid for, the damages are the difference between the contract price and the market value on the day of delivery. *Day v. Dox*, 9 Id. 129. With the interest on such difference. *Taylor v. Read*, 4 Paige, 561. Statement of damages with a view to a compromise, if not accepted, does not bind plaintiff. *Beebe v. Robert*, 12 Wend. 413. On a contract to carry goods by sea and refusal to receive on board all agreed upon, no tender of the balance is necessary to entitle to damages, and the rule of damages is the difference between what plaintiff actually received or might have received for the goods refused and the price at the port of destination, deducting freight and expenses. *Nourse v. Snow*, 6 Greenl. 208. If a party can protect himself from loss for a breach of contract at a trifling expense, or with reasonable exertions, he is bound to do so, and defendant is liable only for such loss as he could not thus prevent. *Miller v. Mariners' Church*, 7 Greenl. 51. The value stated in a written contract with sheriff, who delivers goods attached on a *mesne process* to a bailee, is conclusive, nor is sheriff bound to accept a part of the goods only. *Brown v. Smith*, 3 N. H. R. 299. No damages except interest recoverable on common counts. *Hanna v. Pegg*, 1 Blackf. 181. When defendant undertook to carry goods to a certain place and sell them for best price, or leave them with a commission merchant in case a certain price could not be obtained, which last he did, in assumpsit for not selling, held, the rule of damages was not the value of the goods, but the injury actually sustained. *Colvin v. Jones*, 3 Dana, 577. A foreign creditor, suing in Massachusetts, recovers (except in bills of exchange) *at the par of exchange*. *Adams v. Cordis*, 8 Pick. 260. An ordinary debtor is responsible on a breach of his engagement only for the debt and interest thereon, and not for all the loss consequent on his failure to fulfil his promise. *Short v. Skipwith*, 1 Brock. 115. In an action for breach

Judgment.—Although it is a rule,^(k) that the court will look to the whole record, and give judgment according to the truth there disclosed, however irregular the mode of pleading may be; yet the court cannot pick out of various parts^(l) of the record a different cause of action from that for which the plaintiff proceeds.

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*CHAPTER V.

ATTORNEY.(1)

OF ACTIONS BROUGHT BY ATTORNEYS AND SOLICITORS FOR THE RECOVERY OF THEIR FEES. p. 165.

OF THE STATUTE 6 & 7 VICT. c. 73. p. 165.

LIABILITY OF ATTORNEYS FOR NEGLIGENCE AND UNSKILFULNESS. p. 176.

ATTORNEYS(2) and solicitors may maintain an action of debt,^(a) or of

(k) *Le Bret v. Papillon*, 4 East, 502; *Charnley v. Winstanley*, 5 East, 266.

(l) *Head v. Baldrey*, 6 A. & E. 469; 2 Nev. & P. 217, S. C.

(a) Adm. in *Bradford v. Woodhouse*, Cro. Jac. 520.

of orders, positive and direct loss resulting plainly and immediately from such breach, may be taken into the estimate of damages, but not such as is merely speculative. *Bell v. Cunningham*, 3 Pet. 85. Where assumpsit lies, and the amount due appears by specialty or judgment, they are evidence for plaintiff. *Mehaffy v. Shaw*, 2 Penn. R. 361. When the parties fix a certain mode of ascertaining the amount to be paid, it must be adhered to, unless it can be shown that time or accident prevented. *U. S. v. Robeson*, 9 Pet. 327.

(1) See Tidd's Practice, ch. 3, p. 60; 1 Troub. & Haly's Pract., 214, 3d ed. An attorney holds his office during good behavior, and is not professionally answerable for a scrutiny into the official conduct of a judge, which would not expose him to legal animadversion as a citizen. Where a letter was written by certain members of the bar to a judge in answer to one from him complaining of want of discipline and respect for himself, in which they expressed an opinion, that public confidence seemed to be withdrawn from both the court and the bar, and suggested his retirement from the bench. Held, that the sending and publishing this letter did not authorize the court to strike off their names from the list of attorneys. *Case of Austin and others*, 5 Rawle, 191; Vide *Ex parte Burr*, 9 Wheat. 529; *Ex parte Tillinghurst*, 4 Peters, 108. An attorney's authority continues until judgment satisfied. *Gaillard v. Smart*, 6 Cowen, 385; *Gorham v. Gale*, 7 Cow. 739; *Anon.* 1 Wend. 108; *Gray v. Wass*, 1 N. H. R. 256; *Erwin v. Blake*, 8 Peters, 18; *Lynch v. The Com'th*, 16 S. & R. 368. And the sheriff is justified in paying to him the amount recovered. *Canterbury v. The Com'th*, 1 Dana, Ken. Rep. 416. But he cannot assign a judgment without express authority. *Head v. Gervais*, Walkers, 431. Nor give up a security of his client. *Tankersley v. Casath*, 4 Dessaus. 45. Nor compromise. *Lombard v. Whiting*, Walker, 229; *Mayer v. Foulkrod*, 4 Wash. C. C. R. 511; *Gable v. Hain*, 1 Penns. Rep. 267. Nor enter a *retraxit*. *Lombard v. Sanford*, 2 Blackf. 137. Nor bind his client by promises to pay a debt barred by the statute of limitations. *Crist v. Garner*, 2 Penns. Rep. 264. Nor execute an appeal bond in his client's name. *Ex parte Holbrook*, 5 Cow. 35. Nor petition for a review of a road. *Shafferstown Road*, 3 Watts, 475. But if he has a discretionary power to collect a debt he may assent to an assignment by the debtor. *Gordon v. Coolidge*, 1 Sumner, 537; Vide *Union Bank v. Feary*, 5 Peters, 99. If he appear for a party without authority, the party is not concluded by his acts, but may be relieved against them. *Critch v. Porter*, 3 Ohio Rep. 519;

(2) See note (4), next page.

indebitatus assumpsit, for the recovery of their fees. The latter form of action is that which is most usually adopted.(1) If a solicitor or agent for a third person retain an attorney,(2) and promise him his fees, *indebitatus assumpsit* will lie against such solicitor or agent.(b) But it seems doubtful, whether, in this case, an action of debt would lie.(c)

To an action of assumpsit for fees due to the plaintiff as an attor-

(b) *Ambrose and Roe*, Skin. 217, 218; *Adm. in Sands v. Trevilian*, Cro. Car. 194.

(c) *Aff. Bradford v. Woodhouse*, Cro. Jac. 520; *Neg. Sands v. Trevilian*, Cro. Car. 194.

Compher v. Mawalt, 2 Watts, 493; *Campbell v. Kent*, 3 Penns. Rep. 75. But see *Hendrickson v. Hendrickson*, 3 Greenl. 102; *Treasurer v. Norton*, 1 Ohio, 131.

As to the admission of attorneys, and the power of the courts over them, see *Commonwealth v. Judges of Cumberland*, 1 Serg. & Rawle, 189; *Anonymous*, 3 Wendell, 450; *State v. Johnson*, 2 Har. & M'Hen. 160; *Austin's case*, 5 Rawle, 191; *Thompson's case*, 3 Hawks, 355; *Paul v. Purcell*, 1 Browne, 348; *State v. Holding*, 1 M'Cord, 379; *Smith v. State*, 1 Yerger, 228; *Hobby v. Smith*, 1 Cowen, 588; *Seymour v. Ellison*, 2 Cowen, 13; *Anonymous*, 2 Halst. 162; *Ex parte Burr*, 9 Wheat. 529.

(4) By R. G. H. T., 6 Will. IV., followed by regulations in E. T., 6 Will. IV., every person applying to be admitted an attorney of B. R., C. B., and Exchequer, undergoes an examination as to his fitness and capacity, by examiners appointed every year in Easter Term. The first examination took place at the Hall of the Incorporated Law Society, in Chancery Lane, on the 4th of June, 1836. The rules and questions relating to this subject will be found in 2 Bingh. N. C. 611, 800; 1 M. & W. 1, 290; 1 Tyr. & Gr. 233; 4 Ad. & Ell. 767. See further provisions as to the appointment of examiners, and the admission of attorneys and solicitors, in stat. 6 & 7 Vict. c. 73, ss. 15, 16, 17, 18. With respect to the certificate requisite for an attorney, see stat. 37 Geo. III. c. 90, ss. 26-7-8, 30; (but see 2nd part of 1st schedule of stat. 6 & 7 Vict. c. 73;) and see stat. 44 Geo. III. c. 59, and stat. 6 & 7 Vict. c. 73, ss. 22, 23, 26. See also *Eyre v. Shelley*, 6 M. & W. 269.

Attorneys and solicitors are public officers, and are under the government of the several courts in regard to their behavior to their clients. *Merritt v. Lambert*, 10 Paige, 352; affirmed by *Walis v. Toulat*, 2 Den. 607. And may be punished for uttering slanderous words. *King v. Wheeler*, 7 Cow. 125. It seems that proceedings on motion against an attorney for money collected, is no bar to a recovery in an action on the case for damages. *Corpund v. Balcirn*, 25 Miss. 129. The removal of a solicitor from his office as solicitor of the court of Chancery for malpractice, deprives him of the power to practise as solicitor, attorney, or counsel in any other court. *Matter of Peterson*, 3 Paige, C. R. 510. And an attorney may be removed from office, or suspended from practice in the Common Pleas by that court, on good cause shown; but it is said that ignorance of the law is not a good cause. *Bryant's case*, 4 Foster, 149.

(1) He has no lien on moneys collected by the sheriff until they come into his hands. *St. John v. Dillendorf*, 12 Wend. 261; *Irwin v. Worman*, 3 Watts, 357; *The People v. N. Y. C. P.*, 13 Wend. 649; *Shapley v. Bellows*, 4 N. H. R. 347; *Walton v. Dickerson*, 7 Barr, 376.

(2) In Pennsylvania it has been determined, that an action cannot be maintained by a member of the bar against his client for professional services, beyond the sum of the attorney's fee allowed by the act of Assembly, unless the client give a bond or note for the amount. *Mooney v. Lloyd*, 5 S. & R. 412. The law seems to be otherwise in Connecticut and South Carolina. *Robbins v. Harvey*, 5 Conn. Rep. 335; *Duncan v. Janay's Exr.*, 1 M'Cord, 149. The case of *Mooney v. Lloyd*, has since been overruled in *Gray v. Brackenridge*, 2 Penns. Rep. 75, and *Foster v. Jack*, 4 Watts, 334; and it is there held, that he may maintain an action on an implied assumpsit for professional services. *Walton v. Dickerson*, 7 Barr, 376. So also in Kentucky, the agreements which attorneys make with clients are not restricted by law, and where there is no special agreement, a compensation may be recovered according to the value of the services. But such agreements are subject to strict scrutiny, and will under some circumstances be set aside in equity. *Downing v. Major*, 2 Dana, 228; *Bibb v. Smith*, 1 Id. 582. In Ohio, an agreement between attorney and client to share the lands recovered is illegal and void. *Key v. Vattier*, 1 Ohio, Rep. 62. But *counsel fees* cannot be recovered *eo nomine* in an action of assumpsit. *Seeley v. Crane*, 3 Green, 35.

ney,(d) the defendant may plead the statute of limitations, viz. that he did not promise or undertake within six years next before action brought.(1)

The stat. 6 & 7 Vict. c. 73, (22nd August, 1843,) s. 1, after reciting that the laws relating to attorneys and solicitors, are numerous [*166] *and complicated, and that it is expedient to consolidate and simplify, and to alter and amend the same, by s. 1, repeals the several acts and parts of acts, which are set forth in the first part of schedule I; and the several acts and parts of acts which are not repealed, are enumerated in the second part of the same schedule; and by s. 2, it is enacted, that "after the passing of this act, no person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit or defend any action, suit or other proceeding, in the name of any other person, or in his own name, in the Court of Chancery, or Courts of Queen's Bench, Common Pleas, or Exchequer, or Court of the Duchy of Lancaster and Durham, or in the Court of Bankruptcy, or in the Court for the Relief of Insolvent Debtors, or in any county court, or in any court of civil or criminal jurisdiction, or in any other court of law or equity, in England and Wales, or act as an attorney or solicitor in any cause, matter or suit, civil or criminal, to be heard, tried, or determined before any justice of assize of oyer and terminer, or gaol delivery, or at any general or quarter sessions of the peace for any county, riding, division, liberty, city, borough or place, or before any justice or justices, or before any commissioners of her majesty's revenue, unless such person shall have been previously to the passing of this act admitted and enrolled and otherwise duly qualified(e) to act as an attorney or solicitor under or by virtue of the laws now in force, or unless such person shall after the passing of this act be admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor, pursuant to the directions and regulations of this act, and unless such person shall continue to be so duly qualified and on the roll at the time of his acting in the capacity of an attorney or solicitor as aforesaid.

The 26th sect. enacts, that no person who as an attorney or solicitor shall sue, prosecute, defend or carry on any action or suit or any proceedings in any of the courts aforesaid, without having previously obtained a stamped certificate which shall then be in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward or disbursement for or in respect of any business matter or thing done by him as an attorney or solicitor as aforesaid, whilst he shall have been without such certificate as last aforesaid.

(d) *Oliver v. Thomas*, *Ld. Raym.* 2.

(e) See *Williams v. Jones*, 2 Q. B. 276; 1 G. & D. 649.

(1) The statute of limitations does not begin to run against an attorney at law for professional services before demand is made, or the professional relation is dissolved. *Foster v. Jack*, 4 Watts, 334. In an action against him for moneys collected, it runs from the time when received. *Stafford v. Richardson*, 15 Wend. 302; *Coffin v. Coffin*, 7 Greenl. 298. Where a nonsuit is suffered in consequence of his negligence in mistaking the name, it runs from the time the error was committed, not merely the time of nonsuit. *Wilcox v. Plummer*, 4 Peters, 172.

And by sect. 27, every person who shall have been duly admitted an attorney of any one of the superior courts of law at Westminster, shall be entitled upon the production of his admission therein, or an official certificate thereof, and that the same still continues in force, to be admitted as an attorney in any other of the said courts, or in any inferior court of law in England or Wales, upon signing the roll of such other court, but not otherwise ;(f) *and every person who shall [*167] have been duly admitted a solicitor of the Court of Chancery, shall be entitled upon the production of his admission therein, or an official certificate thereof, and that the same still continues in force, to be admitted as a solicitor in any inferior Court of Equity in England or Wales, and in the Court of Bankruptcy, upon signing the roll of such other court, but not otherwise, and shall thereupon be entitled to practice as a solicitor therein in like manner as if he had been sworn in and admitted a solicitor of such court.

By sect. 37, from and after the passing of this act, no attorney or solicitor, nor any executor, administrator or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left(g) for him at his counting-house, office of business, dwelling house, or last known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor, (or, in the case of a partnership, by any of the partners,(h) either with his own name, or with the name or style of such partnership,) or of the executor, administrator, or assignee of such attorney or solicitor, or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill; and upon the application of the party chargeable by such bill within such month it shall be lawful, in case the business contained in such bill or any part thereof shall have been transacted in the High Court of Chancery, or in any other court of equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any court of law or equity, for the Lord High Chancellor or the Master of the Rolls, and in case any part of such business shall have been transacted in any other court, for the Courts of Queen's Bench, Common Pleas, Exchequer, Court of Common Pleas at Lancaster, or Court of Pleas at Durham, or any judge of either of them, and they are hereby respectively required, to refer such bill, and the demand of such attorney or solicitor, executor, administrator, or assignee, thereupon to be taxed and settled by the proper officer of the court in which such reference shall be made, without any money being brought into court; and the court or judge making such reference, shall restrain such attorney or solicitor, or executor, administrator, assignee of such attorney or solicitor, from commencing any action

(f) See *Prior v. Smith*, 6 Dowl. P. C. 299.

(g) See *Brooks v. Mason*, 1 H. Bl. 290, *post*, 172.

(h) See *Owen v. Scales*, 10 M. & W. 657; 2 Dowl. N. S. (P. C.) 304.

or suit touching such demand pending such reference; and in case no such application as aforesaid shall be made within such month [*168] as aforesaid, then it shall *be lawful for such reference to be made as aforesaid, either upon the application of the attorney or solicitor, or the executor, administrator or assignee of the attorney or solicitor, whose bill may have been so as aforesaid delivered, sent, or left, or upon the application of the party chargeable by such bill, with such directions, and subject to such conditions as the court or judge making such reference shall think proper; and such court or judge may restrain such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, from commencing or prosecuting any action or suit touching such demand pending such reference, upon such terms as shall be thought proper: provided always, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill after a verdict shall have been obtained, or a writ of inquiry executed in any action for the recovery of the demand of such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, or after the expiration of twelve months after such bill shall have been delivered, sent, or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made; (1) and upon every such reference, if either the attorney or solicitor, or executor, administrator or assignee of the attorney or solicitor, whose bill shall have been delivered, sent, or left, or the party chargeable with such bill, having due notice, shall refuse or neglect to attend such taxation, the officer to whom such reference shall be made may proceed to tax and settle such bill and demand *ex parte*; and in case any such reference as aforesaid shall be made upon the application of the party chargeable with such bill, or upon the application of such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, and the party chargeable with such bill shall attend upon such taxation, the costs of such reference shall, except as hereinafter provided for, be paid according to the event of such taxation; that is to say, if such bill when taxed be less by a sixth part than the bill delivered, sent, or left, then such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall pay such costs; and if such bill when taxed shall not be less by a sixth part than the bill delivered, sent, or left, then the party chargeable with such bill, making such application or so attending, shall pay [*169] such costs; and every order to be made for *such reference as aforesaid shall direct the officer to whom such reference shall be made to tax such costs of such reference to be so paid as aforesaid,

(1) An attorney's bill had been delivered to some ignorant parties in June, 1840, and in November, 1842, a summons for its taxation had been dismissed by a judge at chambers, on the ground of the insufficiency of the materials on which it was founded. It appeared that a sum of money had been deposited in 1839, in the joint names of the attorney and another party, on behalf of the clients. It was holden, that there being a dispute respecting the sum, the court would refer the bill, and require the attorney to account, on a rule *nisi*, obtained in Trinity Term, 1843. *Binns v. Hey*, 13 Law J., N. S., Q. B. 28; *Sayer v. Wagstaff*, coram *Lyndhurst*, C., Dec. 4, 1844.

and to certify what, upon such reference, shall be found to be due to or from such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, in respect of such bill and demand, and of the costs of such reference, if payable; provided also, that such officer shall in all cases be at liberty to certify specially any circumstances relating to such bill or taxation, and the court or judge shall be at liberty to make thereupon any such order as such court or judge may think right respecting the payment of the costs of such taxation; (1) provided also, that where such reference as aforesaid shall be made when the same is not authorized to be made except under special circumstances, as hereinbefore provided, then the said court or judge shall be at liberty, if it shall be thought fit, to give any special directions relative to the costs of such reference: provided also, that it shall be lawful for the said respective courts and judges, in the same cases in which they are respectively authorized to refer a bill which has been so as aforesaid delivered, sent, or left, to make such order for the delivery by any attorney or solicitor, or the executor, administrator, or assignee of any attorney or solicitor, of such bill as aforesaid, and for the delivery up of deeds, documents, or papers in his possession, custody, or power, or otherwise touching the same, in the same manner as has heretofore been done as regards such attorney or solicitor, by such courts or judges respectively, where any such business had been transacted in the court in which such order was made; provided also, that it shall not in any case be necessary in the first instance for such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, in proving a compliance with this act, to prove the contents of the bill he may have delivered, sent, or left, but it shall be sufficient to prove that a bill of fees, charges, or disbursements, subscribed in the manner aforesaid, or enclosed in or accompanied by such letter as aforesaid, was delivered, sent, or left, in manner aforesaid; but nevertheless it shall be competent for the other party to show that the bill so delivered, sent, or left was not such a bill as constituted a *bonâ fide* compliance with this act: provided also, that it shall be lawful for any judge of the superior courts of law or equity to authorize an attorney or solicitor to commence an action or suit for the recovery of his fees, charges or disbursements against the party chargeable therewith, although one month shall not have expired from the delivery of a bill as aforesaid, on proof to the satisfaction of the said judge that *there is probable [*170] cause for believing that such party is about to quit England.

“This statute does not authorize the taxation of every pecuniary demand or bill which may be made or delivered by a person who is a solicitor, for every species of employment in which he may happen to be engaged. The business contained in a taxable bill may be business of which no part was transacted in any court of law or equity; but I am of opinion that it must be business connected with the profession of an attorney or solicitor, business in which the attorney or solicitor was em-

(1) The meaning of this is that the officer may certify any thing that appears to him, in the course of the proceedings, fit ground for departing from the general rule, that the costs are to be paid by the unsuccessful party, and the judges are empowered to order accordingly. Per *Parke, B.*, in *re Woollett*, 12 M. & W. 506.

ployed because he was an attorney or solicitor, or in which he would not have been employed if he had not been an attorney or solicitor, or if the relation of attorney or solicitor and client had not subsisted between him and his employer.”(i)

The 37th section of this act relates to unpaid bills only, and provides that within one month after delivery, taxation may be ordered without special direction; that after the expiration of one month from the time of the bill being delivered, taxation may be ordered with such directions as the court may think proper, and that after verdict or writ of inquiry, taxation is only to be ordered on special circumstances, to be proved to the satisfaction of the court.(k) Under this 37th section, where an attorney’s bill is referred to taxation after action brought upon it, the attorney is liable to pay the costs of taxation if more than one-sixth is taken off.(l)

By sect. 38, where any person, not the party chargeable with any such bill within the meaning of the provisions hereinbefore contained, shall be liable to pay or shall have paid such bill either to the attorney or solicitor, his executor, administrator, or assignee, or to the party chargeable with such bill as aforesaid, it shall be lawful for such person, his executor, administrator, or assignee, to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make, and the same reference and order shall be made thereupon, and the same course pursued in all respects, as if such application was made by the party so chargeable with such bill as aforesaid: provided always, that in case such application is made when, under the provisions herein contained, a reference is not authorized to be made except under special circumstances, it shall be lawful for the court or judge to whom such application shall be made to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill as aforesaid, if he was the party making the application.

The 39th section enables the Lord Chancellor or the Master [*171] of *the Rolls to direct taxation of bills chargeable on executors, trustees, or administrators.

By sect. 40, for the purpose of any such reference upon the application of the person not being the party chargeable within the meaning of the provisions of this act as aforesaid, or of a party interested as aforesaid, it shall be lawful for such court or judge to order any such attorney or solicitor, or the executor, administrator, or assignee of any such attorney or solicitor, to deliver to the party making such application a copy of such bill, upon payment of the costs of such copy: provided always, that no bill which shall have been previously taxed and settled, shall be again referred, unless, under special circumstances, the court or judge to whom such application is made shall think fit to direct a re-taxation thereof.

By sect. 41, the payment of any such bill as aforesaid shall in no

(i) Per *Ld. Langdale*, M. R. in *Allen v. Aldridge*, 5 Beavan, 405.

(k) Per *Ld. Langdale*, M. R. in *re Downes*, 5 Beav. 428.

(l) In *re Woollett*, 12 M. & W. 504.

case preclude the court or judge to whom application shall be made from referring such bill for taxation, if the special circumstances of the case shall in the opinion of such court or judge appear to require the same, upon such terms and conditions, and subject to such directions, as to such court or judge shall seem right, provided the application for such reference be made within twelve calendar months after payment.(1)

Lord *Langdale*, M. R., in *re Lees*, 5 Beavan, 410, held, that this statute as regards taxation is retrospective with respect to bills previously taxable, and also as to bills thereby made taxable, provided the latter remained unpaid at the passing of the act; and that payment of a bill previously taxable before the act came into operation, would not preclude taxation under the act, upon a proper application made in due time, but that payment before the act came into operation of a bill not previously taxable, precluded taxation under the act.

By sect. 43, all applications made under this act to refer any such bill as aforesaid to be taxed and settled, and for the delivery of such bill and for the delivering up of deeds, documents, and papers, shall be made in the matter of such attorney or solicitor; and upon the taxation and settlement of any such bill, the certificate of the officer by whom such bill shall be taxed shall (unless set aside or altered by order, decree, or rule of court) be final and conclusive as to the amount thereof, and payment of the amount certified to be due and directed to be paid, may be enforced *according to the course of the [*172] court in which such reference shall be made; and in case such reference shall be made in any court of common law, it shall be lawful for such court, or any judge thereof, to order judgment to be entered up for such amount, with costs, unless the retainer shall be disputed, or to make such other order thereon as such court or judge shall deem proper.

For the numerous decisions upon the construction of the stat. 2 Geo. II. c. 23, and the other statutes repealed by the stat. 6 & 7 Vict. c. 73, the reader is referred to the former editions of this work. The following cases, however, which were decided before the passing of the late act, have been retained, as being applicable to the existing law.

An attorney's bill, generally speaking, ought to give a history of the cause, so as to enable the officer to judge of the propriety of the various items of which it is composed.(m)

The bill must be *left* with the party charged;(n) for in a case where the plaintiff had delivered his bill to the defendant in due time, who acknowledged his debt, and said that he would pay it, but that he did not know what to do with the bill, upon which the plaintiff took it back

(m) *Waller v. Lacy*, 1 M. & Gr. 54; 1 Scott's N. R. 186.

(n) *Brooks v. Mason*, 1 H. Bl. 290.

(1) Lord *Langdale*, M. R., in *re Downes*, 5 Beav. 429, said, "Mr. Justice Patteson, in the case of *Binns v. Hey*, 13 Law J., N. S., 28, Q. B., stated that he considered the true construction of this clause to be, that wherever the act applies, the court cannot send a bill for taxation if it has been paid more than twelve months in any case whatever. I entirely concur in that opinion, as affording the general rule, subject, however, to a qualification in this (the Rolls) Court.

again, it was holden, that the bill ought to have been left with the defendant: for the intention of the statute was, that the client should have due time to examine the charges made by the attorney, and take advice upon them, if necessary. In like manner it has been holden,^(o) that although an attorney shows his client a copy of his bill, explaining the different charges to him in the reasonableness of which the client acquiesces, the attorney is notwithstanding bound to leave a copy of the bill with him. But the legislature, by requiring a delivery of the bill *to the party to be charged*, meant no more than that he should have reasonable notice of its contents; leaving it to the construction of the law, as in other cases, what should be deemed a delivery to him for the purpose of notice. Hence, where a party in a cause having changed his attorney in the progress of it, a judge's order was afterwards obtained by the second attorney for the delivery to him of a bill signed by the first attorney, which delivery was accordingly made: this was holden^(p) to be a sufficient delivery *to the party to be charged* within the words and meaning of the statute. Where several are jointly liable to an attorney for business done,^(q) the delivery of a copy of a bill to one of them from whom the attorney has received his instructions,^(r) is sufficient. The bill having been delivered a month before the com-
[*173] mencement of the action,^(s) and the party *charged not having made any application to have the bill taxed during that interval, he will not be permitted to question the reasonableness of the items before a jury.

An attorney who has several demands against his client, some of which are barred by the statute of limitations, cannot appropriate^(t) in payment of the demand so barred, a sum received by him on account of his client for damages recovered in an action. Where, after action brought, the bill is referred to taxation at the request of the defendant, the attorney should make it a condition of the taxation, that the defendant should allow the master to tax interest also, if the attorney wishes to avail himself of a previous notice of a claim of interest^(u) under stat. 3 & 4 Will. IV. c. 42, s. 28. See this section, *post*, p. 185. Delivery of the bill is conclusive evidence^(x) against an increase of charge in a subsequent bill of any of the items contained in it; and strong presumptive evidence against any additional items.

An attorney will not be entitled^(y) to the costs of taxation, although less than a sixth shall have been taxed off his bill, if he has wilfully inserted any item of charge which he must know ought not to have been charged.

By stat. 2 & 3 Will. IV. c. 39, s. 17, every attorney whose name

(o) *Crowder v. Shee*, 1 Camp. 437.

(p) *Vincent v. Slaymaker*, 12 East, 372. Per *Grose, J., Le Blanc, J., and Bailey, J.*; dissentiente Lord *Ellenborough, C. J.*

(q) Per *Ellenborough, C. J.*, 1 Campb. 438.

(r) *Finchett v. How*, 2 Campb. 277.

(s) *Williams v. Frith*, Doug. 198; *Hooper v. Till*, Ib. 198, S. P.

(t) *Waller v. Lacy*, 1 Man. & Gr. 54; 1 Scott's N. R. 186.

(u) *Berrington v. Phillips*, 1 M. & W. 48.

(x) *Loveridge v. Botham*, 1 Bos. & Pul. 49.

(y) *Holderness v. Barkworth*, 3 M. & W. 341.

shall be indorsed on any writ issued by authority of this act, shall, on demand, in writing, made by or on behalf of any defendant, declare forthwith, whether such writ has been issued by him, or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the court or any judge of the same or of any other court shall so order, declare in writing, within a time to be allowed by such court or judge, the profession, occupation, or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of the court from which such writ shall appear to have been issued; and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, the said court, or any judge of either of the said courts, shall and may, if it shall appear reasonable so to do, make an order for the immediate discharge of any defendant who may have been arrested on any writ, on entering a common appearance.

On taxation of the bill the master has no authority to disallow items on the ground that with respect of the business to which they refer the attorney was guilty of negligence; that is a matter for the consideration of a jury.⁽²⁾

It is clearly established as a rule of practice, that negligence cannot be set up as a defence to an action on an attorney's bill: ^(a)(1) for the plaintiff does not come prepared to prove any thing more *than the business done, and is not in a situation to meet a [*174] charge of negligence.⁽²⁾ If, however, the business, which the

(2) *Matchett v. Parkes*, 9 M. & W. 767.

(a) *Templar v. M'Lachlan*, 2 B. & P. N. R. 136.

(1) In an action for fees by an attorney, defendant may show, under the general issue, that the attorney conducted the business so negligently that his services were of no value to his client; and thus defeat the whole claim. If the evidence be merely in diminution of the value of the services, notice must be given with the general issue. *Gleason v. Clark*, 9 Cowen, 57. He cannot recover costs paid by him in consequence of his own negligence. *Hoppiny v. Quin*, 12 Wend. 517; *Runyan v. Nichols*, 11 Johns. Rep. 547.

(2) "I do not go to the length of saying that in no case can negligence in the party suing be used as a defence to the action, though I think it can only be used where the negligence has been such, that the party for whom the business was done has thereby lost all possibility of benefit from such business." Per Sir J. Mansfield, S. C. "No principle of law is more clearly established than this, that a party cannot enforce a charge for doing business which is useless to his employer." Per Tindal, C. J., *Shaw v. Arden*, 9 Bingh. 290. The same doctrine was laid down by Lord Ellenborough, in *Farnsworth v. Garrard*, 1 Campb. 38; "The late Mr. Justice Buller thought, (and I, in deference to so great an authority, have at times ruled the same way,) that in cases of this kind, a cross action for the negligence was necessary; but that if the work be done, the plaintiff must recover for it. I have since had a conference with the judges on the subject: and I now consider this as the correct rule; (see *Denew v. Daverell*, 3 Campb. 451; *Duncan v. Blundell*, 3 Stark. N. P. O. 6;) that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. The claim shall be co-extensive with the benefit." There is a distinction, however, in this respect, between a contract and a security; for in an action on a bill of exchange, a partial failure of consideration is no defence; as where a bill had been accepted for the price of some hams, which turned out so bad that they were almost unmarketable; this was holden to be no defence, but the defendant must seek his remedy by a cross action. *Morgan v. Richardson*, 1 Campb. 40, n., recognized by Lord Ellenborough, C. J., in *Tye v. Gwynne*, 2 Campb. 346, cited also and commented upon by Parke, B., in *Wells v. Hopkins*, 5 M. & W. 8, 9. See also *Obbard v. Betham*, 1 M. & Malk. 438; *Mann v. Lent*, 10 B. & C. 877. In *Morgan v. Richardson*, money had been paid into

attorney undertakes, wholly fails from his gross ignorance or negligence; as where an attorney was employed to prosecute an appeal at the quarter sessions, and owing to his gross ignorance, the [*175] case was so conducted *that the sessions refused to hear the appeal; it was holden, (b) that the attorney could not recover. But an attorney may recover, although there has been error in the execution of his duty; (c) if the error be such as a cautious man might fall into. Entire items for useless work may be discarded by a jury; (d) but in the case of an entire item for work partly useful, the jury are precluded from reducing that item, in an action to recover the amount of the bill, and the client must resort to a cross action. The work becomes useless through the plaintiff's fault, if, in consequence of his misconduct at some particular point, the whole is made ineffectual; (e) and such failure of the work is a defence admissible on non assumpsit in an action upon the attorney's bill.

An attorney is not liable to be assessed in the poor-rates in respect of the profits of his profession. (f) An attorney who has attended on a subpoena, as a witness in a civil suit, cannot maintain an action (g) against the party who subpoenaed him, for compensation for loss of time.

An attorney (h) who has commenced an action for his client, has a right to refuse to go on without an advance of money on account, provided he gives his client reasonable notice of his intention. (1) The contract (i)

(b) *Huntley v. Bulwer*, 6 Bingh. N. C. 111.

(c) *Montrou v. Jefferys*, 2 C. & P. 113.

(d) *Hill v. Featherstonhaugh*, 7 Bingh. 569, recognized in *Shaw v. Arden*, 9 Bingh. 287, cited *arg.* in *Huntley v. Bulwer*, 6 Bingh. N. C. 114.

(e) Per Lord Denman, C. J., in *Bracey v. Carter*, 12 A. & E. 376, recognizing *Hill v. Allen*, 2 M. & W. 283.

(f) *R. v. Startifant*, 7 T. R. 60.

(g) *Collins v. Godefroy*, 1 B. & Ad. 950.

(h) *Lawrence v. Potts*, 6 C. & P. 428. See also *Wadsworth v. Marshall*, 2 Cr. & Jer. 665.

(i) *Harris v. Osbourn*, 4 Tyrw. 445; 2 Cr. & M. 629, S. C., recognized in *Nicholls v. Wilson*, 11 M. & W. 106. See *Hoby v. Built*, 3 B. & A. 350.

court, but Lord *Ellenborough* said, that that circumstance formed no ingredient in the opinion he then expressed. A. & B. entered into an agreement for the sale of the lease of a house; B. was let into possession, and accepted a bill for the purchase money; in an action brought by A. against B. for nonpayment of the bill, it was holden, that B. could not defend the action by proving that A. had refused to execute an assignment of the lease—but that B. must bring a cross action, or go into equity for a specific performance. *Moggridge v. Jones*, 3 Campb. 38. See further on this subject the case of *Fisher v. Samuda and another*, 1 Campb. 190, where Lord *Ellenborough* expressed an opinion, that where an action has been brought for the value of goods furnished at a stipulated price, and the purchaser does not, either in bar of the action, or to reduce the damages, object to the quality of the goods, but allows the seller to recover a verdict for the full price agreed upon, he cannot afterwards maintain a cross action, on the ground of the goods being of a bad quality, and unfit for the purpose for which they were ordered.

(1) An attorney is not bound to proceed in a cause unless his legal fees are tendered or secured to him if he requests this to be done. *Gleason v. Clark*, 9 Cowen, 57. But he will not be allowed, during the pendency of a cause, to extort from his client unreasonable compensation for his services, though after the cause is ended the court will not interfere in respect to any compensation which the client may make. *Phillipps v. Overton*, 4 Hay. 291; *Lecatt v. Sallee*, 3 Porter, 115; *Bibb v. Smith*, 1 Dana, 580; *Rose v. Mynatt*, 7 Yerg. 30.

of an attorney or solicitor retained to conduct or defend a suit is entire and continuing, viz. to carry it on to its termination, and can only be determined by the attorney upon reasonable notice. But an attorney is not compelled to proceed to the end of a suit, in order to be entitled to his costs, but may upon reasonable cause and reasonable notice, abandon the conduct of the suit, and in such case may recover his costs for the period during which he was employed.^(k) The attorney of a defendant has no such interest in the suit as to prevent the parties from compromising it without his consent.^(l) The lien of an attorney on a judgment is merely a claim to the equitable interference of the court, to have the judgment held as a security for his costs, but he has no authority over the execution of a writ of *ca. sa.*, so as to carry it into effect against the order of the plaintiff, even though the plaintiff and defendant should collude to deprive him of his lien.^(m)

Under the new rules, the non-delivery of the bill, duly signed,⁽ⁿ⁾ must be pleaded specially.

**Liability of Attorneys.*—An action on the case may be [*176] maintained by a client against his attorney for negligence or unskilfulness in the discharge of his professional duty ;⁽¹⁾ as where an

(k) *Vansandau v. Browne*, 9 Bingh. 402.

(l) *Quested v. Callis*, 10 M. & W. 18.

(m) *Barker v. St. Quintin*, 12 M. & W. 441.

(n) *Moore v. Dent*, 1 M. & Rob. 462. *Parke, B.*; *Robinson v. Roland*, 6 Dowl. (P. C.) 271; *Lane v. Glenney*, 2 Nev. & P. 258; 7 A. & E. 83, S. C.

Where an attorney appears for a party, the court will look no further, but will proceed as if he had sufficient authority, and leave the party to his action. *Jackson v. Stewart*, 6 Johns. 34; *Henck v. Todhunter*, 7 Har. & Johns. 275; *Harding v. Hull*, 5 Id. 478; *Mannikurzen v. Dorsett*, 2 Har. & Gill, 374; *North Brunswick v. Borream*, 5 Halst. 357; *Norris v. Douglass*, 2 South. 817; *Osburn v. The Bank of the United States*, 9 Wheat. 738; *Proprietors v. Bishop*, 2 Verm. 231; *Noble v. Bank of Kentucky*, 3 Marsh. 263; *Talbot v. M^r Gee*, 4 Monr. 377; *Cockran v. Leister*, 2 Root, 348; *Taliaferro v. Porter*, Wright, 610; *Bryans v. Taylor*, Ib. 245. Where judgment had been entered in an amicable action by agreement of attorneys, and the defendant made affidavit that he had never employed the attorney whose name was signed to the agreement, the court gave the defendant leave to contest the demand, but ordered the judgment to stand as security. *Coxe v. Nicholls*, 2 Yeates, 546. If there were fraud or collusion between the plaintiff and the defendant's attorney; or if he be not responsible or perfectly competent to answer to his assumed client, the court will relieve against the judgment. *Denton v. Noyes*, 6 Johns. 296. See also *Coit v. Sheldon*, 1 Tyler, 304; *Smith v. Bowditch*, 7 Pick. 137; *Hall v. Williams*, 6 Id. 232; *Meachem v. Dudley*, 6 Wend. 514; *Critchfield v. Porter*, 3 Hamm. 518; *Cox v. Hill*, Id. 411; *Handely v. Stateler*, 6 Litt. 186; *Bell v. Usury*, 4 Id. 234; *Compher v. Anawalt*, 2 Watts, 493; *Campbell v. Kent*, 3 Penn. Rep. 75; *Kitchen v. Williamson*, 4 Wash. C. C. Rep. 84.

(1) "An attorney impliedly undertakes, and is bound to use skill and diligence in the management of the business in which he is employed by his client. It would indeed be very difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause, is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or *lata culpa*, mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, appear to establish, that an attorney is liable for the consequences of ignorance or non-observance of the rules of practice of the court; for want of care in the preparation of a cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. But on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice and doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law.

attorney neglected to charge a defendant (a prisoner) in execution within the time allowed by the practice of the court, by reason of which neg-

"Besides the ordinary proceedings by action for any breach of duty, and by indictment for any crime, there is a mode of proceeding against attorneys by an application to the summary jurisdiction of the court, which jurisdiction is exercised according to law and conscience, and not by any technical rules. The court will, in general, compel the attorney specially to perform his duty, if practicable, and will punish him for its breach. The mode of punishment (where the court interferes summarily) is either by fine, attachment, or in very gross cases, where enough is shown to prove that the attorney is unfit to be a member of the profession, by striking him off the roll; and if struck off by one court, he will not afterwards be admitted in any other. In some cases the court think it sufficient to make him pay the costs incurred by the parties by reason of his misconduct; as where an attorney put in bail which he knew to be insufficient, and gave notice of their justification, the court ordered him to pay the costs of opposing them. It may be added, that the court will thus interfere, though the attorney may have ceased being such, if he were an attorney at the time the crime or misconduct complained of took place; for this purpose the maxim being, 'once an attorney always an attorney.'

"The court will, in general, interfere in this summary way, and strike an attorney off the roll, or otherwise punish him for gross misconduct, not only in cases where the misconduct has arisen in the course of a suit or other regular and ordinary business of an attorney, but where it has arisen in any other matter so connected with his professional character as to afford a fair presumption that he was employed in, or intrusted with it, in consequence of that character." 1 Archb. Pract. 67, 115, 117, 8th Lond. ed.

An attorney is liable only for gross negligence or gross ignorance, in the performance of his professional duties; and this is a question of fact, to be determined by the jury, and is sometimes to be ascertained by the evidence of those who are conversant with, and skilled in, the same kind of business. *Pennington v. Yell*, 6 Eng. 212; *Holmes v. Peck*, 1 Rhode Island, 242. And it is a fair presumption, that an attorney acts according to the instructions of his client, unless in a case of such gross negligence that a violation may be inferred. *Ib.* *Cox v. Sullivan*, 7 Geo. Rep. 144; *Garrison v. Wilcoxon*, 11 Id. 184; *Nisbit v. Lawson*, 1 Kelly, 275; *Wilson v. Coffin*, 2 Cush. 316; *Wilson v. Russ*, 7 Shep. 421; *Mardis v. Shackelford*, 4 Ala. 493; *Hovey v. Martin*, Riley, 156; *Warren v. Griswold*, 8 Wend. 665; *Gallagher v. Thompson*, Wright, 466; *Evans v. Watson*, 2 Porter, 209.

The employment of an attorney to conduct a cause is a personal trust and confidence, which cannot be delegated to another but by consent of the person interested. *Hitchcock v. M^r Gehee*, 7 Port. 556; *Johnson v. Cunningham*, 1 Ala. 249. But if made, the party interested may make it binding by his assent, with a full knowledge of the facts. Or if he does not dissent on reasonable notice. But where notice was not given until three years after the delegation was made, silence will not be construed a ratification. *Ib.*

And the attorney is entitled to the benefit of the rule, that every one shall be presumed to have discharged his legal and moral obligations, until the contrary shall be made to appear. *Pennington v. Yell*, 6 Eng. 212. And even then the extent of the damages must also be affirmatively shown: as where the amount of a note is alleged to have been lost by his negligence, it must be shown that it was a subsisting debt against the maker, and also that he was solvent. *Ib.* And unless the latter be shown, he would be liable only for nominal damages; and under no circumstances would be liable for more than the actual damages that the client has sustained by his negligence. *Ib.* *Cox v. Sullivan*, 7 Geo. Rep. 144. When an attorney undertakes the collection of a debt, it becomes his duty to sue out all processes, both *meane* and final, necessary to effect that object: and not only the first execution, but all such as may become necessary. *Ib.* *Dearborn v. Dearborn*, 15 Mass. 316; *Crooker v. Hutchinson*, 2 Chip. 117; 1 Verm. 13 S. C.; *Eccles v. Stevenson*, 3 Bibb, 517. But he is not bound to institute new collateral suits without special instructions, such as actions against the sheriff and clerk for the failure of their duty. *Ib.* It would seem that he should pursue bail, however, and those who may have become bound with the defendant in the progress of the suit, either before or after judgment. *Ib.* But he is not bound to attend in person to the levy of an execution, or to search out for property, out of which to make the debt; this is the business of the sheriff; nor is he liable for any of the shortcomings of that officer. *Ib.* And as to all professional duties, he will always be justified in ceasing to proceed with his client's cause, unless specially instructed to go on, whenever he shall be *bonâ fide* influenced to this course by a prudent regard for the interest of his client. *Ib.* *Gleason v. Clark*, 9 Cow. 57; *Castro v. Bennett*, 2 Johns. 296; *Benton v. Craig*, 2 Miss. 198.

lect the defendant was superseded; it was holden,^(o) that the action was maintainable against the attorney for negligence, but that as it sounded

(o) *Russell v. Palmer*, 2 Wills. 325. See *Pitt v. Yalden*, 4 Burr. 2060.

It has been held, that money collected by an attorney for his client must be demanded, or a direction to remit given and neglected, before a suit can be brought therefor; but where the attorney denies his liability to pay, and sets up a claim against his client exceeding the amount collected, this amounts to a waiver of a demand. *Walrath v. Maynard*, 3 Barb. Sup. Ct. R. 584; *Krause v. Dorrance*, 10 Barr, 462. And where two attorneys collect and transmit their client's funds in depreciated bank paper, which the clients refuse to receive, and send back with an offer to return them, and a request to make up the deficiency, and the attorneys decline to do anything about it, the clients have a right to sell the paper and recover the deficiency from the attorneys. *West v. Ball*, 12 Ald. 340. One attorney confided a note to another for collection, and took his receipt therefor, but without giving instructions with respect to the ownership. After the money was collected, it was remitted to the payee of the note, whose name however, was indorsed on the note. Held, that this remittance (the payee not being the owner,) did not discharge the collecting attorney from liability to his immediate principal; and that the action of the latter for the money could not be defeated by proofs that he was himself the agent of the indorsee, unless the indorsee had asserted his right to the money as against his agent. *Lewis v. Peck*, 10 Ald. 142.

It is the duty of an attorney to pay over to his client the money collected for him; and if he has any doubt whether the debts collected belonged to his client, all that he has any right to ask, is indemnity on paying over the money. *Marvin v. Ellwood*, 11 Paige, 365. Where the evidence of a debt, then due, is left with an attorney, who gives a general receipt for it, it will be presumed that he received it for the purpose of collection; and if an action be brought against him for his negligence, by which the debt was lost, it is incumbent on him to show that he received it specially, and for some other purpose. *Smedes v. Elmendorf*, 3 Johns. 185. An attorney gave a receipt for certain notes for collection, and after his death an action was brought against his executors for moneys had and received, and the receipt was the only evidence relied on to charge the testator's estate. Held, that this evidence was insufficient, and that the plaintiff was bound to prove the actual receipt of money or other payment, or a discharge by the attorney on account of the notes. *Kuhn v. Hunt*, 2 Brevard, 164. An attorney at law who has collected money for his client, will, if he deliver it to a third person to carry to his client without authority or directions so to do, be liable to his client for the sum thus collected, if the same be stolen from such third person while on his way with the money, even though such person were trustworthy, and took the same care of the money that he did of his own. *Grayson v. Wilkinson*, 5 Smedes & Marsh. 268. An attorney who has collected money for his client, is bound to notify him within a reasonable time that he has it in his hands; and if he does so, the client has no cause of action against the attorney to recover the money until after demand and refusal. *Denton v. Embury*, 5 Eng. 228; *Cummins v. McLain*, 2 Pike, 402; *Mardis v. Shackelford*, 4 Ala. 493; *Rathbun v. Ingalls*, 7 Wend. 320; *Taylor v. Bates*, 5 Cow. 376; *Ferguson's case*, 6 Id. 596; *Staples v. Staples*, 4 Greenl. 533; *Taylor v. Armisted*, 3 Call. 290; *Contra, Coffin v. Coffin*, 7 Greenl. 298. But if the attorney does not notify his client that he has collected funds on his account within a reasonable time, he will be liable to an action without special demand. *Ib.* An attorney who undertakes the collection of a debt, and by gross negligence puts it into such a situation as to embarrass the creditor in obtaining payment, and to render the debt of less value, as where an attorney takes the debtor's note for the debt to himself secured by a mortgage, contrary to the creditor's directions,—is liable to his employer in an action on the case, though the debtor always has been, and still is, able to pay the debt. *Wilson v. Coffin*, 2 Cush. 316. If an attorney who has commenced a suit, which is alleged to be malicious, knew that there was no cause of action, dishonestly, and for some sinister view, for some ill purpose, or for some purpose of his own, which the law calls malicious, causes a party to be arrested and imprisoned, he will be liable therefor. *Burnap v. Mash*, 13 Ill. 535. When a person places a note in the hands of an attorney for collection, and takes from him a receipt for it in his own name, but does not claim it as his own, nor any lien upon it, and the note itself is payable to a third person, and not indorsed, a payment by an attorney of the proceeds of the note to the payee, will discharge him from all liability to the person who placed the note in his hand. *Peck v. Wallace*, 19 Ala. 219. When an attorney died twelve days

bankruptcy is not liable in the first instance to the messenger, whom he nominates, for his bill of fees; but if the solicitor agree with the petitioning creditor to work a commission for a sum certain, and receive a great part of that sum, he will be liable to such messenger.^(y)(1) In an action against an attorney^(z) for suffering M. C., a debtor in custody at the suit of the plaintiff, to be superseded, it was averred that M. C. was indebted to the plaintiff; it appeared in evidence that at the time of contracting the supposed debt, M. C. was a married woman; this was holden to be a fatal variance.⁽²⁾ Where the misconduct or negligence of the attorney constitutes the cause of action, the statute of limitation begins to run from the time of the misconduct.^(a)

Evidence.—The regular proof of a person being an attorney, is either by the production of the original roll, signed by the party on his admission, together with proof of his signature, as evidence of identity; or by an examined copy of the roll, together with the admission;^(b) but in an action by an attorney for slandering him in his profession, it is sufficient for him to prove that he has acted as an attorney in the court of which he is alleged to be an attorney, and if the defendant's words assume that the plaintiff is an attorney, it operates as an admission that he is so, and supersedes the necessity of other proof.^(c)

Assumpsit on an attorney's bill.^(d)—To prove that a copy of the bill had been delivered pursuant to the statute, the plaintiff's clerk was called, who swore that he had delivered to the defendant a bill signed by the plaintiff, containing an account of the business done. He was then proceeding to state the items of this bill from the plaintiff's books, when the defendant's counsel objected that no notice had been given [*178] to produce it. It was insisted that *this was unnecessary, and *Jory v. Orchard*, 2 Bos. & Pul. 39 and *Anderson v. May*, 2 Bos. & Pul. 237, were cited; but, per Lord *Ellenborough*, C. J., "If there are two contemporary writings, the counterparts of each other, one of which is delivered to the opposite party and the other is preserved, as they may both be considered as originals, and they have equal claims to be considered as originals, and they have equal claims to authority, the one which is preserved may be received in evidence without notice to produce the one which was delivered. So it must have been in the cases which have been cited, and if a duplicate of the bill delivered is offered I am ready to receive it. But I am quite clear, that this evidence

(y) *Hartop v. Jukes*, 2 M. & S. 438. See stat. 6 Geo. IV. c. 16, s. 14.

(z) *Lee v. Ayrton, one, &c.*, Peake's N. P. C. 119.

(a) *Howell v. Young*, 5 B. & C. 259; 8 D. & R. 14.

(b) 2 Phillipps' Evid. 159, 5th ed.

(c) *Berryman v. Wise*, 4 T. R. 366, recognized in *Pearce v. Whale*, 5 B. & C. 38; relied on in *Sparling v. Haddon*, 9 Bingh. 12.

(d) *Phillipson, Gent., one, &c., v. Chase*, 2 Campb. 110. But see *Colling v. Trowet*, post, 178.

(1) The provisional assignee is not responsible for the fraud of an agent appointed with due care. *Raw v. Cutten*, 9 Bingh. 96.

(2) See *Gilbert v. Williams*, 8 Mass. Rep. 51; *Lynch v. The Commonwealth*, 16 S. & R. 368; *Stephens v. White*, 2 Wash. (Virg.) Rep. 203; *Eccles v. Stephenson*, 3 Bibb, 517, and *supra*, note 1, p. 176.

from the plaintiff's books is inadmissible to prove that a bill was delivered according to the statute. I approve of the practice as to notices to quit; and I remember when the point was first ruled by Mr. Justice *Wilson*, who said that if a duplicate of the notice to quit was not of itself sufficient, no more ought a duplicate of the notice to produce, and thus notices might be required *ad infinitum*." Plaintiff nonsuited.

A copy of an attorney's bill^(e) (the original having been delivered to the defendant) will be received in evidence, without proof of notice to produce the original. Assumpsit on an attorney's bill: at the trial, it appeared that the plaintiff had not given the defendant notice to produce the bill delivered to the defendant; but a witness proved, that the bill so delivered was signed by the plaintiff, and then produced a paper, which he swore to be a copy of the bill delivered; this paper, however, was not signed by the plaintiff; but there was a copy of the plaintiff's signature made by the witness. This evidence was holden^(f) to be sufficient, on the ground that notice to produce bill delivered was not necessary, because the bill delivered was in the nature of a notice.⁽¹⁾

* CHAPTER VI.

[*179]

AUCTION.

OF AGREEMENTS RELATING TO THE SALE OF LANDS AND GOODS BY AUCTION. p. 179. CASES WHERE THE DUTY ATTACHES. p. 181. LIABILITY OF AUCTIONEER. p. 183-4. RECOVERY OF DEPOSIT AND INTEREST ON DEFECT OF TITLE. p. 184-5.

A SALE of *lands* by auction is within the 4th section,⁽²⁾ and a sale of goods^(a) within the 17th section⁽³⁾ of the statute of frauds (29 Car.

(e) *Colling v. Treweek*, 6 B. & C. 394.

(f) *Anderson v. May*, 2 Bos. & Pul. 237. See the remarks of *Bayley, J.*, on this case, in *Colling v. Treweek*, 6 B. & C. 400.

(a) *Kenworthy v. Schofield*, 2 B. & C. 945.

(1) The reader is referred to 1 Stephens, N. P. 403-491, for a much more elaborate discussion of this head.

(2) By which it is enacted, that, "No action shall be brought whereby to charge a defendant upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

(3) By which it is enacted, that "No contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* or upwards shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the same bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." See *Brent v. Green*, 6 Leigh, 16.

II. c. 3), and to make it binding, the solemnities required by that statute must be observed: (b) the auctioneer is to be considered as the agent of both parties, (c)(1) and a note or memorandum in writing of the agreement or bargain, made and signed by him, will be sufficient to give validity to the contract. The defendant bought a lot of goods for more than 10*l.* at an auction. (d) Catalogues and conditions of sale were printed, and the defendant was the best bidder. The auctioneer wrote the defendant's name, and the price, against the lot in the printed catalogue, by order of the defendant. Between the day of [*180] sale and *the time fixed by the conditions for taking the lot away, the defendant sent his servant to see them weighed, which he did. The defendant neglecting to take away the goods, they were resold at a considerable loss, and an action was brought for the difference; and the court strongly inclined—1. That sales by auction were not within the statute of frauds, because a number of persons are generally present, who can testify the terms of the contract: 2. They held the contract here was sufficiently reduced into writing and signed by an agent of the defendant's, for the auctioneer for that purpose was his agent: (2) 3. They held the weighing by his servant was a delivery: 4. *Yates, J.*, held, that, as the contract was executory, viz., the lot to be taken away in six weeks, it was not within the statute. (3) [But now by stat. 9 Geo. IV. c. 14, s. 7, the enactments of the statute of frauds are extended to all contracts for the sale of goods of the value of 10*l.* and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for

(b) *Walker v. Constable*, 1 Bos. & Pul. 306.

(c) *Kemys v. Proctor*, 3 Ves. & Beames, 57. See this subject more fully discussed under tit. "Statute of Frauds."

(d) *Simon v. Motivos*, 3 Burr. 1921, more fully stated in Bull. N. P. 280, under the name of *Simon v. Metivier*. Best report in 1 Bl. Rep. 599, cited in *Mason v. Armistage*, 13 Ves. 25.

(1) *S. P. Cleaves v. Foss*, 4 Greenl. 1; *Alna v. Plummer*, Id. 258; *McComb v. Wright*, 4 Johns. Ch. 659; *Blackwood v. Lemon*, Harper, 219. And a memorandum of the sale entered by the clerk of the auctioneer, is sufficient, if it be made in the presence of the parties and of the auctioneer. *Ib.* See *Thomas v. Trustees, &c.*, 3 Marsh. 298; *Martin v. McFadden*, 4 Littell, 240. At the sale by auction of a personal chattel, the auctioneer, after the hammer is down, is the agent of the buyer, and his setting down the name and price satisfies the statute of frauds. *Brown v. Gilliland*, 3 Dessaus. 540.

(2) This rule has been acted upon ever since this decision; and in conformity with such rule, it has been holden, that upon sales made by brokers acting between the parties buying and selling, the memorandum in the broker's book, and the bought and sold notes transcribed therefrom, and delivered to the buyers and sellers respectively, are a sufficient compliance with the statute to render the contract of sale binding on each. See the opinion of Lord *Ellenborough*, C. J., in *Hinde v. Whitehouse*, 7 East, 569. Where a purchase is made at an auction sale at one time, and from the same vendor, although the goods are struck off separately, and at distinct prices, the whole is but one entire contract, and a delivery of part of the goods renders the sale valid for the whole within the statute of frauds, though they belong to different owners. *Miles v. Hunt*, 17 Wend. 333; *S. C.* 20 Id. 431; *Coffman v. Hampton*, 2 Watts & Serg. 377.

(3) If any money is paid as a *deposit*, though short of the sum stipulated by the conditions, and accepted as such by the auctioneer, it will bind the bargain quoad the auctioneer. *Hanson v. Roberdeau*, Peake's N. P. C. 120.

delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.]

A bidding at an auction may be retracted before the hammer is down, because the assent of the seller is not signified till that takes place.^(e) Verbal declarations of the auctioneers, superadding any term to,^(f) or contrary^(g) to, the printed conditions of sale, are not admissible in evidence. The printed particulars cannot be varied^(h) by such verbal statements of the auctioneer, either as to the parcels or quality⁽ⁱ⁾ of the subject matter of sale.

An action will not lie against an auctioneer for selling a horse at the highest price bid for him,^(k) contrary to the owner's express directions not to let him go under a larger sum.⁽¹⁾

*An auctioneer has a special property in goods which he is [*181] employed to sell, and may maintain^(l) an action for the price against a buyer; but not in a case^(m) where the right of a third person intervenes, and is established. Lord Abinger, C. B., on *Williams v. Millington*, being cited in *Sykes v. Giles*, 5 M. & W. 650, observed, that, "the rule of law is, that the agent who makes the contract, may bring an action on the contract in respect of his privity, and the principal in respect of his interest."⁽²⁾

If the owner of an estate put up to sale by auction,⁽ⁿ⁾ employ puf-

(e) *Payne v. Cave*, 3 T. R. 148.

(g) *Gunnis v. Erhart*, 1 H. Bl. 289.

(i) *Jones v. Edney*, 3 Campb. 285.

(l) *Williams v. Millington*, 1 H. Bl. 81.

(m) *Dickenson v. Naul*, 4 B. & Ad. 638.

(n) *Howard v. Castle*, 6 T. R. 642, recognized by *Grose and Lawrence, Js.*, in 8 T. R. 93, 95. See *Smith v. Clarke*, 12 Ves. 477; *Wheeler v. Collier*, M. & Malk. 123; *R. v. Marsh*, 3 Y. & J. 331, and *Crowder v. Austin*, 3 Bingh. 368; 11 Moore, 283.

(f) *Powell v. Edmunds*, 12 East, 6.

(h) *Shelton v. Livius*, 2 Cr. & J. 411.

(k) *Bexwell v. Christie*, Cowp. 395.

(1) But it has been held, that if goods are sent to an auctioneer with directions to dispose of them at a certain average advance on the invoice price, he is liable for the difference if he sell them for less than the price limited. *Steele v. Ellmaker*, 11 S. & R. 86. See also *Wolf v. Luyster*, 1 Hall, 146. An auctioneer being answerable only for gross negligence or ignorance, was held not to be liable in damages for an injury arising from an omission to comply with a statute recently passed of doubtful construction and which had not received a judicial interpretation. *Hicks v. Minturn*, 19 Wend. 550. But an auctioneer who innocently sells stolen goods is liable to the owner in an action of trover. *Hoffman v. Carron*, 20 Wend. 21; *S. C.* 22 Id. 285.

An auctioneer acting as an agent of another in the sale of property, is personally responsible as vendor, unless at the time of the sale he discloses the name of his principal. *Mills v. Hunt*, 20 Wend. 431; *Morton v. Dean*, 13 Metc. 385.

It is not illegal to place goods in an auctioneer's hands with directions that he shall not part with or dispose of them unless they produce a specified sum; the restriction not being regarded as an unlawful means of enhancing the price, nor an imposition on fair purchasers. *Wolf v. Leyster*, 1 Hall, 146; *Hazul v. Dunham*, Ib. 655. And if the auctioneer disobey these directions he is liable in damages to his employer. Ib. *S. P.* *Steele v. Ellmaker*, 11 S. & R. 86; *Wilkinson v. Campbell*, 1 Bay, 169.

(2) An auctioneer has a possession of the goods he sells, coupled with an interest, and not a bare custody, like a servant or shopman; and also a lien for charges of sale, commissions, and auction duty; and may sue the buyer in his own name for the price of the goods sold. *Hulse v. Young*, 16 Johns. 1; *Corlies v. Gardner*, 2 Hall, 345. But this authority to sue is subject to the right of the principal, as in case of other agents and factors, to take the collection into his own hands, and sue in his own name. *Girard v. Taggart*, 5 S. & R. 19.

fers to bid for him, it is a fraud on the real bidders, (1) and the highest bidder cannot be compelled to complete the contract. (2)

If the agent of the owner put up an estate in so many lots, (o) and

(o) *Cruso v. Crisp*, 3 East, 337. But see *Ld. Eldon*, in 1 Dow. 114.

(1) The owner may legally and fairly bid, either by himself or an agent, if before the bidding begins he gives public notice of his intention; and in such cases if he becomes the purchaser, he may claim an allowance of the duties, (see the statutes 17 Geo. III. c. 50, s. 10; 19 Geo. III. c. 56, s. 12; and 28 Geo. III. c. 37, s. 20,) provided that the notice required be given, and the delivery thereof verified upon the oath of the auctioneer, together with the fairness of the transaction. This notice must be in writing, and signed by the owner and the person intended to be the bidder. Puffing or by-bidding at a sale by auction, is such a fraud as will avoid the sale. *Moncrief v. Goldsborough*, 4 Har. & M'Hen. 282; *Donaldson v. M'Roy*, 1 Browne, 346; *Smith v. Greenlee*, 2 Dev. 126; *Torle v. Leavitt*, 3 Foster, 360; *Martin v. Ranlett*, 5 Richard. 541; *Staines v. Shore*, 4 Harris, 200; *M'Dowell v. Simms*, 6 Iredell, 278.

If at an auction a puffer is employed, by whom the property sold is run up to an unreasonable price, yet the fraud cannot be inquired into in an action for the purchase-money against the vendee; an action on the case or a bill in equity is the proper remedy. *Millar v. Campbell*, 3 Marsh. 526.

The employment of and bidding by a by-bidder, is not always ground for rescinding a contract; and the fact is entitled to but little weight where the price is not exorbitant, and there has been a long acquiescence by the purchaser. *Latham v. Morrow*, 6 B. Mon. 630. Where, at an auction sale, all the bidders except the purchaser are by-bidders, secretly employed by the seller, and the judgment of the purchaser is improperly influenced by their bids, the sale is a fraud, against which equity will relieve the purchaser. But where there are real bidders as well as sham bidders, and the last bid before the purchaser is a real bid, and the judgment of the real bidders and the purchaser has not been blinded by the sham bidders, the sale is valid. *Vearie v. Williams*, 3 Story, 611; *Donaldson v. M'Roy*, 1 Browne, 346; *Smith v. Greenlee*, 2 Dev. 126; *Moncrief v. Goldsborough*, 4 Har. & M'Hen. 282; *Millar v. Campbell*, 3 Marsh. 526; *Wolfe v. Layton*, 1 Hall, 146; *Hayul v. Dunham*, Ib. 655. A vendor may employ a person to bid on his behalf, and a purchaser at such sale will be compelled to complete his purchase, though he had no notice that such person was employed, and though the price was by such means carried beyond its real value. *Jenkins v. Hogg*, 2 Const. Rep. 821. Upon general principles, Lord Mansfield's opinion (in *Berwell v. Christie*, Cowp. 395,) was, that all secret dealing on the part of the seller is fraudulent. He may announce publicly that the goods shall not go under a certain price, or he may declare as a condition of sale, that he reserves one bid to himself, and this would be fair dealing; but he must not employ an agent to bid up to a certain price without making it known. I agree, that the most proper way would be to declare publicly, that the goods were not to go under a limited price, or that the owner reserved a right of a bid for himself. But I cannot say that all other modes of sale are fraudulent. The governing principle is, that the buyer shall not be deceived by any secret manoeuvre of the seller. In order to decide whether a deception has been practiced, much depends on the known custom of conducting sales at auction. If it is generally understood that the seller reserves the right of bidding his goods in at a limited price, unless the contrary be expressed as a condition of sale, then it is difficult to conceive how it can be a deception to employ an agent to bid up to that price. Perhaps the tone of Lord Mansfield's morality was too lofty for the common transactions of business. Some men may think it immoral to purchase a thing at less than its value; such was the opinion of the famous Roman lawyer *Scaevola*, who, having purchased a commodity at less than its value, held himself bound to pay the difference. But in all probability it will be long enough before an act of this kind will be recorded by any of our bidders at auction. *Tilghman*, C. J., in *Steele v. Ellmaker*, 11 Serg. & R. 68.

(2) S. P. *Moncrief v. Goldsborough*, 4 Har. & M'Hen. 282. And the law was so laid down by the Common Pleas of Philadelphia, in the case of a sheriff's sale. *Donaldson v. M'Roy*, 1 Browne, 346. But in *Steele v. Ellmaker*, 11 Serg. & R. 86, which was the case of a sale by an auctioneer, C. J. *Tilghman* expressed great doubts of the propriety of the doctrines advanced by Lord Mansfield, in *Berwell v. Christie*, and intimated his opinion, that the seller might fairly employ an agent to bid up the property to a limited price without giving previous notice. And such has been the decision in South Carolina. *Jenkins v. Hogg*, 2 Const. Rep. 821; see 1 Parsons on Contr. 417; *Miller v. Campbell*, 3 Marsh. 526; and note (1), *supra*. S. P. *Wright v. Deklyne*, 1 Peters's C. C. R. 199.

no person bidding for the same, he puts it up again in fewer lots, at other prices, and still no person bidding, he puts it up again in one lot at a certain price, and on there not being any bidding, the estate is withdrawn from sale; this is not a *bidding* of the owner by an agent, so as to subject the party to the auction duty, for want of a notice in writing to the auctioneer (previously to the auction) of such agency, as required by statutes 19 Geo. III. c. 56, and 28 Geo. III. c. 37, in order to excuse the owner from the payment of such duty.

An auctioneer was employed to sell an estate,^(p) the lowest price of which was fixed by the owner, and written down by him on a piece of paper, which was put under a candlestick, at the time of sale, with the privity of the auctioneer, but not signed by the owner, nor any notice in writing given to the auctioneer of the price so set down, nor had the auctioneer given the previous notice of the sale to the collector of the duty, as required by the acts of 19 Geo. III. c. 56, and 28 Geo. III. c. 37; but being asked at the sale, whether he had taken the proper precautions to avoid the duty in case there were no sale, he said, that it was his mode to fix a price under the *candle- [*182] stick, and if the bidding did not come up to that price, it was no sale or duty: It was holden, that the duty having attached, though there was no sale, for want of taking the precautions required of the owner by the statutes, under such circumstances, and the auctioneer having been sued for the duty on his bond to the crown, and compelled to pay it, he could not recover it over against the owner; he having in effect warranted, that proper precautions had been taken to prevent the duty attaching in the event, though both parties were mistaken as to the law. A purchaser^(q) cannot rescind his own contract on the ground that he has refused to pay the auction duty pursuant to the condition of sale, although the statute 17 Geo. III. c. 50, s. 8, enacts that in case of such refusal the bidding shall be void, for it is void only at the option of the seller.

The plaintiff, an auctioneer, was employed to sell lands belonging to the two defendants. One of the defendants, without the plaintiff's knowledge, employed H. to bid for one of the lots, in order to raise the price, and the plaintiff knocked down the lot to H. The plaintiff then sold two other lots belonging to different persons, and at the close of the entire day's sale, demanded the auction duty from H., who refused to pay it. The conditions of sale stated, that the auction duty was to be paid by the purchaser "immediately after the sale." It was holden,^(r) in an action by the auctioneer against the defendants for the auction duty; first, that H. was to be considered as the highest bidder; secondly, that the demand of the duty was legal.

Where an estate^(s) is sold by auction by a mortgagor, mortgagee being passive, the duty is payable on the difference only between the price paid for the estate and the mortgage debt, inasmuch as the equity of redemption only is really sold. By stat. 6 Geo. IV. c. 16, s.

(p) *Capp v. Topham*, 6 East, 392.

(q) *Malins v. Freeman*, 4 Bingh. N. C. 395; see *Willson v. Carey*, 10 M. & W. 641.

(r) *Willson v. Carey*, 11 M. & W. 368.

(s) *R. v. Sedgwick*, 2 Cr. M. & R. 603; 1 Tyr. & G. 94.

98, "all sales of any real or personal estate of any bankrupt shall not be liable to any auction duty." A trader, having mortgaged his real estates, afterwards conveyed them to trustees in trust to pay off incumbrances, and for other purposes; he then became bankrupt, whereupon a sale by auction of the estates was made by order of the assignees, with the consent of the trustees, and without, for any thing that appeared, the mortgagees having been consulted. It was holden,^(t) that the estates, though mortgaged, must still be considered as the estates of the mortgagor, the bankrupt, (the interest of the mortgagee being merely a security,) and consequently, according to the words and intention of the foregoing act, no auction duty was payable.

In an action for *money paid, laid out, and expended*, it appeared in evidence, that the defendant had employed the plaintiff, an [*188] *auctioneer, to sell an estate.⁽¹⁾ The plaintiff accordingly put it up to sale, and it was knocked down to a purchaser, who afterwards refused to complete his purchase, on the ground of a defect in the title. An action was brought against the present plaintiff, to recover the deposit; notice of the action was given to the defendant, and he was required to defend it, but declined, whereupon the plaintiff paid the deposit and interest, together with the costs of suit, and now brought this action to recover the same, as well as the auction duty, which he had been compelled to pay. Lord *Ellenborough*, C. J., "The money paid on account of the *costs* in the cause, cannot be recovered in this form of action, which is for money paid only; to recover in such action, it should appear *clearly* to be money actually and necessarily paid to to the use of the party. There should have been a special count, inasmuch as the right of the plaintiff to the costs is not so apparent. The plaintiff might have defended the action of his own wrong, and without any authority from the defendant. If he had done so, he would not be entitled to call upon his principal to pay the costs, and in that case they would have been incurred without his consent. If the plaintiff had declared specially, the defendant would then have had notice of these points, the plaintiff's claim would have been on the record, and the defendant might have been prepared to contest it, which, under the present declaration, he cannot; the plaintiff may recover for the money actually paid on the other accounts."^(u)

Where an estate is sold by auction,^(x) if a good title is not made out according to the conditions of sale, and an action is brought against

(t) *A. G. v. Winstanley*, 2 Dow & Cl. D. P. 302.

(u) *Spurrier v. Elderton*, 5 Esp. N. P. C. 1. (x) *Burrough v. Skinner*, 5 Burr. 2639.

(1) An auctioneer cannot delegate his authority to sell by auction, but he may employ another person to use the hammer and make the outcry under his immediate direction and supervision; nor will his occasional absence during the sale, subject his servant to the penalties of the statute in Massachusetts, against selling by auction without a license. *The Commonwealth v. Harnden*, 19 Pick. 482; *Stone v. The State*, 12 Mis. 400.

An auctioneer to whom commissions are due for his services, in selling goods, has a right to appropriate so much of the money arising on the sales as may be due to him for his commission, to the payment of his individual debts to a purchaser at such sale *Harlan v. Sparr*, 15 Mis. 184.

the auctioneer, for the recovery of the deposit, who pays money into court, such action may be maintained, the deposit not appearing to have been paid over to the principal. An auctioneer is personally liable where he does not name his principal. Per *Kenyon, C. J., Hanson v. Roberdeau*, Peake's N. P. C. 120; *Short v. Lewis*, C. P. Jan. 14, 1841. So where the defendant was both auctioneer and attorney for the sellers, although he paid over the deposit to the sellers before demand, yet he was holden(y) liable, on the ground that he was not authorized to part with the deposit, when he must, from his employment as attorney for the sellers, have known long before he paid it over, that the title was disputable, and consequently that he had paid the money over in his own wrong. *Heath, J.*, added, that it was admitted that if express notice had been given to defendant not to pay over the money, the action would lie, and he considered the defendant's knowledge, as seller's attorney, of doubts as to the title, as equivalent to express notice. And in a more recent case,(z) it was determined that where an auctioneer sells an estate by public auction and receives a *deposit, it is his duty, as the agent of both vendor and pur- [*184], chaser, to retain the deposit until the sale is complete, and it is ascertained to whom the money belongs. Thus where an auctioneer sold an estate by public auction, and received the deposit, and signed an agreement stating that he acknowledged to have sold the estate, and that he agreed to complete the sale; and the sale was not completed on account of a defect of title; it was holden,(a) that the purchaser might recover the deposit in an action for money had and received against the auctioneer, though the latter had paid it over to the vendor without any notice from the purchaser not to do so, and before the defect of title was ascertained. In strict law, the auctioneer, being a stockholder, is not entitled(b) to notice of the contract having been rescinded. When the purchaser refuses to complete the contract, the question, whether the deposit is forfeited, if not expressly provided for, depends on the construction of the whole agreement; if not forfeited, it is recoverable, when the vendor has incapacitated himself from conveying, not before.(c)

When the vendor was the owner of the estate, and an objection having been made to the title, he offered to convey the estate with such title as he had, or to return the purchase money with interest; it was holden,(d) that further damages for the supposed goodness of the bargain could not be recovered. But where a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him; it was holden,(e) that a purchaser of certain lots might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss which he sustained by not having the contract carried into

(y) *Edwards v. Hodding*, 5 Taunt. 815. (z) *Gray v. Gutteridge*, 1 Man. & Ryl. 614.

(a) *Ibid.*

(b) *Duncan v. Cafe*, 2 M. & W. 244.

(c) *Palmer v. Temple*, 9 A. & E. 520.

(d) *Flureau v. Thornhill*, 2 Bl. Rep. 1078. (e) *Hopkins v. Grazebrook*, 6 B. & C. 31.

effect. In the foregoing case the defendant had sold property as his own, which was not so ; and the court was of opinion, that the defendant being in fault by representing himself as the owner of the property, the plaintiff's right was not restrained to nominal damages. But where premises for which a party had contracted were by him offered for resale before he had examined the abstract with the original deeds, although the title proved afterwards defective, it was holden, *(f)* that the damage, if any, resulting from such offer, arose from his own premature act, and not from any fault of the vendor, and consequently, that the vendor was only liable for the expenses incurred in the investigation of the title and nominal damages for the breach of the contract. *(1)*

In a case of this kind the purchaser may recover not only the [*185] *deposit paid, but also interest on it from the time when it was paid ; and it may be proper to add to the declaration a specific count for the interest, for interest cannot be recovered on a count for money had and received. *(g)* And where the purchaser, upon failure of the vendor to deduce a title, had recovered back the deposit in an action against the auctioneer, it was holden, *(h)* that he might recover interest on the deposit, in an action against the vendor for not completing his contract, under an averment for special damage. The expenses incurred in investigating the title may be recovered, if laid in the declaration as special damage. *(i)* but not on the count for money paid. *(k)* In *Gosbell v. Archer*, 4 Nev. & Man. 485 ; 2 A. & E. 500, it was holden, that upon an abandonment of an *unwritten* contract for the sale of land on defect of title, the expenses of investigating the title cannot be recovered, nor interest upon the deposit.

An auctioneer is not liable for interest on the deposit ; it was formerly considered that to make the auctioneer liable for interest, it must appear, 1st, that the contract on failure of condition had been rescinded ; 2ndly, that a demand of deposit had been made, and refusal to return it, *(l)* and, according to *Burrough, J.*, in *Curling v. Shuttleworth*, 6 Bingh. 134, it must have been proved, that the auctioneer had made interest of the money. But it has now been solemnly decided *(m)* that

(f) *Walker v. Moore*, 10 B. & C. 416.

(g) *Walker v. Constable*, 1 Bos. & Pul. 307 ; *Tappenden v. Randall*, 2 Bos. & Pul. 472 ; *Farquhar v. Farley*, 1 Moore, 322 ; 7 Taunt. 592. *Sed quere.* And see *Maberley v. Robins*, 5 Taunt. 625.

(h) *Farquhar v. Farley*, 7 Taunt. 592 ; 1 Moore, 322.

(i) *Bratt v. Ellis*, 2 Sugden's Law of V. and P. p. 51, ed. 10th ; *Jones v. Dyke*, *ib.* ; *Turner v. Beaurain*, *ib.* ; *Richards v. Barton*, 1 Esp. N. P. C. 268.

(k) *Camfield v. Gilbert*, 4 Esp. N. P. C. 221.

(l) Per *Burrough, J.*, *Lee v. Munn*, 8 Taunt. 55.

(m) *Harington v. Hoggart*, 1 B. & Ad. 577.

(1) Where the terms on which the land is sold at auction are that vendee shall give approved indorsed notes in thirty days, and if he fail, the land shall be resold at his risk, no action lies until a resale ascertains the deficit. *Webster v. Hoban*, 7 Cranch, 399. Where plaintiff, as auctioneer, sold to defendant goods by auction, to be paid for in an approved indorsed note at six months, and delivered the goods and demanded the note, which was refused ; it was held that the plaintiff might reclaim the goods or treat the sale as an absolute one without credit, and sue at once in *indebitatus assumpsit*. *Cortis v. Gardner*, 2 Hall, 345.

an auctioneer, pending the time which elapses between the payment of deposit and completion of title, is a mere stakeholder, and not liable for interest to the vendor, although the vendor (without the concurrence of the vendee) gave the auctioneer notice to invest the money in government securities, and although interest may have been made. As the auctioneer is entitled to retain the deposit, until the contract is completed, without paying interest for it, where the amount of the deposit is large, it may be advisable to stipulate that, pending the investigation of the title, the deposit should be invested in exchequer bills.

By stat. 3 & 4 Will. IV. c. 42, s. 28, "Upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, *then [*186] from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law."

Where leasehold premises are sold by auction, and the lease containing the usual covenant to repair is produced and read to the bidders, if a part of the buildings, *e. g.* a summer-house, demised and described in the lease, has been pulled down before the sale, the purchaser is not bound to complete the purchase, and may recover his deposit. *N.* The summer-house was not described in the particulars of sale.⁽ⁿ⁾

Assumpsit for money had and received.^(o) *Plea, N. A.* This action was brought to recover the deposit money paid by plaintiff, who was the purchaser of an annuity sold by defendant (an auctioneer) at a public auction. One of the conditions of sale was, that a good title should be made out by the 10th of July. In the beginning of July the plaintiff called on the seller of the annuity to show him the title deeds, but he, not having them in possession, gave him an abstract of the title which did not mention any of the deeds. Bearcroft suggested that application ought to have been made to the vendor at an earlier period, in order to enable him to procure the title deeds by the 10th of July. *Kenyon, C. J.*, "A seller of an estate ought to be prepared to produce his title deeds at the particular day. A court of equity will, under particular circumstances, enlarge the time;^(p) but then the circumstances entitling him to such indulgence must clearly appear, which is not the case in this instance. It is objected, that the plaintiff had no right to the possession of the deeds: but though he had no right to keep them, he had a right to inspect. A court of equity would have

(n) *Granger v. Worms*, 4 Campb. 83.

(o) *Berry v. Young*, 2 Esp. N. P. C. 640.

(p) *Langford v. Pitt*, 2 P. Williams, 630. But see *Lloyd v. Collett*, in Court of Chancery, 28th Nov. 1793, on motion for injunction. 4 Bro. C. C. 469; 4 Ves. 689. Cited also by *Graham, Baron*, in *Omerod v. Hardman*, 5 Ves. 737. See also *Wynn v. Morgan*, 7 Vesey, 202.

obliged the vendor to give attested copies of the deeds at his own expense, with an undertaking to produce them thereafter at the vendee's expense for the support of his title. As the seller has here failed in completing his engagement, plaintiff is entitled to a return of the deposit." Verdict for plaintiff 280*l.*, amount of deposit. The day for the completion of the purchase of an interest in land, inserted in a written contract, cannot be waived(*q*) by a parol agreement, and another day substituted, so as to bind the parties.

An action for money had and received was brought to re-
[*187] cover *the amount of a deposit paid by the plaintiff to the defendant, (*r*) on an agreement for the purchase of an estate, the defendant having failed to make out a good title on the day when the purchase was to be completed. The abstract of the title delivered to the plaintiff began in the year 1798, and after reciting that the deeds relating to the estate had been lost, stated a fine and non-claim. Upon inquiry it was found that the fact of the deeds having been lost was not true. The counsel for the defendant said, they were ready to make out a good title. *Kenyon*, C. J., "As to the sentiments which I have long entertained relative to the purchase of real estates, I find no reason for receding from them. They have been confirmed by conversing with those whose authority is much greater than mine. The vendor must be prepared to make out a good title on the day when a purchase is to be completed. Indulgence, I am aware, is often given for the purpose of procuring probates of wills, letters of administration, and acts of parliament. But this indulgence is voluntary on the part of the intended purchaser; it is the duty of the seller to be ready to verify his abstract at the day on which it was agreed that the purchase should be completed. If the seller deliver an abstract, setting forth a defective title, the plaintiff may object to it. No man was ever induced to take a title like the present. A fine and non-claim are good splices to another title, but they will not do alone. There are many exceptions in the statute in favour of infants, femmes covert, &c. *Erskine*, for the defendant: "Do I understand your Lordship to say, that though the defendant can now make out a good title, yet as that title did not form a part of the abstract, the plaintiff may avail himself of that circumstance?" *Kenyon*, C. J., "He certainly may, and avoid the contract. When the abstract is delivered by the seller, he must be able to verify it by the title deeds in his possession. As a good title was not made out at the day fixed, I shall direct the jury to find a verdict for the deposit, with interest up to that day." The jury found a verdict for the plaintiff accordingly.(1)

Where, in an action by purchaser against vendor for not making out a good title, it was not shown upon the declaration that a precise day

(*q*) Per *Tindal*, C. J., delivering judgment of the court in *Stowell v. Robinson*, 3 Bingham N. C. 937, 8, recognizing *Goss v. Lord Nugent*, 5 B. & Ad. 58.

(*r*) *Cornish v. Rowley*, B. R. Middlesex Sittings after M. T. 40 Geo. III. MSS. See *Wilde v. Fort*, 4 Taunt. 334; *Hagedon v. Laing*, 1 Marsh. 514; *Martindale v. Smith*, 1 Q. B. 389, 1 G. & D. 1, *post*, tit. "Trover."

(1) See *Bank of Columbia v. Wagner*, 1 Peters, S. C. 455.

was fixed by which it was incumbent on the vendor to deduce a good title, inasmuch as the law implied that the party should have a reasonable time; it was holden,^(s) that it should have been alleged in the declaration, that a reasonable time had been allowed to the vendor.

A contract to make a good title means a title good both at law and in equity. Therefore, in an action^(t) to recover back the deposit* on a purchase, upon the vendor's failure to make a [*188] good title, a court of law will collaterally inquire whether the title be good in equity. And where upon a sale^(u) there is such a doubt upon the vendor's title as to render it probable that the purchaser's right may become a matter of investigation, the court will not compel the purchaser to complete the purchase. But in assumpsit^(x) to recover a deposit upon a purchase, upon an allegation that the defendant has failed to make proper title, the Court of C. B. held, that they would not consider, whether the title is of a doubtful description, such as a court of equity would not compel an unwilling purchaser to take, but simply whether the defendant has or has not a legal title to convey. "We are not to consider ourselves as a court of equity, where the seller is seeking to enforce the purchase by bill for a specific performance, in which case that court frequently refuses the aid of its authority to enforce a performance where the title is of an unmarketable or even doubtful description; leaving the party to his action at law for damages; but we are called upon to answer the simple question on this record, whether, on the construction of a deed, the defendant has or has not a legal title to convey to a purchaser: and although the deed appears to be inartificially framed, we think, upon the proper construction of it, the defendant has, and at the time of the exposure to sale had, good right and title to sell and assign to the plaintiff, and consequently that the present action, grounded on that breach of contract, cannot be maintained."^(y)

In every contract for the sale of an existing lease, there is an implied undertaking by a vendor (if the contrary be not stipulated in express terms) to make out the lessor's title to demise;^(z) and from the short residue of the term, the small value of the property, and the absence of any premium for the lease, it cannot be inferred, that the vendee intended to waive his right to call for the production of the lessor's title.

Auctioneers who take upon themselves to describe in their particulars the property to be sold, should truly describe it;^(a) for the buyers act on the faith of those descriptions. Hence, where leasehold houses were described in the particulars and conditions of sale as a well secured

^(s) *Sansom v. Rhodes*, 6 Bingh. N. C. 261.

^(t) *Maberley v. Robins*, 5 Taunt. 625; 1 Marsh. 258. See *Willett v. Clarke*, 10 Price, 207.

^(u) *Curling v. Shuttleworth*, 6 Bingh. 121, stated by *Alderson, J.*, in *Boyman v. Gutch*, 7 Bingh. 390, to have been questioned in *K. B.*

^(x) *Boyman v. Gutch*, 7 Bingh. 379.

^(y) Per *Tindal, C. J.*, delivering judgment of court in *Boyman v. Gutch*, *ubi sup.*

^(z) *Souter v. Drake*, 5 B. & Ad. 992; 3 Nev. & Man. 40, overruling *Abbott, C. J.*, in *George v. Pritchard*, Ryan & Moody, 417. *Souter v. Drake* was recognized in *Hall v. Betty*, 4 M. & Gr. 413; 5 Scott's N. R. 508.

^(a) *Coverley v. Burrell*, 5 B. & A. 257.

rental with reversionary interest, and as an eligible investment, and no notice was given that, by the provisions of a local act power was given to a market company to purchase and take the property [*189] for the purposes of the act, it was holden, (b) *that the purchaser was entitled to rescind to contract. When certain goods were put up for sale, and each lot was described as being of so many yards, and the goods were open to public inspection for two days before the sale, and by the printed conditions of sale the purchaser of any lot was to pay down a deposit; the lots to be taken away with all faults, imperfections, or errors of description, on a day specified, and the remainder of the purchase money to be paid on delivery, the biddings at the sale being at so much per yard; it was holden that in such a sale no condition is implied, that a purchaser may inspect and measure the lots before paying the remainder of the purchase money, (c) and that payment before delivery meant delivery for any purpose.

A written paper, delivered by an auctioneer to a bidder to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, and the rent payable, is not such a memento of an agreement as requires a stamp, unless it be signed by some of the parties or by the auctioneer; nor is it such a writing as will exclude parol evidence: (d) but if signed by the auctioneer, and delivered to the bidder, it ought to be stamped. (e)

Where, by the conditions, the only authority given to the auctioneer is to receive the deposit money, and no agent is named for the purpose of receiving the remainder of the purchase money, the payment of such remainder ought to be made to the vendor (f) or his general agent, which the auctioneer is not. At all events, the auctioneer, under such conditions, has no authority to receive the purchase money by means of a bill of exchange.

A lessee of lands subject to a covenant against certain obnoxious trades, with a proviso for re-entry, granted under-leases of houses erected on the land, not containing a similar covenant and proviso: it was holden, (g) that a purchaser by auction of houses on the same land, and of the improved ground-rents of the houses so underlet, might recover his deposit, this omission in the under-leases not having been mentioned in the conditions of sale. (1) In an action against the vendor of an estate to recover the deposit on a contract for the purchase, if the defendant, on notice, produce the contract, the plaintiff need not prove

(b) *Ballard v. Way*, 1 M. & W. 520.

(c) *Pettitt v. Mitchell*, 4 M. & Gr. 819; 5 Scott's N. R. 721, distinguishing the cases of *Howe v. Palmer*, 3 B. & Ald. 321; and *Lorymer v. Smith*, 1 B. & C. 1.

(d) *Phillipps on Evid.* 530, 5th ed. cites *Ramsbottom v. Tunbridge*, 2 M. & S. 434; *Ingram v. Lea*, 2 Campb. 521; *Adams v. Fairbairn*, 2 Stark. N. P. C. 277.

(e) *Ramsbottom v. Mortley*, 2 M. & S. 445.

(f) *Sykes v. Giles*, 5 M. & W. 645.

(g) *Waring v. Hoggart*, 1 Ry. & M. 39.

(1) Where goods have been sold by a licensed auctioneer, the principal may maintain an action in his own name against the vendee, whether such action be for the price of the goods or for damages for not taking and paying for them. *Girard v. Taggart*, 5 S. & R. 19; *Halse v. Young*, 16 Johns. Rep. 1; *Carlew v. Gardner*, 2 Hall, 345.

its execution ;(*h*) for an instrument produced on notice by a party claiming an interest under it, does not require to be so proved.

*CHAPTER VII.

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BANKRUPT.

- I. OF THE ALTERATIONS MADE IN THE BANKRUPT LAWS BY STAT. 6 GEO. IV. c. 16; STAT. 1 & 2 WILL. IV. c. 56, ESTABLISHING A COURT OF BANKRUPTCY; STAT. 5 & 6 VICT. c. 122, AND OTHER STATUTES. p. 190, 1.
- II. OF PERSONS LIABLE TO BE BANKRUPTS. p. 195.
- III. OF PERSONS NOT LIABLE TO BE BANKRUPTS. p. 197.
- IV. OF THE SEVERAL ACTS OF BANKRUPTCY. p. 197; AND OF THE BANKRUPTCY OF JOINT STOCK COMPANIES. p. 221; AND OF PERSONS HAVING PRIVILEGE OF PARLIAMENT. p. 226.
- V. OF THE PETITIONING CREDITOR'S DEBT. p. 227.
- VI. OF PROPERTY IN POSSESSION OF THE BANKRUPT AS REPUTED OWNER. p. 232.
- VII. OF WARRANTS OF ATTORNEY, CONVEYANCES, AND PAYMENTS MADE BY AND TO BANKRUPTS. p. 247.
- VIII. OF ACTIONS WHICH MAY BE BROUGHT BY THE ASSIGNEES OF A BANKRUPT. p. 255; AND IN WHAT MANNER THEY OUGHT TO SUE. p. 260; ACTIONS AGAINST ASSIGNEES. p. 262.
- IX. OF ACTIONS BY THE BANKRUPT. p. 264.
- X. OF THE PLEADINGS. p. 265.
- XI. OF THE EVIDENCE. p. 283.

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- I. *Of the Alterations made in the Bankrupt Laws by Stat. 6 Geo. IV. c. 16; Stat. 1 & 2 Will. IV. c. 56, establishing a Court of Bankruptcy; Stat. 5 & 6 Vict. c. 122, and other Statutes.*

THE legislature having deemed it expedient to amend the laws relating to bankrupts, and to simplify the language thereof, and to consolidate the same in one act, and to make other provisions respecting bankrupts, by a statute, (6 Geo. IV. c. 16, which passed on the 2nd of May, 1825, to take effect on the 1st of September in that year,) repealed the following statutes:—

- | | |
|--------------------------|--------------------|
| 34 & 35 Hen. VIII. c. 4. | 10 Ann. c. 15. |
| 13 Eliz. c. 7. | 7 Geo. I. c. 31. |
| 1 Jac. I. c. 15. | 5 Geo. II. c. 30. |
| 21 Jac. I. c. 19. | 19 Geo. II. c. 32. |
| *13 & 14 Car. II. c. 24. | 24 Geo. II. c. 57. |

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(*h*) *Bradshaw v. Bennett*, M. & Rob. 143; 5 C. & P. 48.

4 Geo. III. c. 83.
 36 Geo. III. c. 90.
 37 Geo. III. c. 124.
 45 Geo. III. c. 124.
 46 Geo. III. c. 135.
 49 Geo. III. c. 121.

56 Geo. III. c. 137.
 1 Geo. IV. c. 115.
 3 Geo. IV. c. 74.
 3 Geo. IV. c. 81.
 5 Geo. IV. c. 98.

The stat. 5 & 6 Vict. c. 122, s. 2, repeals all laws inconsistent or at variance with the provisions of that act.

The statute of 6 Geo. IV. c. 16, in many of its provisions, corresponds with the enactments of former statutes, and therefore, in the following pages, such of the decisions as have been made on the construction of those statutes, and are likely to occur again, will be inserted.

By stat. 1 & 2 Will. IV. c. 56, and by H. M. letters patent, in pursuance of that statute, a Court of Bankruptcy was established, consisting, at first, of a chief judge and three other judges, *(a)* and six commissioners. *(b)* It is a court of law and equity, and has all the powers and privileges incident to a court of record. *(c)* The judges form a court of review, and have superintendence and control in all matters of bankruptcy, *(d)* co-extensive with, but not exceeding, *(e)* the Chancellor's former jurisdiction, and subject to an appeal *(f)* to the Chancellor on matters of law and equity, or on the refusal or admission of evidence only. Whether a man be a trader is a question of fact on which an appeal does not lie. *(g)*

The six commissioners are formed into two subdivision *(h)* courts, consisting of three commissioners for each court, and have all the powers *(i)* which former commissioners had; *(k)* and now by stat. 5 & 6 Vict. c. 122, s. 66, any commissioner of the Court of Bankruptcy, authorized to act in the prosecution of any fiat, shall be deemed to be a court authorized to act in the prosecution of such fiat, and all matters and duties authorized to be done by the Court of Bankruptcy, may be done by one or more of the commissioners. *(l)* In every case where the Lord Chancellor had, by any former act, power to issue a commission, he, M. R., V. C., and each of the masters in chancery acting under a special appointment from the Lord Chancellor, may issue a fiat, *(m)*

[*192] in lieu of a commission authorizing *the creditor to prosecute his complaint in the Court of Bankruptcy, or elsewhere, before such persons as shall be appointed in the fiat, who are to have like

(a) The number of judges has since been reduced. See stat. 3 & 4 Will. IV. c. 47, s. 7; 5 & 6 Will. IV. c. 29, s. 21; and by stat. 5 & 6 Vict. c. 122, s. 64, the Court of Review may be formed by one judge.

(b) Stat. 1 & 2 Will. IV. c. 56.

(c) Sect. 1, and declaratory enactment in 5 & 6 Will. IV. c. 29, s. 25.

(d) 1 & 2 Will. IV. c. 56, s. 2.

(e) *Ex parte Lucas*, 1 Mont. & Ayr. 103.

(f) Sec. 3; *Exp. Keys*, 1 Mont. & Ayr. 226, 240.

(g) *Exp. Hinton*, 2 Dea. & Ch. 407.

(h) Sect. 6.

(i) Sect. 7. See also 5 & 6 Will. IV. c. 29, s. 23, 4.

(k) See enlarged powers of subdivision courts in 5 & 6 Will. IV. c. 29, s. 23, 4, 5.

(l) As to commissioners' power of commitment, see *post*, tit. "Imprisonment."

(m) 1 & 2 Will. IV. c. 56, s. 12.

power as if appointed by commission under the great seal. The provisions(*n*) of former acts, and all rules and orders then in force, extend to this act, and fiats issued under it, to all purposes, as if such fiat were a commission under the great seal, except as otherwise directed by this act.—Traders disputing(*o*) the adjudication are, within a limited time, to present a petition for reversal to the Court of Review, who are to decide thereon, having power, if they think fit, to direct issues for a trial by jury before the chief judge, or one or more of the other judges, of matters of facts affecting the validity of the adjudication.

By the stat. 5 & 6 Vict. c. 122, the whole arrangement with regard to the working of country fiats has been altered, and in lieu of the former system, district courts have been established in various parts of the country, to which official assignees have been attached; and by No. 6, of the general orders of 12th November, 1842, the present practice of the Court of Bankruptcy when not inconsistent with the act or those rules, is to be followed in such court, and every district court.

By the 23rd section of stat. 5 & 6 Vict. c. 122, every person adjudged bankrupt is to have notice thereof, before the adjudication is advertised in the *London Gazette*, and is also to be allowed five days to show cause against the adjudication; and the 24th section enacts, that if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication) within twenty-one days after the advertisement of the bankruptcy in the *London Gazette* (or if he were in any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceeding, to dispute or annul the fiat, and shall not have prosecuted the same with due diligence and with effect, the *Gazette* containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, and that such fiat was sued forth on the day on which the same is stated in the *Gazette* to bear date, saving all rights which shall have accrued to any such person as aforesaid previous to the commencement of this act, and in respect of which any proceedings shall be pending at the time of the commencement of this act which shall be adjudged and determined, as if this act had not been passed. See in *re Thorold*, 1 Phill. 239; 3 M. D. & D. 285.

*It has been decided, (*p*) that this section does not make the [*193] *London Gazette* containing the advertisement of the adjudication of bankruptcy conclusive evidence of the bankruptcy, when the adjudication was made before the 11th day of November, 1842, on which day this act came into operation.

(*n*) 1 & 2 Will. IV. c. 56, s. 16.

(*p*) *Edwards v. Sherren*, 11 M. & W. 595.

(*o*) Sect. 17.

Upon the reversal of any adjudication, Chancellor may order fiat to be rescinded, *(q)* and such order shall have the validity of a supersedeas of a former commission under existing laws. The Chancellor is empowered *(r)* to appoint official assignees, not exceeding thirty, to act in all bankruptcies prosecuted in the Court of Bankruptcy, one of whom is to be, in all cases, an assignee of each bankrupt's estate, with the assignees chosen by the creditors; and the personal estate and effects, and the rents of the real estate, and the proceeds of sale of all the estate and effects, real and personal, of the bankrupt are to be received by such official assignee alone, except where otherwise directed by court. The personal estate *(s)* of the bankrupt, present and future, becomes vested in the assignees without any deed, by virtue of their appointment; and so, in case of death or removal, in the new assignees. So present and future real estate, *(t)* in United Kingdom or colonies, vests in assignees without any deed of conveyance, with a proviso, *(u)* that in cases where the conveyance would require to be registered, a certificate of appointment of assignees shall be registered. Where the bankrupt had purchased the office of under marshal of the city of London, it was holden, *(x)* that this was an office which did not concern the administration of justice, and that the assignees might lawfully sell it. But where the East India Company had made a grant, not under seal, of a retiring pension to a military officer of the company, it was holden, *(y)* that this pension did not, upon his bankruptcy, pass to his assignees.

It must be remarked here, that the statute for abolishing fines and recoveries, 3 & 4 Will. IV. c. 74, expressly repeals the stat. 6 Geo. IV. c. 16, s. 65, so far as relates to estates tail; and to that extent also virtually repeals the 26th section of the 1st and 2nd Will. IV. c. 56, and empowers *(z)* any commissioner acting in any fiat, by deed, enrolled within six months after its execution, to dispose of the lands of any bankrupt, tenant in tail, to any purchaser, for the benefit of his creditors, and to create, by such disposition, as large an estate as the bankrupt himself could have done under the act. The statute 1 & 2 Will.

IV. c. 56, is still in force in respect of real estates of which a [*194] bankrupt is seised in fee; and, *indeed, also respecting his estates tail, *(a)* until they are conveyed by the commissioners. But the commissioners appear to be the proper parties to convey the bankrupt's estate tail, under the statute 3 & 4 Will. IV. c. 74, s. 56; and the assignees the proper parties to convey the bankrupt's estates in fee simple, under the 1 & 2 Will. IV. c. 56. *(b)* By stat. 3 & 4 Will. IV. c. 74, s. 67, assignees are empowered to recover rents of the lands of a bank-

(q) 1 & 2 Will. IV. c. 56, s. 19.

(r) Sect. 22.

(t) Sect. 26.

(x) *Exp. Butler*, 1 Atk. 210.

(y) *Gibson v. East India Co.*, 5 Bingh. N. C., 262, in which case the doctrine cited, *ante*, p. 70, from the case of *Church v. Imperial Gas Co.*, was recognized. See *Wells v. Foster*, 8 M. & W. 151.

(z) 3 & 4 Will. IV. c. 74, s. 56.

(a) See *Exp. Somerville*, 1 Mont. & Ayr. 408; 3 Deac. & Ch. 668.

(b) See Cru. Dig. vol. i. p. 88, 4th ed. by H. H. White, where the reader will find the other provisions of this act relating to bankrupts' real estates.

(s) Sect. 25.

(u) Sect. 27.

rupt, of which the commissioner has power to make disposition, and to enforce covenants, as if entitled to the reversion, until such disposition made, or until it is ascertained that such disposition is not required. This clause applies to all copyhold lands; but as to lands of any other tenure, to such only as the commissioner may dispose of after the bankrupt's death. By stat. 6 Geo. IV. c. 16, s. 77, all powers vested in any bankrupt which he might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice) may be executed by the assignees for the benefit of the creditors, in such manner as the bankrupt might have executed the same.

Formerly a *commission* might have been superseded, on the ground that it had been concerted between the petitioning creditor, his solicitor, or agent, or any of them, and the bankrupt, &c.; but by stat. 1 & 2 Will. IV. c. 56, s. 42, no commission of bankrupt shall be superseded, nor any fiat annulled, nor any adjudication reversed, by reason only that the commission, fiat, or adjudication has been concerted by and between the petitioning creditor, his solicitor, or agent, or any of them, and the bankrupt, his solicitor, or agent, or any of them. This statute did not give validity to fiats founded on concerted *acts of bankruptcy*, and therefore the execution of a deed, whereby a trader assigned all his property to a trustee for the benefit of all his creditors, was holden not to be an act of bankruptcy, sufficient to support a fiat, founded on the petition of a creditor who was either a party or privy to such deed.^(c) But by the 7th section of 6 Geo. IV. c. 16, one species of act of bankruptcy, *viz.* a declaration of insolvency, though concerted between the bankrupt and a creditor, is rendered valid by express enactment: and by the subsequent stat. 5 & 6 Vict. c. 122, s. 8, it is enacted, that no fiat in bankruptcy shall be deemed invalid by reason of any act of bankruptcy of the person against whom the adjudication of bankruptcy thereunder shall be made, having been concerted or agreed upon between the bankrupt and any creditor or other person, save and except where any petition to supersede or annul a fiat for any such cause shall have been already presented, and shall be now pending.

*II. *Of Persons liable to be bankrupts.* [*195]

By stat. 6 Geo. IV. c. 16, s. 135, this act shall extend to aliens, denizens, and women, both to make them subject thereto, and to entitle them to all the benefits given thereby.

Any person being a trader, and capable of contracting in the way of trade, may become a bankrupt. Lord *Hardwicke*, Ch., refused to supersede a commission⁽¹⁾ which had been taken out against a clergy-

^(c) *Marshall v. Barkworth*, 4 B. & Ad. 508; 1 Nev. & M. 279, recognizing *Bamford v. Baron*, 2 T. R. 594, n. post, p. 209.

(1) The reader should be reminded, that the commission is now abolished, and the fiat is substituted in its place by 1 & 2 Will. IV. c. 56, s. 12; it is, however, necessary to retain the word throughout this chapter, with reference to the old law on this subject.

man, who was proved to have been a trader and had committed an act of bankruptcy, although it was urged, that clergymen were prohibited from trading, by stat. 21 Hen. VIII. c. 13, s. 5, (d) and that all contracts made by them in trade, were, by that statute, declared to be void. (e) The illegality of the trading makes no difference, for a party cannot set up his own illegality to prevent himself from being made a bankrupt; (f) and therefore a smuggler may be a trader, within the bankrupt act. (g) In 1 Atk. 201, Lord *Hardwicke* said, that a commission of bankruptcy had been taken out against a peer, an Earl of Suffolk, for trading in wines; and though there might be some powers that the commissioners of bankrupts could not exercise against a peer, yet, notwithstanding this, he might be liable to a commission of bankruptcy, *if he would trade*. See also *Highmore v. Molloy*, 1 Atk. 206, where Lord *Hardwicke* said, that a public officer, as an exciseman, &c., made himself subject to the bankrupt law. A feme covert, sole trader, according to the custom of London, may bind herself by contracts made for the support of her trade, and consequently a commission of bankruptcy may be taken out against her, with respect to her separate effects in trade; (h) but a commission issued against an infant is void, (i) and not merely voidable. (1)

[*196] *By the second section of the statute of Geo. IV. c. 16, the following persons shall be deemed to be traders liable to become bankrupt:—

Bankers, (2)	Persons insuring ships or their
Brokers, (3)	freight, or other matters, against
Persons using the trade or pro-	perils of the sea,
fession of a scrivener, receiv-	Warehousemen,
ing other men's moneys or	Wharfingers,
estates into their trust or	Packers,
custody, (4)	Builders, (5)

(d) See also stat. 57 Geo. III. c. 99.

(e) *Ex parte Meymot*, 1 Atk. 196.

(f) Per *Holroyd, J.*, in *Cobb v. Symonds*, 5 B. & A. 516; 1 D. & R. 111.

(g) *S. C.*

(h) *Lavie v. Phillips*, 3 Burr. 1776; 1 Bl. R. 570. See also *Ex parte Franks*, 7 Bingh. 762.

(i) *Belton v. Hodges*, 9 Bingh. 365.

(1) The new Insolvent Act, stat. 5 & 6 Vict. c. 116, protects from all process against the person, such persons as are not traders within the meaning of the bankrupt laws, or being such traders owe less than 300*l.*, on taking certain steps directed by the act. This Act has been amended by the stat. 7 & 8 Vict. c. 96. Arrangements between debtors and creditors of persons not being traders within the meaning of the bankrupt laws are facilitated by the stat. 7 & 8 Vict. c. 70.

(2) This includes a person acting as banker, though not keeping an open shop. *Ex parte Wilson*, 1 Atk. 218.

(3) This includes pawnbrokers, *Rawlinson v. Pearson*, 5 B. & A. 124, and see *Highmore v. Molloy*, 1 Atk. 206; ship-brokers, *Pott v. Turner*, 6 Bingh. 702; 4 M. & P. 551; and bill-brokers, *Ex parte Phipps*, 2 Deac. 487.

(4) An attorney does not become a scrivener liable to be made a bankrupt under this Act, by lending the money of clients, and charging a procuration fee to the borrowers. *Lott v. Melville*, 3 M. & Gr. 40; 3 Scott's N. R. 346; in this case it was also held, that a transaction in which an attorney calls in and receives the money of a client, and retains the money in his possession, paying interest to that client upon the amount, is not a trading as a money scrivener.

(5) See *Ex parte Neirincks*, 2 Mont. & Ayr. 384; 1 Deac. 78.

Carpenters,
 Shipwrights,
 Victuallers,
 Keepers of inns, taverns, hotels,
 or coffee houses,(1)
 Dyers,
 Printers,
 Bleachers,
 *Fullers,
 Callenderers,
 Cattle or sheep salesmen,(2)
 All persons using the trade of

merchandize, by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross, or by retail. All persons who either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting [*197] for hire, or by the workmanship of goods or commodities.

By stat. 5 & 6 Vict. c. 122, s. 10, all livery stable-keepers, coach-proprietors, carriers, ship-owners, auctioneers, apothecaries, market-gardeners, cow-keepers, brick-makers, alum-makers, lime-burners, and millers, shall be deemed traders, and subject and liable as traders to this and to the other statutes relating to bankrupts.

III. *Of Persons not liable to be Bankrupts.*

Farmer,(3)	Member of, or subscriber to, any
Grazer,	incorporated commercial or trad-
Common Labourer,	ing companies, established by char-
Workman for hire,	ter or act of parliament.
Receiver-general of the taxes,	

See the 2nd section of stat. 6 Geo. IV. c. 16.

IV. *Of the several Acts of Bankruptcy, p. 197, and of the Bankruptcy of Joint-Stock Companies, p. 221, and of Persons having Privilege of Parliament, p. 226.*

1. *Departing this Realm*, p. 198, 9.
2. *Remaining Abroad*, p. 198, 9.

(1) "The word *hotel* is not used in the sense of the old word *hostel*, for that means what is now termed an inn; and as the word *inn* precedes, it could scarcely have been intended to designate the same thing by both. The modern word is introduced from the French, and rather implies a house to which people resort for lodging, than for the sort of entertainment which is to be procured only at an inn." Per *Tindal*, C. J.; *Smith v. Scott*, 9 Bingham 17; 2 M. & Sc. 35; in which case it was holden, that the keeper of a private lodging house, who also sought a profit by furnishing her guests with provisions, although such provisions were set apart as the separate property of each guest, was liable to the bankrupt laws. So a person, who kept a boarding and lodging-house, where guests were entertained by the month or week, each having a bed-room to himself, but taking his meals with the proprietor of the house, was holden within the meaning of this clause. *Gibson v. King*, 10 M. & W. 667, recognizing *Smith v. Scott*. R., a livery stable-keeper, bought provender, and sold it to his customers, and any who applied for it, as is done in all livery-stables; it was holden, a sufficient trading. *Cannan v. Denew*, 10 Bingham 292; 3 M. & Sc. 761.

(2) See *Ex parte Newall*, 3 Deac. 333.

(3) See *Carter v. Dean*, 1 Swans. 64; *Ex parte Lavender*, 4 Deac. & Chit. 487; 2 Mont. & Ayr. 103.

3. *Departing from his Dwelling-house*, p. 198, 9.
4. *Otherwise absenting himself*, p. 198, 200.
5. *Beginning to keep House*, p. 198, 201.
6. *Suffering himself to be Arrested for any Debt not due*, p. 198, 204.
7. *Yielding himself to Prison*, p. 198, 204.
8. *Suffering himself to be Outlawed*, p. 198, 204.
9. *Procuring himself to be Arrested, or his Goods, &c., to be Attached, Sequestered, or taken in Execution*, p. 198, 204.
10. *Making any Fraudulent Grant of his Lands, &c.*, p. 198, 205.
- [*198] *11. *Or any Fraudulent Surrender of his Copyhold Lands*, p. 198, 205.
12. *Or any Fraudulent Gift or Transfer of his Goods, &c.*, p. 198, 205.
13. *Lying in Prison for 21 Days*, p. 214.
14. *Escaping out of Prison or Custody*, p. 214, 6.
15. *Filing a Declaration of Insolvency*, p. 217.
16. *Paying Money, or giving Security to Persons who struck the Docket*, p. 217.
17. *Creditor Filing Affidavit of Debt*, p. 218.
18. *Debtor not attending Summons, or attending and not admitting Demand, or deposing to a good Defence, and not Paying, Securing, or Compounding for such Demand within 14 Days*, p. 219.
19. *Signing an Admission of Demand, and not Paying, Tendering, Securing, or Compounding for the same within 14 Days*, p. 219.
20. *Admitting a part of Demand, and not Paying or Tendering or Securing or Compounding for it, and as to Residue, not making Deposition of a good Defence to it, or Paying, Securing, or Compounding for it*, p. 219.
21. *Filing Petition for Discharge in Insolvent Court*, p. 220.
22. *Not Paying, Securing, or Compounding for a Judgment Debt within 14 Days after Notice*, p. 220.
23. *Disobeying Order of a Court of Equity, or in Bankruptcy or Lunacy, for Payment of Money*, p. 221.

By stat. 5 & 6 Vict. c. 122, s. 7, no person shall be liable to become bankrupt, by reason of any act of bankruptcy committed more than twelve months prior to the issuing of any fiat in bankruptcy against him.

By stat. 6 Geo. IV. c. 16, s. 3, if any such trader shall depart this realm, or being out of this realm, shall remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison, or suffer himself to be outlawed; or procure himself to be arrested, or his goods, money, or chattels, to be attached, sequestered, or taken in execution; or make, or cause to be made, either within this realm, or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels; or make, or cause to be made, any fraudulent surrender of any of his copyhold lands, or tenements; or make, or cause to be made, any fraudulent gift, delivery, or transfer of any of his goods or chattels; every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made, any of the acts, deeds, or matters aforesaid, *with intent to defeat or delay his creditors*, shall be deemed to have thereby committed an act of bankruptcy.

- [*199] *1. *Depart this realm; 2, or, being out of this realm shall remain abroad.*

Since the decision in *Robertson v. Liddell*,^(k) in which the construction laid down in *Fowler v. Padget*^(l) was overruled, merely departing this realm, although it is not proved that any creditor was thereby de-

(k) 9 East, 487.

(l) 7 T. R. 509.

feated or delayed in the recovery of his debt, if such departure was with an intention so to defeat or delay them, will constitute an act of bankruptcy.

B. & C. having been partners in trade in London, under the firm of B. & C., upon a dissolution of this partnership, agreed that C. should from that time carry on trade in London on his sole account, and that B. should establish and conduct a house of trade in Dublin, under the firm of B. & C.; in the profits of which C. should equally participate: that all goods ordered by B. to be purchased by C. in England, and sent by him for the use of B. & C. to be sold in Dublin, should be charged by C. to the firm at prime cost only. It did not appear that the creditors in general were apprised of this alteration. B. having come over to London for the purpose of making some arrangements with his creditors, was informed, a few days before the time which he had fixed for a meeting with them, that J. S. was about to arrest him on the following day. J. S. had furnished to the order of C. goods which had been sent to B. & C. for sale, J. S. knowing, when he accepted the order, that they were destined for B. & C., and having credited them in his books. C. sent the goods to B. & C. without charging any profit on them. B., in consequence of the intimation, immediately returned to Dublin, to avoid being arrested. During the whole of his residence in Dublin, he had continued to keep his former house in London; his name was on the door, and his wife and family had continually resided in it. The court adjudged, that there was a debt due from B. to J. S., because the goods were furnished on the joint account, and that B. had committed an act of bankruptcy, by departing the realm with an intent to delay a creditor.(m)

3. *Depart from his dwelling-house.*

To constitute this an act of bankruptcy, the intention of the debtor to delay his creditor, by departing from his dwelling-house, is sufficient.(n) But if the departure be not with such intent, it is not an act of bankruptcy. Whether the departing from the dwelling-house be accompanied with an intent to delay a creditor, is a question of fact for the jury to decide, upon all the circumstances.(o) "If a trader leave his house, circumstances may show that it was *not for [*200] the purpose of absconding."(p) In a case where there was an inchoate intention by a trader to delay his creditors, by not returning to his dwelling-house in case a particular event happened; but which event not having happened, the trader did, in fact, return to his dwelling-house according to his usual habit, the court(q) considered this as a departure not with an absolute, but only with an inchoate intent to delay, and, consequently, not an act of bankruptcy.

(m) *Williams v. Nunn*, 1 Taunt. 270.

(n) *Hammond v. Hincks*, 5 Esp. N. P. C. 139; *Robertson v. Liddell*, 9 East, 487.

(o) *Aldridge v. Ireland*, cited in *Williams v. Nunn*, 1 Taunt. 273; *Holroyd v. Whitehead*, 3 Campb. 530.

(p) Per Lord Mansfield, C. J., in *Worsley v. Demattos*, 1 Burr. 467; 2 Kenyon, 237, S. C.

(q) *Fisher v. Boucher*, 10 B. & C. 705. See also *Key, Assignee of Sherwin, v. Shaw*, 8 Bingh. 320.

4. *Otherwise absent himself.*

If a person, who has not a constant dwelling, absent himself from his usual abode with design to defeat or delay his creditors, he shall be adjudged a bankrupt.^(r) On the 28th of November, Hall rode out of town, and returned in the evening, before which a bailiff had been at his shop to arrest him; the next morning he sent for the bailiff, and told him he went out, in order to get the term of the plaintiff, and now the return of the writ was out, if they would take out a new writ he would give bail, which was done accordingly, and this was holden to be an act of bankruptcy.^(s) A. being greatly indebted, gave orders that he should not be denied when his creditors called. Several creditors called, and A. saw them, and upon their asking for money he pretended to go out to get it, and left his house under that pretence, but did not return in the course of the evening; it was proved that during his absence he went either to the billiard table or a tavern. Lord *Kenyon*, C. J., was of opinion that these were acts of bankruptcy, as absenting himself for the purpose of delaying his creditors.^(t) Where a trader, upon being arrested for a debt exceeding 100*l.*, escaped from the officer, and fled into the house of another, and was pursued by the officer, and inquired for at the house, but was denied and the door kept fast, and whilst he remained there declared that he did it for fear of other creditors: and, when it was dark, returned home to his own house, and gave directions to deny him to any one that called, and continued nearly a month in his bed-chamber; it was holden that this constituted one or more acts of bankruptcy, under the words "beginning to keep house," or "otherwise absenting himself."^(u) A trader having a counting-house^(x) (the only place in which he carried on business) in town, and a dwelling-house in the country, departed from his counting-house, to which he never afterwards returned, taking his books with him, and slept at his dwelling-house a few nights, after which he finally quitted that also; it was holden, that the trader, having departed from [*201] his counting-house *without any intention of returning, began to absent himself from the time of such departure, within the meaning of this clause, and thereby committed an act of bankruptcy at that time. If a trader leave his house in order to avoid his creditors,^(y) it will be an act of bankruptcy, although no creditor was thereby delayed. Where a trader went to his neighbour and told him that he expected to be arrested, and while he remained there was informed that a sheriff's officer was going towards his house, upon which he concealed himself in the back room, and desired his neighbour to watch, and when told that the officer had gone past his house and had left the street, immediately returned home; held, that this was an act of bankruptcy within the foregoing words, although it appeared that not only no cred-

(r) Com. Dig. Bankrupt, (C. 1.)

(s) *Maylin v. Eyloe*, coram *Raymond*, C. J., Str. 809.

(t) *Bigg v. Spooner*, 2 Esp. N. P. C. 651.

(u) *Bayly v. Schofield*, 1 M. & S. 338.

(x) *Judine v. Da Cossens*, 1 Bos. & Pul. N. R. 234.

(y) *Hammond v. Hincks*, 5 Esp. N. P. C. 139, recognized in *Robertson v. Liddell*, 9 East, 487.

itor was delayed, but that none could possibly be delayed.(z) So where a newsvender who frequented the Royal Exchange for the purpose of collecting intelligence for a newspaper, appointed a creditor to meet him on the Royal Exchange, and afterwards directed a friend, if the creditor inquired there for him, to say he was not there; held,(a) that this was an "otherwise absenting himself." *Gibbs*, C. J., expressed an opinion in this case that the words "otherwise absenting himself" meant an absenting himself from his creditors, not from any particular place.

A trader left at his house a message for a creditor, who had in his absence called for a debt, that he could spare no money, and would not pay him that day, and would go out of the way and not return home till dinner-time. It was holden, that it was for the jury to consider whether he absented himself to delay a creditor; and this evidence warranted their conclusion that he did not.(b) So where he absented himself from his house, where his creditors were, to avoid irritation and harsh language.(c) So where he went to London to procure funds,(d) whereby he was prevented from keeping an appointment. The absenting himself must be either from his place of abode or place of business, or from some particular creditor,(e) or from some place to which he would otherwise have gone,(f) but from fear of meeting a sheriff's officer, and being arrested at the suit of a creditor.

5. "*Begin to keep his house.*"

The observation which has been made on the act of departing the realm may be repeated here, viz., that the beginning to keep house with intent to delay creditors, will constitute an act of bankruptcy, *although it is not proved that a creditor was in fact [*202] delayed. The intention to delay creditors must be found, in order to complete the act of bankruptcy, but the time during which the debtor has kept house is immaterial, whether it be an hour or a day.(g)

The usual evidence of this act is a denial to a creditor, who calls for money. "A denial by order of a trader to a creditor is not of itself an act of bankruptcy, but only evidence of it, and therefore may be explained. If a man is sick, or if a man lives three days in business, and the rest of the week in the country, this explains a denial at any other house or lodging at any other part of the town, saying, 'Go to the shop.' On the other hand, it is not necessary, in order to constitute a denial an act of bankruptcy, that the bankrupt should have given orders to deny any particular person by name: if he gives orders to be denied to *every body*, it includes creditors, and is a keeping the house within the meaning of the statute."(h) "Although an author-

(z) *Chenoweth v. Hay*, 1 M. & S. 676. See *Rouch v. Great Western Railway Co.*, 1 Q. B. 51.

(a) *Gillingham v. Laing*, 6 Taunt. 532.

(b) *Vincent v. Prater*, 4 Taunt. 603.

(c) *Ib.*

(d) *Exp. Lavender*, 2 Mont. & Ayr. 11.

(e) *Bernasconi v. Farebrother*, 10 B. & C. 549.

(f) *Robson v. Rolls*, 9 Bingh. 648.

(g) Agreed in *Heylor v. Hall*, Palmer, 325.

(h) Per Lord Mansfield, C. J., in *Round v. Hope and Byde*, Co. B. L. 5th edit. p. 94.

ized denial to a creditor, requiring to see his debtor, is the most usual and familiar evidence of *beginning to keep house* within the meaning of the statute, it is not the *only*(i) evidence by which this may be proved. If a trader has no servant, the act cannot be evinced through such medium. In that case, if he shuts himself up in his house, debar-ring all access to it, whereby his creditors are delayed, an act of bankruptcy is established, by proof of his having done so. The keep-ing house in the statute, does not apply to the dwelling-house only of the party; hence,(k) closing the door and shutters of a bank, although the banker was not domiciled there, is a 'beginning to keep house.' And, generally, if a trader secludes himself in his house to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, *he begins to keep house* within the mean-ing of the legislature, and commits an act of bankruptcy."(l) "The denial of the party must be with an intent to delay creditors; therefore being denied, when sick in bed, or engaged in company, will not be an act of bankruptcy." *Bull. N. P.* 39, 40. So where a trader desired not to be disturbed at his dinner, denial by his servant to a creditor was holden not an act of bankruptcy.(m)

In a case where it appeared that the creditor, to whom the denial was supposed to have been given by the plaintiff's clerk, had only demanded payment of a debt, but had not asked to see the plaintiff personally, and that the clerk, supposed to give the denial,
 [*203] *had no specific directions for giving it, it was holden, that such denial did not amount to an act of bankruptcy.(n) A person carrying on business at Warwick, came occasionally to London, to make purchases for his trade, and, while in London, was frequently at the counting-house of C., with whom he dealt, and where other per-sons were in the habit of calling upon him: it was holden, that desiring C. to deny him to a creditor, whom he expected to call, and concealing himself in C.'s house when the creditor called, was an act of bankruptcy. *Curtis v. Willes*, 1 Ry. & Moo. 58. See *Russell v. Bell*, 10 M. & W. 340. In *Dickinson v. Foord*, Barnes, 160, it was holden, that keeping house with an intent to delay creditors, without an actual denial, was sufficient; but in *Garret v. Moule*, 5 T. R. 575, a different rule was laid down, viz., that there must be an actual denial to a creditor, with intent to delay him; and Lord *Kenyon*, C. J., said, that on trials in cases of this kind, the question had always been asked, whether or not the debtor was denied to the creditor. So in *Hawkes v. Saunders*, Co. B. L. 5th edit. p. 79, it was holden, that an order to be denied, without an actual denial, was not sufficient.(1) There is no

(i) Per *Littledale*, J., in *Fisher v. Boucher*, 10 B. & C. 713.

(k) *Cumming v. Baily*, 6 Bingh. 363.

(l) Per Lord *Ellenborough*, C. J., in *Dudley v. Vaughan*, 1 Campb. 272. See *Bayly v. Schofield*, 1 M. & S. 338, and *ante*, p. 200.

(m) *Smith v. Currie*, 3 Campb. 349.

(n) *Dudley v. Vaughan*, 1 Campb. 271. See *Key v. Shaw*, 8 Bingh. 320.

(1) S. P. Per *Lee*, C. J., in *Jackman v. Nightingale*, Bull. N. P. 40, and that therefore it was necessary to prove that the person denied was a creditor. Lord *Camden*, C. J.,

authority to show that a mere direction given by a trader to his servant, to deny him to his creditors generally, or to any particular creditor by name, not followed up by an actual denial, or by any other act which is evidence of an actual beginning to keep house, is an act of bankruptcy. Hence, where a trader under apprehension of arrest, gave directions to his servant to deny him, in case A., a sheriff's officer, called; it was holden,^(o) that the sheriff's officer not having called, this of itself was not any evidence of a beginning to keep house. But if the trader gives a general order to be denied, and is denied to a creditor, it is sufficient,^(p) although the object of the trader was to be denied to another creditor, and not to the person who called. The denial must be to a creditor who has a debt due to demand; ^(q) a denial to the holder of a security payable at a future day, will not be sufficient, although the security be such as might by stat. 7 Geo. I. c. 31, s. 1, 2, have been proved under the commission. But denial to a holder of a bill, on the morning of the day in which it becomes due, is sufficient. A. being in bad circumstances^(r) on the evening of the seventh of January, expressed his fears to his clerk that he should not be able to pay a bill which would become payable the next day, and desired him to come earlier *than usual the next morning, and be in the [*204] way, and in case the holder of that bill should inquire for him, to deny him. The holder of the bill called the next morning before nine o'clock, and presented the bill for payment, when the clerk said that his master was not at home. In the course of the day, A. appeared in public, and before five o'clock in the evening, paid the bill. The judge directed the jury to find for the plaintiff, conceiving that the act of bankruptcy was complete by the denial of a creditor with intent to delay him. Several of the jury suggested, that, by the practice of merchants, the payer of the bill has the whole of the day on which it becomes due, till five o'clock, to pay it in. However, upon the judge's repeating to them his opinion, the jury found for the plaintiff. A motion was made for a new trial on the ground suggested by the jury, and a question was raised, whether the bill holder could be considered as a creditor until after the expiration of the time, which, by the custom, the payer had to discharge it in; and it was contended also, that the creditor in this case, supposing him to be one then, could not be said to have been delayed, as he had been punctually paid in due time, and could not have protested the bill till after five o'clock. But the court, approving the direction of the judge, refused to grant a rule.

6. *Suffer himself to be arrested for any debt not due.*

See stat. 13 Eliz. c. 7, s. 1, and stat. 1 Jac. I. c. 15, s. 2.

(o) *Fisher v. Boucher*, 10 B. & C. 705.

(p) *Mucklow v. May*, 1 Taunt. 479.

(r) *Colkett v. Freeman*, 2 T. R. 59.

(q) *Exp. Levi*, 7 Vin. Abr. 61, pl. 14.

held, that being denied to one who came on behalf of a creditor was not sufficient. Green's B. L. 39.

7. *Yield himself to prison.*

B. was arrested for 28l., and although he had money sufficient to pay the debt, yet chose rather to go to prison, in order, as he declared, to force his creditors to come to a composition. Lord *Talbot*, C., held this to be an act of bankruptcy: but observed, that if there had not been an intention to delay creditors, yielding himself to prison would not constitute an act of bankruptcy.^(s)

8. *Suffer himself to be outlawed.*

An outlawry in Ireland does not make one a bankrupt; nor outlawry here, unless it be with intent to defraud creditors. Com. Dig. Bankrupt, C. 4.

9. *Procure himself to be arrested, or his goods, money, or chattels, to be attached, sequestered, or taken in execution.*

See stat. 1 Jac. I. c. 15, s. 2, and *Clavey v. Hayley*, Cowp. 428.

[*205] *10, 11, 12. *Make, or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make any fraudulent surrender of his copyhold lands or tenements, or make any fraudulent gift, delivery, or transfer of any of his goods or chattels.*⁽¹⁾

If a trader, in contemplation of bankruptcy, in order to pay even a just and *bond fide* creditor, or one who, by possibility, may become a creditor, viz., a surety,^(t) assigns by deed all,^(u) or even a part⁽²⁾ of his effects to such creditor, the deed is fraudulent, and consequently an act of bankruptcy within the meaning of this clause.^(x) And the same rule holds if the assignment be to some creditors, but in total exclusion of others. If all the creditors do not concur, the deed is fraudulent and an act of bankruptcy.^(y) Hence where a conveyance by deed was made by A., a trader,^(z) of *all* his effects, as a security to B., who had agreed to become A.'s banker, and to answer his drafts, for the purpose of enabling him to carry on his trade, subject to a defeasance on his

^(s) *Ex parte Barton*, 7 Vin. Abr. tit. Cred. and Bankr., 61, 62, pl. 15.

^(t) *Hassels v. Simpson*, Doug. 88, n.

^(u) *Worseley v. Demattos*, 1 Burr. 467; 2 Kenyon, 218, S. C.; *Wilson v. Day*, 2 Burr. 827.

^(x) *Ex parte Foord*, cited by Lord Mansfield, in 1 Burr. 477; *Kettle v. Hammond*, Middlesex Sittings after H. 7 Geo. III.; Bull. N. P. 40.

^(y) *Eckhardt v. Wilson*, 8 T. R. 140.

^(z) *Worseley v. Demattos*, 1 Burr. 467. But see *Reed v. Wilmot*, 7 Bingham, 577, decided on the authority of *Edwards v. Harben*, 2 T. R. 587; and see also *Martindale v. Booth*, 3 B. & Ad. 498.

(1) A bill of exchange is a chattel, within the meaning of these words, the fraudulent delivery or transfer of which will constitute an act of bankruptcy. *Cumming v. Baily*, 6 Bingham, 363. See Lord Tenterden's comment on this clause in *Cook v. Caldecott*, M. & Malk. 525.

(2) The language of the old statute was, conveyance of his lands, &c., but in 6 Geo. IV. c. 16, the words are, "conveyance of *any* of his lands," &c.

paying such sums as B. might advance, with a covenant that on failure in the performance of the conditions, B. should take possession of the effects; the conveyance was holden to be fraudulent, and an act of bankruptcy, although the transaction, as between the parties, was fair, and for a good and valuable consideration; 1st, on the ground of A.'s remaining in possession(1) after the execution of the deed, and thereby obtaining a false credit; and 2ndly, on the ground of an undue preference having been given by the deed to B., contrary to the spirit of the bankrupt laws, which anxiously provide for an equal distribution of the estate of the bankrupt among all his creditors.(2)

*So where a trader, being in distressed circumstances,(a) executed a deed of assignment of *all* his estate to *one* of his creditors, purporting to be a security for an unliquidated sum, without delivering any kind of possession, except giving a letter of attorney to his own clerk, (who had before this transaction managed his affairs,) to collect debts, &c., the assignment was holden fraudulent on the ground of undue preference, and there not being any alteration of possession.(3). A trader, finding his circumstances on the decline,(b) executed at midnight a bill of sale of *all* his goods (with the exception of a few articles to the amount of about 100*l.*) to some favourite creditors, in trust to pay them their full debts, leaving other debts to the amount of 900*l.* unprovided for, and absconded the next morning; the deed was holden fraudulent, for the interest which was excepted in the assignment was too minute to make a difference. Where a deed of assignment purporting to be made by all three partners of a firm, and to convey all their personal estate in trust for the benefit of creditors, was executed by one of them only; it was holden that the deed operated to convey the(c) share of the one who so executed, and as an act of bankruptcy by him, in the absence of anything to show that the deed was delivered as an escrow. N. The other partners did not execute until after the fiat had issued.

In order to render an assignment of a trader's effects an act of bankruptcy, it must be shown that he assigned all or so nearly all his effects as to put it out of his power to carry on the trade.(d) It is incumbent

(a) *Wilson v. Day*, 2 Burr. 827.

(b) *Compton v. Bedford*, 1 Bl. R. 362, London Sitings after H. T. 1762, Lord Mansfield, C. J.

(c) *Bowker v. Burdekin*, 11 M. & W. 128.

(d) Per Parke, B., *Carr v. Burdiss*, 1 Cr. M. & R. 447; 5 Tyrw. 136, S. C.; *Chase v. Goble*, 2 M. & Gr. 930; 3 Scott's N. R. 245.

(1) The circumstance of the assignee of the effects not taking possession, is only evidence of fraud, and consequently may be explained. Per Lord Mansfield, C. J., 1 Burr. 484.

(2) The principle of all the cases is, that if the conveyance to a particular creditor necessarily prevents the property of the trader from being distributed as the law requires in cases of bankruptcy, that is itself an act of bankruptcy. Per Le Blanc, J., in *Newton v. Chantler*, 7 East, 145.

(3) It is observable that in this and in the preceding case the deed was valid as between the parties; which circumstance was adverted to by Lord Mansfield, in *Wilson v. Day*, where he said, that it was not necessary that the deed should be fraudulent as between the parties; it was sufficient if it was a fraud on the creditors generally.

on the party who sets up an act of this description, to show the general situation of the property to have been such, that insolvency(*e*) would have been the effect of the transfer. Whoever means to contend that by executing a particular deed the party had committed an act of bankruptcy, is bound to make that out; and when the deed does not in terms purport to be a conveyance of the whole of the property, he who asserts

that it is a deed which does so operate is bound to prove that it [*207] is so.(*f*) But where a trader *assigned by deed all his property in trust for the benefit of his creditors, it was holden(*g*) an act of bankruptcy; for, per *Parke, B.*, "It is clearly settled, that if the necessary consequence of a man's act is to delay his creditors, he must be taken to intend it. When a man assigns all his property, and puts it into a different course of distribution from what the bankrupt laws direct, he commits an act of bankruptcy."

The circumstance of the trader being at the time of the conveyance under arrest, at the suit of the creditor to whom the conveyance is made, will not vary the case.(*h*) Where a trader being in insolvent circumstances,(*i*) in consideration of a loan of 120*l.* without interest, assigned *one-third part* of all his effects to the lender, who was his brother, and within two days after the execution of the deed, the trader absconded: it was holden, that the bill of sale was fraudulent, on the ground of its being made in contemplation of bankruptcy, and its being partial and unjust to other creditors. So where a trader, in insolvent circumstances,(*k*) having an act of bankruptcy in contemplation, and being threatened with an attachment for non-payment of money under a decree of the Court of Chancery, voluntarily by deed assigned a lease, *part* of his estate, to three of his creditors, (one of whom had lent him money, and the others had indorsed notes for him,) as a security for the payment of these debts, and then in trust for himself; the deed was holden an act of bankruptcy; 1st, As a fraud upon the creditor under the decree, who might have claimed the benefit of the lease, notwithstanding the assignment was for a valuable consideration, on the authority of *Twyne's case*: and 2ndly, As being a voluntary preference contrary to the general policy of the bankrupt laws. Where a trader, being arrested for debt by one creditor,(*l*) executed a bill of sale to another creditor (who had been induced to give a bond for his appearance at the return of the writ) of all his effects, for the purpose of paying, in the first instance, the debts due to both the creditors, and afterwards the overplus, if any, to himself; and the creditor, to whom the bill of sale was executed, took possession of the effects the day after the execution of the deed, on which day the trader committed an act of bankruptcy by keeping house; it was holden, that the execution of the bill of sale was an act of bankruptcy. A trader, being urged by

(*e*) *Wedge v. Newlyn*, 4 B. & Ad. 831.

(*f*) Per *Tindal, C. J.*, in *Chase v. Goble*, 2 M. & Gr. 930; 3 Scott's N. R. 245.

(*g*) *Stewart v. Moody*, 1 Cr. M. & R. 777; *Siebert v. Spooner*, 1 M. & W. 714; 1 Tyr. & Gr. 1075.

(*h*) *Newton v. Chantler*, 7 East, 138.

(*i*) *Linton v. Bartlet*, 3 Wils. 47.

(*k*) *Devon v. Watts*, Doug. 86.

(*l*) *Butcher v. Easto*, Doug. 294. See also *Law v. Skinner*, 2 Bl. R. 996, which is not inserted, because the report was questioned in *Hassels v. Simpson*, Doug. 91, 92, n.

the importunity of a creditor, executed a conveyance of lands in trust to sell, and to pay such creditor, with a further trust to pay debts to certain relatives, in order to give them an undue preference in contemplation of bankruptcy: it was holden, that the deed so executed was an act *of bankruptcy:(*m*) but that the deed [*208] was valid so far as related to the protection of the urgent creditor. By stat. 7 Geo. IV. c. 57, s. 32, "if any prisoner who shall file his petition for his discharge under that act, shall, before or after his imprisonment, being in insolvent circumstances, *voluntarily* assign any real or personal property to or in trust for any creditor, such assignment shall be deemed fraudulent and void as against the provisional or other assignee." The word "voluntarily" is used here to denote either an assignment made without such valuable consideration as is sufficient to induce a party acting really and *bond fide* under the influence of such consideration, or an assignment made in favour of a particular creditor spontaneously, and without any pressure on his part, to obtain it. Hence, where A., being distrained on for rent arrear, applied to one creditor to advance him money, who refused unless upon security, whereupon A. assigned to him all his personal estate in trust to pay him and other creditors: it was holden not a voluntary conveyance within 7 Geo. IV. c. 57, s. 32. *Arnell v. Bean*, 8 Bingh. 87. See *Wainwright v. Clement*, 4 M. & W. 385.

A trader, knowing himself to be in insolvent circumstances,(*n*) and being under arrest in execution, at the suit of a creditor, executed a bill of sale of *all* his goods to the creditor, for the purpose of paying his debt, with a reservation of the surplus to himself; it was holden, that this assignment, although executed under the compulsion of an arrest, was fraudulent, and an act of bankruptcy; the necessary consequence of the deed being to prevent the bankrupt from carrying on trade, and thereby operating as an injury to the other creditors. But a sale by a trader of his whole stock, with intent to abscond and carry off the purchase money to a *bond fide* purchaser who pays the fair price of it, in ignorance(*o*) of any fraudulent intention of the seller, is not an act of bankruptcy. So where goods were sold by the defendant as agent of B., in contemplation of B.'s bankruptcy, for the purpose of raising money for the benefit of the defendant and B.: the defendant was employed to procure purchasers, the goods remaining in the possession of B. till delivered to the purchaser; it was holden,(*p*) that such sale was not an act of bankruptcy by B., upon the ground that there was not a delivery of any goods to the defendant, and so far as the question turned upon a fraudulent sale, there was not any sale which was fraudulent on the part of the buyers. So a deed, by which F., one of two traders in partnership, conveyed his separate estate to trustees, for the joint creditors of both, the joint creditors agreeing that the

(*m*) *Morgan v. Horseman*, 3 Taunt. 241.

(*n*) *Newton v. Chantler*, 7 East, 138.

(*o*) *Baxter v. Pritchard*, 1 A. & E. 456; 3 Nev. & M. 638; *Rose v. Haycock*, 1 A. & E. 460, n.; 3 Nev. & M. 644, n., S. P.

(*p*) *Harwood v. Bartlett*, 6 Bingh. N. C. 61, recognizing *Baxter v. Pritchard*, and *Rose v. Haycock*, *ubi sup.*

traders should continue in possession of their stock, and carry on their business with a view to retrieve themselves; and [*209] *that upon their paying 4s. 6d. in the pound by certain instalments, they should receive a general release: it was holden, (q) that it was not an act of bankruptcy; and that it was properly left to the jury to say, whether the deed was executed *bond fide* to enable the traders to retrieve themselves, or was executed by F. with intent to defraud his separate creditors.

It must be observed, that it is not competent to those persons who have signed the fraudulent deed, (r) or to those who, without executing, have assented to the deed, (s) and are privies to the transaction, to set it up as an act of bankruptcy. A commission was sued out on the petition of A. B., founded on an act of bankruptcy in December, and it appeared, that in the preceding October, the bankrupt, by a deed to which A. B. was a party, assigned all his property: it was holden, (t) that the assignees (although A. B. was not one of them) could not avail themselves of this deed as an act of bankruptcy in order to recover money subsequently paid by the bankrupt, inasmuch as the creditors represented by the assignees derived all their rights under the commission from the petitioning creditor, who was a party to the deed. But where a commission of bankruptcy was sued out on a fraudulent deed, upon the petition of a creditor who had not concurred in such deed, but who was chosen assignee, together with other creditors who had concurred and were privy to the fraud; (u) it was holden, that it was not any objection to an action brought by them as assignees for the recovery of part of the bankrupt's estate, that some of the assignees had concurred in the fraudulent deed, the petitioning creditor not having so concurred. An assignment by bankers, (then in failing circumstances, and who had stopped payment,) of their estate and effects to trustees for the benefit of their creditors, is an act of bankruptcy, (x) although the assignment be made merely for the purpose of making an act of bankruptcy; the trustees not being privy to the purpose for which the deed was made. The reader should be reminded that the statute 1 & 2 Will. IV. c. 56, s. 42, (*ante* p. 194,) applied to concerted *commissions*, &c., only, and did not include, (y) concerted *acts of bankruptcy*. But see as to concerted acts of bankruptcy, the stat. 5 & 6 Vict. c. 122, s. 8, (*ante*, p. 194.)

A. having contracted with a canal company to build works on the canal (z) as their engineer, purchased, with money advanced [*210] by the *company, timber and other articles for that purpose, which were deposited on the premises of the company. Being

(q) *Abbott v. Burbage*, 2 Bingham N. C. 144.

(r) *Bamford v. Baron*, 2 T. R. 594, n., cited by *Eldon, C.*, *Exp. Harcourt*, 2 Rose, 213. See also *Prosser v. Smith*, Holt's N. P. C. 442, and *Exp. Gane*, Mont. & M'Arth. 399.

(s) *Hicks v. Burfitt*, Winton Lent Ass. 1812, per *Chambre, J.*, 4 Campb. 235, n.; *Back v. Gooch*, *ib.* 232; *Gibbs, C. J.*, S. P. 1 Holt's N. P. C. 13, S. C. This last was the case of a petitioning creditor.

(t) *Tope v. Hockin*, 7 B. & C. 101.

(u) *Tappenden v. Burgess*, 4 East, 230; *Jackson v. Irvin*, 2 Campb. 49.

(x) *Simpson v. Sikes*, 6 M. & S. 295.

(y) *Marshall v. Barkworth*, 4 B. & Ad. 508; *ante*, p. 194.

(z) *Manton v. Moore*, 7 T. R. 67.

considerably indebted, he borrowed of the company a further sum of money to pay his creditors the full amount of their debts, and as a security executed a bill of sale of his effects, which were then lying on the premises of the company, and delivered them by the delivery of a copper halfpenny. It was insisted, that the bill of sale was fraudulent, because the possession remained, to all appearance, the same after as before the conveyance, and the bankrupt continued to gain a false credit as the owner of the goods; but the court held, that possession of the goods having been delivered to the company at the time of the execution of the bill of sale, *as far as possession under these circumstances could be given*, the deed was not fraudulent. The statute does not require that the conveyance should be made in contemplation of bankruptcy; it is sufficient if it be made voluntarily, in order to give a preference to particular creditors, to the prejudice of general creditors. (a)(1) Formerly the act of bankruptcy drew the line of separation between that property which might be disposed of by the bankrupt, and that which was vested in the assignees; afterwards it was established, that if a trader, in contemplation of bankruptcy, make a voluntary disposition of his property, with a view to give a preference to a particular creditor, such disposition is void. This doctrine of voluntary preference was not distinctly laid down until the case of *Harman, Assignee of Fordyce v. Fisher*, in 1774. (b) It was there stated in terms for the first time; and it may be considered as an excrescence on the bankrupt laws which is to be watched, and not extended, (c) nor to be acquiesced in unless strictly proved. The cases prior to *Harman v. Fisher*, viz. *Alderson v. Temple*, 4 Burr. 2235, and *Martin v. Pewtress*, 4 Burr. 2477, were cases of gross fraud. The case of *Harman v. Fisher* was this:—Fordyce, at five o'clock in the morning, just going to commit an act of bankruptcy, ordered his servant to take a letter containing certain bills to a creditor in discharge of a debt, and in the letter he tells the creditor that *he has the honour to show him that preference* which he conceives is certainly his due. About an hour afterwards, Fordyce absconded and went to France. This was holden to be void. Lord Mansfield, C. J., observing, that this was done “pursuant to no contract; in performance of no obligation; in no course of dealing; without the privity of the creditor, or call on his part for the money, and without the probability of the notes being delivered before

(a) *Pulling v. Tucker*, 4 B. & A. 382, cited by Patteson, J., as in point in *Botcherby v. Lancaster*, 1 A. & E. 79.

(b) See also the remarks of Lord Chancellor Hardwicke, in *Unwin v. Grosvenor*, May 14, 1739, 1 West. C. T. H. 648.

(c) See the opinions of Parke, J., and Patteson, J., in *Morgan v. Brundrett*, 5 B. & Ad. 296, 7, to this effect.

(1) Under the bankrupt law of the United States of 1800, c. 173, [xix.] s. 1, it has been determined, that a colorable sale and transfer of personal property, although void as against the creditors of the vendor, do not amount to an act of bankruptcy, unless executed by a fraudulent deed or conveyance, both of which terms refer to instruments under seal. *Livermore v. Bagley*, 3 Mass. Rep. 487. And see *Barnes v. Billington*, 1 Wash. C. C. R. 29; *Harrison v. Sterry*, 5 Cranch, 301; *Ogden v. Jackson*, 1 Johns. 370; *Jocko v. Winning*, 3 Mass. 325.

an act of bankruptcy was committed." Then followed the case [*211] of *Rust v. Cooper*, Cowp. 629, where it was expressly *stated, that the goods were delivered in contemplation of bankruptcy, and in order to give the defendant a preference. But even there, Lord *Mansfield* says, "If in a fair course of business a man pays a creditor *who comes to be paid*, notwithstanding the debtor's knowledge of his own affairs, or his intention to break, yet, being a fair transaction in the course of business, the payment is good; for the preference is there got consequentially, and not by design." So if a creditor call for payment before the intention of voluntary preference can be accomplished, (d) it is sufficient to take the case out of the rule. So a transfer of property made under the apprehension of a prosecution for forgery, is valid. (e) In *Poland v. Glyn*, 2 D. & R. 311, and 4 Bingh. 22, n., *Abbott*, C. J., told the jury, that the object of the bankrupt law being to divide the whole of the bankrupt's property equally amongst his creditors, if a tradesman found himself in such a situation, that in the judgment of any reasonable man a bankruptcy was inevitable, no voluntary payment by him could be good. The jury found for the plaintiff, the assignee of bankrupt; and the court refused to disturb the verdict; *Bayley*, J., observing, that it is a rule, that if a person be in such a situation, that he must be presumed to think bankruptcy probable, then if he makes a payment with a view to put one creditor in a better situation than the rest, such payment cannot be supported. But see *Flook v. Jones*, 4 Bing. 20, and *Fidgeon v. Sharpe*, 5 Taunt. 545; in which last case, *Gibbs*, C. J., says, "by the common law, he [a trader] may pay any one: the general effect of the statutes on the subject of bankrupts, is, that all payments made before bankruptcy are legal and valid; but a certain class of cases has arisen, in which certain payments have been supposed to be made in fraud of the bankrupt laws, and are therefore fraudulent and void. But I find in all the cases, from *Fordyce's* to the present, the fact found, that the act was done in fraud of the bankrupt laws; it must be an act, then, not only that in effect contravenes the bankrupt laws, but it must be done with intent to contravene them, and in contemplation of bankruptcy. The innocence or guilt of the act depends then, on the mind of him who did it; and it cannot be in fraud of the bankrupt laws, unless the actor meant it should be so." And in the concluding part of the same opinion the C. J. *Gibbs* thus observes: "The court agree with Lord *Mansfield's* doctrine in *Fordyce's* case, that the thing must be intended in fraud of the bankrupt laws. The contemplation of insolvency is one step, and affords a strong presumption towards the contemplation of bankruptcy, but it does not go all the way."

[*212] *It has been decided, that if a trader being in insolvent circumstances, makes a voluntary payment to a creditor, con-

(d) *Bayley v. Ballard*, 1 Campb. 416. But see *Cook v. Rogers*, 7 Bingh. 446, and *post*, p. 213.

(e) *De Tastet v. Carroll*, 1 Stark. N. P. C. 88; Lord *Ellenborough*, C. J., B. R. M. T. 56 Geo. III., S. C., on motion for N. T.; *Atkins v. Seaward*, Winton Lent Ass. 1819; *Holroyd*, J., S. P. See also *Reed and others v. Ayton*, 1 Holt, N. P. C. 503, and *Arbousin v. Hanbury*, 1 Holt, N. P. C. 575, S. P.

templating at the time either the taking the benefit of the insolvent act, or his being made a bankrupt; if he afterwards petitions for relief under the insolvent act, the assignees under his insolvency, or if he afterwards becomes bankrupt, the assignees in bankruptcy may recover back the money so paid.(f)

B. a bookseller,(g) in September, 1807, applied to the defendant, a pawnbroker, to discount three bills for him, which he had drawn upon C. & D. The defendant gave him cash for them, but soon after becoming suspicious of B.'s credit, he asked him, whether they were not accommodation bills: B. answered that they were. The defendant then required some security to be put into his hands, in case the bills should not be paid when they became due. In consequence of this application, B. at different times, between November and February, deposited with the defendant various parcels of books to the value of about 300*l.* for the purpose of being sold for his benefit, if the bills should not be duly honoured by the acceptors. These books were chiefly brought by B. in a hackney-coach in the evening. It likewise appeared that he had compounded with his creditors two or three years before, which circumstance must have been known to the defendant who had lent him money to pay the stipulated composition. B. committed an act of bankruptcy in the beginning of March, and the commission was sued out against him on the 17th of that month; the bills then remaining in the defendant's hands unsatisfied. It was contended, on the part of the plaintiffs, that the defendant had unduly obtained possession of the books by a voluntary preference. Lord *Ellenborough*. "How is this a case of voluntary preference? The bankrupt parted with the books upon the defendant's importunity. The bills were not due, but the bankrupt was liable upon them, and the defendant had a right to ask for further security. The defendant had not a right of action when the books were deposited with him; but the bills constituted a good petitioning creditor's debt, and might have afforded him the means of compulsion. Strictly, only the acts of a trader subsequent to his bankruptcy, are void. Precedent acts supposed to be in contemplation of bankruptcy have likewise been invalidated; but this is an excrescence upon the bankrupt laws. The cases upon the subject have gone far and far enough, and I am not disposed to give them any extension. If the debt had been due here, the preference certainly would not have been fraudulent. It wants *voluntariness*, in which the fraud consists. The consideration upon which a payment made to an importunate creditor of a debt actually due has been allowed to be valid, has not been that he might resort to a suit to enforce payment, *but that his demand repels the presumption that [*213] the bankrupt upon the eve of bankruptcy made a distinction among his creditors, and spontaneously favoured one of them to the prejudice of the rest. A demand of further security for a debt not yet due has the same effect; and in neither case is there any fraud upon the bankrupt laws, on which ground alone transactions previous to

(f) *Ogden v. Stone*, 11 M. & W. 494.

(g) *Crosby v. Crouch*, 2 Campb. 166; 11 East, 256.

bankruptcy can be set aside." Plaintiffs nonsuited. On a motion to set aside the nonsuit, the court were of opinion, that the delivery of the goods did not constitute an act of voluntary preference, so as to render it fraudulent and void; that in order to constitute such voluntary preference, two things must concur: first, that the delivery should be voluntary on the part of the bankrupt; and, secondly, that at the time of such delivery, there should be a contemplation of bankruptcy. In the present case, the proposition for giving further security came from the creditor, and not from the bankrupt. *Hartshorn v. Slodden*, 2 Bos. & Pul. 582, was cited as in point; see also *Smith v. Payne*, 6 T. R. 152. So where money was advanced by A. to B. for the purpose of enabling B. to execute an order for the E. I. Company upon an agreement that A. should receive the money for the order, and repay himself, and A. did so receive it; this was holden,^(h) not a fraudulent preference; although A. knew at the time of the loan that B. was insolvent. But in a mixed case, in which the debtor had an object in favouring the particular creditor, but in which the creditor also, before he knew of such a disposition on the part of the debtor, had urged and importuned him for payment; and payment was accordingly made; the judge left it to the jury whether the payment were made in contemplation of bankruptcy, and under fear of compulsion, or voluntarily: and the jury having found that it was made voluntarily and with a view to favour the particular creditor, the court⁽ⁱ⁾ refused to disturb the verdict. "The proper definition^(k) of a fraudulent preference is a voluntary preference moving from the bankrupt in favour of a particular creditor and in contemplation of bankruptcy." A creditor obtains a preference in contemplation of an intended deed of composition, which would be fraudulent against the creditors under that deed; the composition going off, the creditor may hold his securities against a commission of bankruptcy subsequently issued, and not contemplated at the time of the preference. *Wheelwright v. Jackson*, 5 Taunt. 109. It will be remarked, that this statute, for the first time, makes a fraudulent surrender of copyhold, and also a fraudulent gift, delivery, or transfer of goods or chattels, an act of [*214] bankruptcy, although such gift, &c. be not by deed. Under stat. 1 Jac. I. c. 15, s. 2, a fraudulent surrender of copyhold was not an act of bankruptcy, not being such a conveyance as would defeat or delay creditors, not being liable either to a fieri facias or elegit. *Exp. Cockshott*, 3 Bro. Ch. C. 502.(1) But now by stat. 1 &

(h) *Hunt v. Mortimer*, 10 B. & C. 44.

(i) *Cook v. Rogers*, 7 Bingh. 438.

(k) Per Parke, J., *Morgan v. Brundrett*, 2 Nev. & Man. 287; 5 B. & Ad. 289, S. C. A party who seeks to avoid a payment or transfer of goods, on the ground that it was voluntarily made by a trader in contemplation of bankruptcy, must show, not merely that the trader was insolvent, or knew that he was insolvent when it was made, but also that he then contemplated bankruptcy. *Atkinson v. Brindall*, 2 Bingh. N. C. 225. See also 2 Bingh. N. C. 444.

(1) Under the bankrupt act of the United States of 1800, c. 173, [xix.] it was held, that a deed of lands in Maryland, which would have been considered as a fraudulent conveyance under the 1st section of the statute, had it been made after it went into operation on the 2d of June, but which was signed, sealed, and delivered on the 30th of May,

2 Vict. c. 110, s. 11, for giving judgment creditors more effectual remedies against the real and personal estate of their debtors, the sheriff is empowered to deliver execution of all lands, &c., including lands and hereditaments of copyhold, or customary tenure, either of the debtor or of any person who holds in trust for the debtor.

By stat. 6 Geo. IV. c. 16, s. 4, where any such trader shall, after this act shall have come into effect, execute any conveyance or assignment, by deed, to a trustee or trustees, of all his estate and effects for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a commission issue against such trader within six calendar months from the execution thereof by such trader. Provided that such deed shall be executed by every such trustee within fifteen days after the execution thereof by the said trader, and that the execution by such trader and by every such trustee be attested by an attorney or solicitor; and that notice be given within two months after the execution thereof by such trader, in case such trader reside in London or within forty miles thereof, in the *London Gazette*, and also in two London daily newspapers; and in case such trader does not reside within forty miles of London, then in the *London Gazette*, and also in one London daily newspaper, and one provincial newspaper published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode of every such trustee, and of such attorney or solicitor.

The reader should be reminded that all the preceding acts of bankruptcy must be done with intent to defeat or delay creditors, (see stat. 6 Geo. IV. c. 16, s. 3, *ante*, p. 198,) for the intent is the ingredient which the acts of parliament require to make a man a bankrupt. Per Lord *Hardwicke*, C., in *Exp. Hall*, 1 Atk. 201.

13. *Lie in prison for twenty-one days.* 14. *Or having been arrested, escape out of custody.*

By stat. 6 Geo. IV. c. 16, s. 5, if any such trader, having been arrested, or committed to prison for debt, or on any attachment for non-payment of money, shall, upon such, or any other arrest or commitment for debt or non-payment of money, or upon any detention for debt lie in prison for twenty-one days, or having been arrested, or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him, and not discharged, or having been arrested, &c., shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy, from the time of such arrest, commitment, *or detention, provided that if any such trader shall be in [*215] prison at the time of the commencement of this act, he shall

and *acknowledged* on the 14th of June, was to be considered as *made* on the 30th of May; and its acknowledgment on the 14th of June, would not cause it to be considered as within the statute. *Wood v. Owing*, 1 Cranch, 239. And see *M'Menonry v. Rossevelt*, 3 Johns. Ch. 446; *M'Menonry v. Stevens*, 3 Id. 71.

not be deemed to have committed an act of bankruptcy, by lying in prison, until he shall have lain in prison for the period of two months.

13. The day on which the arrest is made is to be included in the reckoning; ^(l)(1) and the period, which under stat. 21 Jac. I. c. 19, s. 2, was two lunar months, is now twenty-one days. But, if there is not a continuing imprisonment from the time of the arrest, then the intention of the legislature appears to have been that the time should run only from the time of the party's going to prison, and not from the arrest. Hence where a trader was arrested for debt on the 4th of November, ^(m)but allowed to go at large until the 8th, when he returned into custody, and being afterwards moved into the King's Bench prison, lay there upwards of two months, it was holden, that the act of bankruptcy which he thus committed, had reference only to the 8th, when he returned into custody, and not to the 4th, when the original arrest took place. So where a trader, being arrested, put in bail, ⁽ⁿ⁾and afterwards surrendered in discharge of his bail, and continued above two months in prison, it was holden, that he was a bankrupt only from the time of surrender, not from the time of his arrest. But where sham bail was put in before a judge ^(o)as a means to get the trader turned over to the prison of the court, and he was accordingly surrendered and sent there, it was holden, that the imprisonment was to be computed from the arrest; there being an unbroken imprisonment from the time of the arrest, and the bailing being considered as a mere form to turn the bankrupt over from one custody to another. A trader was surrendered in discharge of his bail on the 1st of June, 1818, between six and eight o'clock in the evening. On the same day, between one and two o'clock in the afternoon, a writ of fieri facias was delivered to the defendants, who, by their officer, entered into the premises of the bankrupt and seized the goods; the bankrupt lay in prison more than two months afterwards. It was insisted, on the part of the plaintiffs, that the act of bankruptcy having been committed on the same day that the goods were taken in execution, the plaintiffs must in law be con-
[*216] sidered as having the property of the *goods vested in them during the whole of the day, because there could not be a fraction of a day. But *Abbott, C. J.*, thought there might, and nonsuited the plaintiffs; and the court afterwards, on motion to set aside the nonsuit, concurred, ^(p)in opinion with the chief justice. And in

^(l) *Glassington v. Rawlins*, 3 East, 407.

^(m) *Barnard v. Palmer*, 1 Campb. 509.

⁽ⁿ⁾ *Tribe v. Webber*, Willes, 464.

^(o) *Rose v. Green*, 1 Burr. 437, stated more fully *post*, p. 216.

^(p) *Thomas and another, Assignees of Houlbrooke, v. Desanges and another*, 2 B. & A. 586. See also *Sadler v. Leigh*, 4 Campb. 197, where Lord *Ellenborough, C. J.*, held, that when the execution and act of bankruptcy (a denial to a creditor) were on the same day, it was open to inquire which had the priority; and in *Saunderson v. Gregg*, 3 Stark. 75, S. P. per *Abbott, C. J.* See *Lester v. Garland*, 15 Ves. jun. 248, Sir W. Grant, M. R.

(1) In *Pellew v. Inhabitants of Wonford*, 9 B. & C. 144, Lord *Tenterden, C. J.*, said, that one rule for deciding whether a particular day should be considered as excluded or included was, that when a computation is to be made from an act to be done by the party, the day of doing the act shall be included, but not otherwise. See *Webb v. Fairman*, 3 M. & W. 473; *Young v. Higgon*, 6 Id. 49; and see *Williams v. Burgess*, 12 A. & E. 635; 4 P. & D. 443.

Godson v. Sanctuary, 4 A. & E. 255, the court took into account the fraction of a day, in computing the two months specified in the 81st section. The trading(*q*) must be before the imprisonment.

Although the trader is, during the twenty-one days, in a progressive course of committing an act of bankruptcy,(*r*) yet the act of bankruptcy is not complete until the expiration of the twenty-one days, and consequently a commission cannot regularly issue until that time; for in order to obtain it, there must be an affidavit that the party has committed an act of bankruptcy. The property of the bankrupt vests in the assignees by relation either from the time of the arrest(*s*) or the going to prison, as the case may be. A sheriff's officer having arrested a defendant (who was dangerously ill) on mesne process in his own house, left him there in the custody of a follower, not named in the warrant, until he was recovered; it was holden,(*t*) that this was such a legal custody, that if the imprisonment, of which this was a part, were continued for two months, (now twenty-one days,) it would constitute an act of bankruptcy. A penalty due to the crown for smuggling is a debt within this statute.(*u*)(1)

14. *Or having been arrested, shall escape out of custody.*

A. having been arrested for debt in Kent, on the 31st of March,(*x*) was, on the 6th of May following, brought up by a *habeas corpus*, in order to be turned over: on the road to the judges' chambers, A. was permitted to call at a house in the city of London, and was carried thence to a judge's chamber to be bailed, and accordingly was bailed, but instantly there surrendered by his bail in discharge of themselves, and thereupon committed to the King's Bench prison, where he lay above two months. It was adjudged, that this passing through another county, by the permission of the sheriff, was not an escape within the meaning of this act.

*15. *Filing a declaration of insolvency.* [*217]

By stat. 5 & 6 Vict. c. 122, s. 22,(*y*) if any such trader shall file in the office of the Lord Chancellor's secretary of bankrupts, a declara-

(*q*) *Exp. Lynch*, Mont. 453.

(*r*) *Gordon v. Wilkinson*, 8 T. R. 507.

(*s*) *King v. Leith*, 2 T. R. 141. See *Moser v. Newman*, 6 Bingh. 556; *Higgins v. M'Adam*, 3 Y. & J. 1.

(*t*) *Stevens v. Jackson*, 4 Campb. 164; 6 Taunt. 106.

(*u*) *Cobb v. Symonds*, 5 B. & A. 516; 1 D. & R. 111.

(*x*) *Rose v. Green*, 1 Burr. 437.

(*y*) This section virtually repeals the 6 Geo. IV. c. 16, s. 6.

(1) The bankrupt act of 1800, c. 173, [xix.] s. 1, makes it an act of bankruptcy if the party "being arrested for debt, or having surrendered him or herself in discharge of bail, shall remain in prison two months, or more, or escape therefrom," &c. Where a man was committed to prison on *mesne process*, and remained in prison sixty days, and was in the meanwhile fixed as bail, after that time was declared a bankrupt, and obtained a discharge, it was held that the act of bankruptcy was not consummate until the last of the sixty days, and that he was discharged from the recognizance, which was a debt provable under the commission. *Rathbone v. Blackford*, 1 Caines' Rep. 588.

tion in writing (in the form of schedule (D.), hereunto annexed), signed by such trader, and attested by an attorney or solicitor that he is unable to meet his engagements, every such trader shall be deemed thereby to have committed an act of bankruptcy at the time of filing such declaration, provided a fiat in bankruptcy shall issue against such trader within two months from the filing of such declaration, and a copy of such declaration, purporting to be certified by the said secretary or his clerk as a true copy, shall be received as evidence of such declaration having been filed. And now, by stat. 7 & 8 Vict. c. 96, s. 41, the Lord Chancellor shall have power; upon petition made to him in writing by any trader who shall have filed a declaration of insolvency in manner and form prescribed by the statute in that case made and provided relating to bankrupts, and upon payment of the like sum as is payable upon the granting a fiat upon the petition of a creditor, to be carried to and applicable to the purposes of the account in the Bank of England, intituled "The Secretary of Bankrupts Account;" to issue a fiat in bankruptcy against such trader, and to authorize the prosecution thereof in the court of bankruptcy in London, or in any district court of bankruptcy; and that it shall be lawful for such court so authorized as aforesaid, upon the application of such trader, and upon proof of the trading and of the filing of such declaration, or upon the application of any creditor or creditors of such trader to such amount as by the said statute required for a petitioning creditor's debt, and upon proof of the matters requisite to support a fiat issued upon the petition of a creditor, to make the adjudication of bankruptcy under such fiat; and all further proceedings under such fiat shall be thenceforth prosecuted and carried up in like manner as if such fiat had been issued and adjudicated upon on the petition of a creditor of the bankrupt.

16. *Paying money or giving security to the persons who struck the docket.*

By stat. 6 Geo. IV. c. 16, s. 8, if any such trader shall, after docket struck, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound than other creditors, such payment, gift, delivery, satisfaction or security, shall be an act of bankruptcy; and if any commission shall have issued upon the docket so struck, the Lord Chancellor may either declare such commission to be valid, and direct the same to be proceeded in, or may order it to be super-
 [*218] seded; and a new commission may issue, and *such commission may be supported, either by proof of such last-mentioned or any other act of bankruptcy: and every person so receiving such money, gift, delivery, satisfaction, or security as aforesaid, shall forfeit his whole debt, and also repay or deliver up such money, &c., or the full value thereof, to such persons as the commissioners shall appoint, for the benefit of the creditors. See *Ex parte Paxton*, 15 Ves. 463.

The word "creditors," here means the creditors entitled to receive dividends under the bankruptcy in the ordinary way, and the property to the payment, gift, or delivery of which the section is meant to

relate, is property which forms the subject of distribution under the particular fiat.(z)

17. *Creditor filing affidavit of debt.*

In place of the enactments in s. 8, of stat. 1 & 2 Vict. c. 110, by which a trader who neglected to pay, secure, or compound for a debt within twenty-one days after affidavit of debt filed, was to be deemed to have committed an act of bankruptcy; the stat. 5 & 6 Vict. c. 122, s. 11,(a) enacts, that if any creditor of any trader within the meaning of this or any other statute relating to bankrupts now or hereafter to be in force, shall file an affidavit in the court authorized as hereinafter provided to act in the prosecution of fiats in bankruptcy in the district (to be described as hereinafter mentioned) in which such debtor shall reside, or in the court of bankruptcy, if such debtor shall not reside in any such district, in the form specified in schedule hereunto annexed (A.) No. 1, of the truth of his debt, and of the debtor as he verily believes being such trader as aforesaid, and of the delivery to such trader personally of an account in writing of the particulars of his demand, with a notice thereunder requiring immediate payment thereof in the form specified in the schedule (A.) No. 2, it shall be lawful for the court in which such affidavit shall be filed, as the case may be, to issue a summons in writing in the form specified in the schedule (A.) No. 3, calling upon such trader to appear before such court, and stating in such summons the purpose for which such trader is called upon by such summons to appear as hereinafter provided. By section 12, upon the appearance of any such trader so summoned, the court shall require the trader to state whether or not he admits the demand of such creditor so sworn to, or any or what part thereof, and if the trader admits the demand or any part of it, to reduce such admission into writing, in a form prescribed by the act; which admission the trader is required to sign, and the same is then to be filed in the court; and the court shall allow the trader upon his appearance, to make a deposition on oath in writing under his hand, to be filed in the court, in the form prescribed, that he verily believes he has a good defence to the said demand, or to some and what part thereof.

*18. *Debtor not attending summons, or attending and not [*219] admitting demand, or deposing to a good defence, and not paying, securing, or compounding for such demand within fourteen days.*

By stat. 5 & 6 Vict. c. 122, s. 13, if any such trader so summoned as aforesaid shall not come before such court at the time appointed, (having no^l lawful impediment made known to and proved to the satisfaction of the court at the said time and allowed,) or if any such trader upon his appearance to such summons as aforesaid, or at any enlarge-

(z) *Exp. Smith*, 3 M. D. & D. 144.

(a) See *Exp. Cheese*, 3 M. D. & D. 79.

ment or adjournment thereof (as the case may be), shall refuse to admit such demand, and shall not make a deposition in the form hereinbefore mentioned, that he believes he has good defence to such demand, then and in either of the said cases if such trader shall not within fourteen days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, pay, secure, or compound for such demand to the satisfaction of such creditor, or enter into a bond in such sum, and with two sufficient sureties as such court shall approve of, to pay such sum as shall be recovered in an action which shall have been brought, or shall thereafter be brought for the recovering of the same, together with such costs as shall be given in such action, every such trader shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of such summons, provided a fiat in bankruptcy shall issue against such trader within two months from the filing of such affidavit.

19. *Signing an admission of demand, and not paying, tendering, securing or compounding for the same within fourteen days.*

By stat. 5 & 6 Vict. c. 122, s. 14, if any such trader so summoned as aforesaid, upon his said appearance shall sign an admission of such demand in the form aforesaid, and shall not within fourteen days next after the filing of such admission pay or tender and offer to pay to such creditor the amount of such demand, or secure or compound for the same to the satisfaction of the creditor, every such trader shall be deemed to have committed an act of bankruptcy on the fifteenth day after the filing of such admission, provided a fiat in bankruptcy shall issue against such trader within two months from the filing of such affidavit.

20. *Admitting a part of demand and not paying or tendering or securing or compounding for it, and as to residue not making deposition of a good defence to it, or paying, securing or compounding for it.*

By stat. 5 & 6 Vict. c. 122, s. 15, if any such trader so summoned as aforesaid, shall upon his said appearance sign an admission for part only of such demand in the form aforesaid, and shall not make a deposition in the form hereinbefore required, that he believes he has a good defence to the residue of such demand, then and in such case if such trader as to the sum so admitted shall not within [*220] *fourteen days next after the filing of such admission, pay or tender and offer to pay to such creditor the sum so admitted, or secure or compound for the same to the satisfaction of such creditor, and as to the residue of such demand shall not within fourteen days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, pay, secure or compound for the same to the satisfaction of such creditor, or enter into a bond in such sum, and with two sufficient sureties as such court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought or shall hereafter be brought for the recovery of the

same, together with such costs as shall be given in such action, every such trader shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of such summons, provided a fiat in bankruptcy shall issue against such trader within two months from the filing of such affidavit.

By sect. 16, a refusal to sign the admission shall be deemed a refusal to admit the demand.

By sect. 17, a properly attested admission of debt, signed out of court, shall, when filed, be of the same force as if signed by a trader on his appearance in court under summons.

21. *Filing petition for discharge in Insolvent Court.*

By stat. 1 & 2 Vict. c. 110, s. 39, the filing of the petition of every person in actual custody, who shall be subject to the laws concerning bankrupts, and who shall apply by petition to the said court for his discharge from custody, according to this act, shall be accounted and adjudged an act of bankruptcy from the time of filing such petition; and any fiat in bankruptcy issuing against such person, and under which he shall be declared bankrupt before the time appointed by the said court, and advertised in the *Gazette*, for such prisoner to be brought up to be dealt with according to this act, or at any time within two calendar months from the time of making any such order as aforesaid, shall have the effect of divesting the real and personal estate and effects of such person out of the said provisional assignee; provided always, that the filing of such petition shall not be deemed an act of bankruptcy, unless such person be so declared bankrupt before the time so advertised as aforesaid, or within two calendar months as aforesaid; but that every such order shall be good and valid, notwithstanding any fiat in bankruptcy under which such person shall be declared bankrupt after the time so advertised, and after the expiration of such two calendar months.

22. *Not paying, securing or compounding for a judgment debt.*

In addition to the foregoing acts of bankruptcy, the stat 5 & 6 Vict. c. 122, s. 20, enacts, that if any plaintiff shall recover judgment in any action personal for the recovery of any debt or money *demand in any of her Majesty's courts of record against any [*221] such trader, and shall be in a situation to sue out execution upon such judgment, and there be nothing due from such plaintiff by way of set-off against such judgment; and if such trader shall not within fourteen days(1) after notice in writing personally served upon him, requiring immediate payment of such judgment debt, pay, secure, or compound for the same to the satisfaction of such plaintiff, he shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of such notice; provided always, that if such execution

(1) These days are to be reckoned exclusive of the first and inclusive of the last day, unless the last day shall happen to fall on a Sunday, &c., in which case that day also shall be reckoned exclusively. General order in bankruptcy, Nov. 12, 1842, No. 43.

shall in the meantime be suspended or restrained by any rule, order or proceeding of any court of justice having jurisdiction in that behalf, no further proceeding shall be had on such notice, but that it shall be lawful, nevertheless, for such plaintiff, when he again shall be in a situation to sue out execution on such judgment, to proceed again by notice in manner before directed.

23. Disobeying order of a court of equity, or in bankruptcy or lunacy, for payment of money.

By stat. 5 & 6 Vict. c. 122, s. 21, if any decree or order shall be pronounced in any cause depending in any court of equity, or any order shall be made in any matter of bankruptcy or lunacy against any such trader, ordering such trader to pay any sum of money, and such trader shall disobey such decree or order, the same having been duly served upon him, the person entitled to receive such sum under such decree or order, or interested in enforcing the payment thereof pursuant thereto, may apply to the court by which the same shall have been pronounced to fix a peremptory day for the payment of such money, which shall accordingly be fixed by an order for that purpose; and if such trader being personally served with such last-mentioned order fourteen days before the day therein appointed for payment of such money shall neglect to pay the same, he shall be deemed to have committed an act of bankruptcy on the fifteenth day after the service of such order.

Bankruptcy of Joint Stock Companies.

The stat. 7 & 8 Vict. c. 111, (5th September, 1844,) after reciting that it is expedient to extend the remedies of creditors against the property of joint stock companies or bodies as thereafter mentioned, when unable to meet their pecuniary engagements, and to facilitate the winding up of their concerns; and that it might also be for the benefit of the public to make better provision for discovery of the [*222] *abuses that may have attended the formation or management of the affairs of any such companies or bodies, and for ascertaining the causes of their failure; enacts, that if any commercial or trading company now or at any time hereafter incorporated by charter or act of parliament, or any company or body of persons now or at any time hereafter associated together for any commercial or trading purposes, and to which any privilege or privileges or power or powers shall, before or after the passing of this act, have been granted under the authority of the stat. 7 Will. IV. & 1 Vict. c. 78, or any commercial or trading company or body which by the said statute is to be considered as subsisting, and to be subject to the provisions of the said statute in manner therein mentioned, or any company or body of persons now or at any time hereafter associated together for any commercial or trading purposes, and registered either provisionally or completely under the provisions of any act passed or to be passed in the present session of parliament, for the registration and regulation of

joint stock companies,(z) or any joint stock company now existing and comprehended within the definition therein contained of a joint stock company, shall commit any act which by this act is to be deemed an act of bankruptcy on the part of any such company or body, a fiat in bankruptcy may issue against such company or body by the name or style of the said company or body, upon the petition of any creditor or creditors of such company or body (whether a member or members of such company or body or not), to such amount as is now by law requisite to support a fiat in bankruptcy; and the court authorized to act in the prosecution of such fiat, and all persons acting under such fiat, may proceed thereon in like manner as against other bankrupts, subject always to the provisions hereinafter made.

By sect. 2, the bankruptcy of any such company or body in its corporate or associated capacity, as the case may be, shall not be construed to be the bankruptcy of any member of such company or body in his individual capacity.

By sect. 4, if any such company or body shall, by virtue of a resolution to be duly passed in that behalf at a board of directors of such company or body duly summoned for that purpose, file or cause to be filed in the office of the Lord Chancellor's secretary of bankrupts a declaration in writing, in the form specified in the schedule (A.) No. 1, hereunto annexed, that the said company or body is unable to meet its engagements, and also a minute of such resolution in the form specified in the said schedule (A.) No. 2, such declaration and minute of resolution respectively being under the common seal of such company or body, and if such company or body have no common seal, then signed by the chairman of the board of directors who was present at the passing of such resolution, and in either case such declaration and minute of resolution *being respectively attested by [*223] the attorney or solicitor of the said company or body for the time being, every such company or body shall be deemed thereby to have committed an act of bankruptcy at the time of filing such declaration, provided a fiat in bankruptcy shall issue against such company or body within two calendar months from the filing of such declaration; and a copy of such declaration and minute of resolution respectively, purporting to be certified by the said secretary, or his clerk, as a true copy, shall be received as evidence of such declaration and minute of resolution respectively having been filed by such company or body, and that upon such evidence being given, and upon proof by the attesting witness of the sealing or signature, as the case may be, of the said declaration and minute of resolution, no further evidence shall be required of the said act of bankruptcy.

By sect. 5, if any plaintiff shall recover judgment in any action personal for the recovery of any debt or money demand, in any of her Majesty's courts of record, against any such company or body, or against any person duly authorized to be sued as the nominal defendant on behalf of such company or body, and shall be in a situation to sue out execution upon such judgment, and there be nothing, due from

(z) The act here referred to is stat. 7 & 8 Vict. c. 110.

such plaintiff by way of set-off, or which may be legally set off against such judgment, and such company or body shall not, within fourteen days after notice in writing, served upon the said company or body, by service of the same on a chief clerk or secretary or registrar of the said company or body, or (if there be no officer of such denomination) on any director of the said company or body, personally, or by the same having been left at the head office for the time being of such company or body, requiring immediate payment of such judgment debt, pay, secure, or compound for the same to the satisfaction of such plaintiff, such company or body shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of such notice: provided always, that if such execution shall in the meantime be suspended or restrained by any rule, order or proceeding of any court of justice having jurisdiction in that behalf, no further proceeding shall be had on such notice, but that it shall be lawful nevertheless for such plaintiff, when he shall again be in a situation to sue out execution on such judgment, to proceed again by notice in manner before directed.

By sect. 6, if any decree or order shall be pronounced in any cause depending in any court of equity, or any order shall be made in any matter of bankruptcy or lunacy against any such company or body, or against any person duly authorized to be sued as the nominal defendant on behalf of such company or body, ordering any sum of money to be paid by such company or body, and such company or body shall disobey such decree or order, the same having been served upon such [*224] company or body, by service of the same on *a chief clerk or secretary or registrar of the said company or body, or (if there be no officer of such denomination) on any director of the said company or body personally, or by the same having been left at the head office for the time being of such company or body, the person entitled to receive such sum under such decree or order, or interested in enforcing the payment thereof pursuant thereto, may apply to the court by which the same shall have been pronounced, to fix a peremptory day for the payment of such money, which shall accordingly be fixed by an order for that purpose; and if such company or body, being served in manner aforesaid with such last-mentioned order fourteen days before the day therein appointed for payment of such money, shall neglect to pay the same, such company or body shall be deemed to have committed an act of bankruptcy on the fifteenth day after the service of such order.

By sect. 7, if any creditor or creditors of any such company or body to such amount as is now by law requisite to support a fiat shall file an affidavit or affidavits in any of her Majesty's superior courts of law at Westminster, that such debt or debts is or are justly due to him or them respectively from the said company or body; and that such company or body, as he or they verily believe, is a commercial or trading company, or body incorporated or associated as aforesaid, as the case may be, and shall sue out of the same court a writ of summons against such incorporated company, or against any person duly authorized to be sued as the nominal defendant on behalf of such associated company or body, as the case may be, and serve a chief clerk or secretary or registrar of such incorporated or associated

company or body, as the case may be, or (if there be no officer of such denomination) any director of the said company or body, personally, with a copy of such summons, if such company or body shall not, within one calendar month after service of such summons, pay, secure or compound for such debt or debts, to the satisfaction of such creditor or creditors, or make it appear to the satisfaction of one of the judges of the court out of which such writ of summons shall issue that it is the intention of such company to defend the action upon the merits, and within one calendar month next after service of such summons cause an appearance or appearances to be entered to such action or actions in the proper court or courts in which the same shall have been brought, every such company or body shall be deemed to have committed an act of bankruptcy from the time of the service of such summons.

By sect. 8, it shall be lawful for the assignees of the estate and effects of any such company or body to maintain any action, suit or other proceeding against any person or persons (whether a member or members of such company or body or not) to recover any debt or demand on behalf of the said company or body against such person or persons, and for any person or persons to prove or claim under *the [*225] fiat against such company or body such debt or demand as may be due to him or them (whether a member or members of such company or body or not) on the balance of accounts between him or them and the said company or body: provided (sect. 9) that no claim or demand which any member of any such company or body may have in respect of his share of the capital or joint stock thereof, or of any dividends, interest, profits, or bonus payable or apportionable in respect of such share, shall be capable of being set off, either at law or in equity, against any demand which the assignees of the estate and effects of such company or body may have against such member on account of any other matter or thing whatsoever, but all proceedings in respect of such matter or thing may be carried on as if no claim or demand existed in respect of such capital or joint stock, or any dividends, interests, profits, or bonus payable or apportionable in respect thereof.

By sect. 10, no action, suit, or other proceeding by any creditor or creditors of any such company or body shall, so far as concerns or may be necessary for the recourse of such creditor or creditors against the person, property, or effects of any member or members thereof for the time being, or any former member or members thereof, be deemed to prejudice or in any manner affect the right of such creditor or creditors to sue out or prosecute a fiat against such company or body, or his or their right to prove or claim under any fiat against such company or body any debt or demand remaining unsatisfied; and that no such fiat, or proof or proceeding thereunder, shall be deemed to prejudice or in any manner affect the right of any creditor or creditors of such company or body to institute or maintain any action, suit, or other proceeding, so far as concerns or may be necessary for the recourse of such creditor or creditors, against the person, property, or effects of any member or members thereof for the time being, or any former member or members thereof: provided always, that nothing herein contained shall prevent remedy against copartners: provided also, that no execu-

tion in respect of any debt or demand proveable under the fiat against any such company or body adjudged bankrupt shall be issued against the person, property, or effects of any member or members for the time being of such company or body, or any former member or members thereof, until after such debt or demand shall have been proved under such fiat, nor shall any such execution be issued after the appointment of a receiver in manner hereinafter mentioned, without leave of the high Court of Chancery.

By s. 11, the law and practice in bankruptcy now in force shall extend, so far as the same may be applicable, to this act, and to fiats in bankruptcy issued by virtue of this act, and to all proceedings under such fiats, save and except as may be otherwise directed by this act.

By stat. 7 & 8 Vict. c. 113, s. 98, every company of more [*226] than *six persons carrying on the trade or business of bankers in England shall be deemed a trading company within the provisions of the stat. 7 & 8 Vict. c. 111.

Bankruptcy of persons having privilege of Parliament.

By stat. 6 Geo. IV. c. 16, s. 9, if any such trader having privilege of parliament, shall commit any of the aforesaid acts of bankruptcy, a commission of bankruptcy may issue against him, but he shall not be subject to be arrested or imprisoned during the time of such privilege, except in cases hereby made felony.

By sect. 10, if a creditor of a trader, having privilege of parliament to the amount required to support a commission, shall file an affidavit in any court of record at Westminster, that such debt is due to him, and that such debtor is, as he verily believes, such trader, and shall sue out of the same court a summons against such trader, and serve him with a copy, if such trader shall not, within one calendar month after personal service of such summons, pay, secure, or compound for such debt to the satisfaction of such creditor, or enter into a bond in such sum, and with two sufficient sureties, as any of the judges of the court out of which such summons shall issue shall approve of, to pay such sum as shall be recovered in such action, together with costs, and within one calendar month next after personal service of such summons cause an appearance to be entered to such action in the proper court in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy, from the time of the service of such summons, and any creditor or creditors of such trader to such amount as aforesaid may sue out a commission against him, and proceed thereon in like manner as against other bankrupts.

By sect. 11, an act of bankruptcy will be committed by traders having privilege of parliament, who disobey the order of any court of equity, or in bankruptcy, or in lunacy, for the payment of money after service and peremptory day fixed.

By stat. 52 Geo. III. c. 144, s. 1, whenever a commission of bankrupt shall issue and be awarded against any person being a member of the House of Commons, and he shall be found and declared a bankrupt under the same, such member shall be and remain during twelve calen-

dar months from the time of the issuing thereof incapable of sitting and voting in the House of Commons, unless within the said period such commission shall be superseded, or unless within the same period the creditors of such member proving their debts under the commission of bankruptcy, shall be paid or satisfied to the full amount of their debts under the commission: provided always, that such of the debts, if any, as shall be disputed by such bankrupt, if he shall within the time aforesaid enter into a bond or bonds in such sum or sums with two sufficient securities to be *approved by the commissioners to [*227] pay such sum or sums of money as shall be recovered in any action, suit, or other proceedings in law or equity concerning such debts, together with such costs as shall be given in the same, shall be considered for the purpose of this act as paid or satisfied. And by sect. 2, if the said commission is not within twelve calendar months from the issuing thereof superseded, nor the debts satisfied in manner aforesaid, then the commissioners must immediately after the expiration of twelve calendar months from the issuing of the commission, certify the same, as the case may be, to the speaker, and thereupon the election of such member is void, and the speaker is to issue a new writ.

V. *Of the Petitioning Creditor's Debt.*

By stat. 5 & 6 Vict. c. 122, s. 9, the amount of the debt or debts of any creditor or creditors petitioning for a fiat in bankruptcy shall hereafter be as follows, that is to say, the single debt of such creditor, or of two or more persons being partners, petitioning for the same shall amount to 50*l.* or upwards, and the debt of two creditors so petitioning shall amount to 70*l.* or upwards, and the debt of three or more creditors so petitioning shall amount to 100*l.* or upwards; and that every person who has given credit to any trader upon valuable consideration for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may so petition or join in petitioning as aforesaid, whether he shall have had any security in writing for such sum or not.

A second commission issued against a trader before a former had been disposed of is a nullity;^(z) inasmuch as there is nothing upon which it can operate, all the bankrupt's property being vested in the assignees under the first commission. So a third commission issued against a trader who has not paid any dividend under a first and second commission, is a nullity.^(a) But in these cases there must have been an assignment^(b) under the first commission.

By stat. 6 Geo. IV. c. 16, s. 16, any creditor, whose debt is sufficient to entitle him to petition against all the partners of any firm, may petition for a commission against one or more partners of such firm; and every commission issued upon such petition shall be valid, although

^(z) *Till v. Wilson*, 7 B. & C. 684.

^(a) *Fowler v. Coster*, 10 B. & C. 427, recognizing *Till v. Wilson*. See also *Nelson v. Cherrill*, 8 Bingh. 316; *Bayley and others, Assignees, &c, v. Nicholls*, B. R. M. T. 3 Will. IV. S. P.

^(b) *Phillips v. Hopwood*, 1 B. & Ad. 619.

it does not include all the partners of such firm; and commissions against two or more persons may be superseded as to one or more without affecting the rest. By sect. 17, in cases of a second or other commission being issued against any other member of such firm, the Chancellor may direct such commission to be proceeded in separately, or in conjunction with the first commission. By sect. 19, [*228] *no commission shall be deemed invalid by reason of any act of bankruptcy prior to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy subsequent to such debt. If the debt, as against the bankrupt, (c) amount to the sum required, it is sufficient, though the creditor should have acquired it for less; as where the debt (amounting to 100*l.*) consisted of notes payable by the bankrupt to other persons, who, before the act of bankruptcy, had indorsed them to the petitioning creditor upon his paying 10*s.* in the pound for them: it was holden, that this debt was capable of supporting the commission. If a creditor to the amount required before an act of bankruptcy, (d) receives, after notice of the bankruptcy, a part of his debt so as to reduce it under 100*l.*, he is not precluded from suing out a commission; because the part payment of the debt was illegal, and cannot be retained; consequently, the original debt remains in force to support the commission. But interest accruing before the act of bankruptcy cannot be added to the principal sum due on a bill of exchange so as to constitute a good petitioning creditor's debt, unless interest be reserved on the face of the bill; for where it is not so reserved, the interest forms no part of the debt, but is only in the nature of damages. (e) So where the petitioning creditor's debt had been reduced below the amount required, (f) by a bill drawn by the bankrupt on a person who, not having any effects of the bankrupt, refused to accept it, the original debt was considered as still in force, and sufficient to support the commission. A commission issued at the instance and request of the bankrupt is good (g) in a court of law. In order to prove the petitioning creditor's debt, (h) the assignees relied on an entry in the bankrupt's books, (i) made some months before the act of bankruptcy, wherein it was stated that the bankrupt was indebted to the petitioning creditor in more than 200*l.*; but there was not any evidence that the debt continued down to the time of the bankruptcy; but Lord *Ellenborough*, C. J., held, that the debt being proved to have once existed, its continuance would be presumed.

Taking a security of a higher nature, (k) after the bankruptcy, for a debt of an inferior nature, contracted before, does not so far extinguish the original debt as to prevent the creditor from suing a commission upon it; as in the case of a bond taken for a simple contract debt. Banker's notes payable on demand held by a creditor of the bankers,

(c) *Ex parte Lee*, 1 P. Wms. 782.

(d) *Mann v. Shepherd*, 6 T. R. 79.

(e) *Cameron v. Smith*, 2 B. & A. 305.

(f) *Bickerdike v. Bollman*, 1 T. R. 405, said to be an excepted case, the principle of which is not to be extended. See *Lafitte v. Slatter*, 6 Bingh. 626.

(g) *Shaw v. Williams*, 1 Ry. & Moo. 19.

(h) *Jackson v. Irvin*, 2 Campb. 48.

(i) See *Ever v. Preston*, C. T. H. 378.

(k) *Ambrose v. Clendon*, Str. 1042, and Ca. Temp. Hard. 267.

if not sufficient before demand made to constitute a good petitioning creditor's debt,^(l) do not extinguish the prior debt due from the bankers.

*A creditor of an insolvent trader may, after the debtor's [*229] discharge under the 53 Geo. III. c. 102, take out a commission of bankruptcy against him; and his debt, although included in the insolvent's schedule, will be a sufficient petitioning creditor's debt;^(m) for the Insolvent Debtors Act does not contain any provision which extinguishes the debt.

A. a trader,⁽ⁿ⁾ before he commits any act of bankruptcy, draws a promissory note for 200*l.*, payable to B. or order, then A. commits an act of bankruptcy, and afterwards B. indorses the note over to C., who is the petitioning creditor; it was holden, *per totam curiam*, that he may well be so, for the 200*l.* was a debt due from the bankrupt before he committed the act of bankruptcy, to some person, *viz.*, to B.

If two persons exchange acceptances, and before the bills are mature one of the acceptors commits an act of bankruptcy, there is not such a debt due from him to the other as will sustain a commission, before the other has paid his own acceptance.^(o)

The debt of the petitioning creditor must be a legal debt; hence the assignee of a bond cannot be a petitioning creditor.^(p) It has been holden that a simple contract debt, though of above six years' standing, will be sufficient;^(q) for though the statute of limitations takes away the remedy, it does not destroy the debt; but it is very doubtful whether this position can now be supported.^(r) Husband entitled to a debt in right of his wife as executrix, cannot alone be the petitioning creditor; and the plaintiff assignee was nonsuited, because the wife was not made a petitioner with him.^(s) Neither can husband alone be the petitioning creditor in respect of a debt composed partly of a sum due to him in his own right, and partly of a sum due to his wife *dum sola*.^(t) The petitioning creditor's debt cannot be supported, when consisting of several creditors, one of whom is an infant.^(u) Where the debt is due to a partnership, it must appear that all the partners to whom it is due concur in the proceeding. Hence, a commission issued on the petition of one only of two partners to whom a joint debt is due, cannot be supported.^(x) But one of two executors may be a

(l) *Simpson v. Sikes*, 6 M. & S. 295.

(m) *Jellis v. Mountford*, 4 B. & A. 256.

(n) *Anon.* C. B. 2 Wils. 135.

(o) *Sarratt v. Austin*, 4 Taunt. 200.

(p) *Medlicot's case*, in Ch. Str. 899, per Lord Macclesfield, C., in *Ex parte Lee*, 1 P. Wms. 783, S. P.

(q) *Quantock v. England*, 5 Burr. 2628, adopting the opinion of *Eyre*, C. J., in *Swayne v. Wallinger*, Str. 746; but see *Exp. Seare*, and *Exp. Dewdney*, 15 Ves. 498, and *Exp. Roffey*, 2 Rose. 245, where it was holden, that a debt upon which the statute of limitations had attached, was not provable under a commission of bankruptcy; and, that the dividends paid upon such a debt should be refunded. See also *Gregory v. Hurrill*, 5 B. & C. 341.

(r) See *Middleton v. Mucklow*, 10 Bingh. 401, and the cases cited in n. (q).

(s) *Master v. Winter*, at the London Sittings, before Lord Hardwicke, Davies, 292, 293, and 2 Montagu, 129.

(t) *Rumsey v. George*, 1 M. & S. 176.

(u) *Exp. Morton*, 1 Buck. 42.

(x) *Buckland v. Newsame*, 1 Taunt. 477.

[*230] good petitioning *creditor for a commission against a debtor of their testator.(y) A debt due *from* a partnership will support a separate commission.(z) So will a debt contracted before the party entered into trade.(a) A debt due to an attorney for his bill of costs, although a bill has not been signed and delivered by him in pursuance of stat. 2 Geo. II. c. 23, s. 23,(b) is notwithstanding a legal debt, and will support a commission.(c) A debt for money lent, due to a creditor at the time when an act of bankruptcy is committed by the debtor, is sufficient to support a commission against him, though afterwards, and before petitioning for such commission, the creditor obtains judgment against him for a sum of money including such debt, and the affidavit made in order to obtain the commission may be an affidavit of debt for *money lent*.(d)

A bill of sale of goods was given in satisfaction of a bond debt by the obligor, a trader, then indebted to several persons: it was afterwards discovered that the obligor had previously committed an act of bankruptcy; it was holden,(e) that the obligee might abandon the bill of sale, and sue out a commission against the obligor. So a creditor, who with others had become a party to a deed of trust, by which, in consideration of the assignment of certain debts due to their debtor for their benefit they release their debts, is not thereby precluded from becoming a petitioning creditor, and suing out a commission of bankrupt against the debtor, on its being discovered that he had, previously to the execution of the deed, committed a secret act of bankruptcy;(f) because the deed was wholly void by reason of the prior act of bankruptcy. But where the deed is not void, as where it was executed by two out of four trustees, it was holden, that the debt of one of the trustees who had executed was thereby extinguished, and he could not(g) sue out a commission.

One who has his debtor in execution cannot petition.(h) It is a general rule, that the petitioning creditor's debt must have been contracted before the act of bankruptcy. In *Wright v. Lainson*,(i) the assignees were required to show, that the document on which they relied to establish such debt was in existence before the bankruptcy. In an action for a breach of promise of marriage, A. recovered damages above 100*l.* against a trader, who, between verdict and judgment, committed an act of bankruptcy: Held, that the debt on judgment

[*231] was not a good petitioning creditor's *debt.(k) It is also an established rule, that the assignees must prove the debt of the

(y) *Treasure v. Jones*, E. 25 Geo. III. MSS. of Lawrence, J., Serjt. Hill's MSS. Vol. xxi. p. 162, A. P. B., No. 88, in Lincoln's Inn Library, S. C.

(z) *Exp. Crisp*, 1 Atk. 134.

(a) *Butcher v. Easto*, 1 Doug. 295.

(b) Repealed by stat. 6 & 7 Vict. c. 73, *ante*, p. 172.

(c) *Exp. Sutton*, 11 Ves. jun. 164, Lord Eldon, Ch.

(d) *Bryant v. Withers*, 2 M. & S. 123.

(e) *Hull v. Smallwood*, Peake's Add. Cases, edited by Peake, jun., p. 13, Kenyon, C. J.

(f) *Doe d. Pitcher v. Anderson*, 1 Stark. N. P. C. 262, 3; 5 M. & S. 161, S. C.

(g) *Small v. Marwood*, 9 B. & C. 300.

(h) *Burnaby's case*, Str. 653. *Cohen v. Cunningham*, 8 T. R. 123, S. P.

(i) 2 M. & W. 739.

(k) *Exp. Charles*, 14 East, 197.

petitioning creditor, by the same evidence which must have been produced in an action against the bankrupt. Hence, in order to prove a petitioning creditor's debt, which arises by bond, proof of the acknowledgment of the obligor will not supersede the necessity of calling the subscribing witness.^(l) Entries made by the bankrupt in his books *before* the act of bankruptcy,^(m) provided the import of them is clear and unequivocal, are to be considered in the same light as parol declarations of the bankrupt, and therefore sufficient proof of the petitioning creditor's debt. But a written paper acknowledging that a balance of a certain sum is due to the petitioning creditor, and signed by the bankrupt, is not evidence, unless it is proved that it was written and acknowledged by the bankrupt before the date of the commission.⁽ⁿ⁾ And no declaration by the bankrupt, whether oral or written, subsequent to his bankruptcy, is admissible to prove a petitioning creditor's debt. The commission must appear to have been regularly granted. A second commission sued out against a bankrupt, pending a former, under which he has not obtained his certificate, is void,^(o) for an uncertificated bankrupt is incapable of trading for his own benefit. But where a prior and joint commission of bankrupt had been issued, but never acted on or suspended, held, that such commission not being in legal operation, did not invalidate a second separate commission.^(p) In a case where it appeared, that not only the petitioning creditor's debt was contracted by the plaintiff, and the trading upon which he was declared bankrupt was carried on by him, and the act of bankruptcy committed during his infancy, but also the commission of bankrupt was issued out against him whilst he still continued an infant; it was holden,^(q) that the commission was not a valid commission in a court of law, and that the plaintiff might dispute its validity against the assignee without giving notice.

By stat. 6 Geo. IV. c. 16, s. 18, if after adjudication the debt of the petitioning creditor be found insufficient to support a commission, it shall be lawful for the Chancellor, upon the application of any other creditor, having proved any debt sufficient to support a commission, provided such debt has been incurred not anterior to the debt of the petitioning creditor, to order the said commission to be proceeded in, and it shall by such order be deemed valid.

Under this statute, where a petitioning creditor's debt turns out to be insufficient to support a fiat, and the Chancellor orders the *commission to be proceeded in on proof of a sufficient debt [*232] by any other creditor, the debt of the second may be added to that of the first, to make up the requisite amount.^(r)

VI. *Of Property in the Possession of the Bankrupt as reputed Owner.*

By stat. 6 Geo. IV. c. 16, s. 72, if any bankrupt, at the time^(s) he

^(l) *Abbott v. Plumbe*, Doug. 216.

^(m) *Watts v. Thorpe*, 1 Campb. 376. S. P. admitted in *Rankin v. Horner*, Somerset Lent Assizes, 1813.

⁽ⁿ⁾ *Hoare v. Coryton*, 4 Taunt. 560.

^(o) *Martin v. O'Hara*, Cowp. 823.

^(p) *Warner v. Barber*, 2 Moore, (C. P.) 71.

^(q) *Belton v. Hodges*, 9 Bingh. 365.

^(r) *Byers v. Southwell*, 6 Bingh. N. C. 39; 8 Scott, 238.

^(s) See *Fawcett v. Fearne*, B. R., June 27th, 1844.

becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any *goods or chattels*, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission : provided, that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of an act of parliament made in the fourth year of his present Majesty, intituled "An Act^(t) for the Registering of Vessels;"⁽¹⁾ (and by stat. 3 & 4 Will. IV. c. 55, s. 43, any transfer of a ship or share thereof by way of mortgage, duly registered, shall not be affected by the bankruptcy of the mortgagor after the registration of the mortgage, although he may have the possession, or be the reputed owner of the ship or share.)^(u)

The language of this clause is, "*at the time he becomes bankrupt, by the consent of the true owner.*" See *Lyon v. Weldon*, 2 Bingh. 334; *Storer v. Hunter*, 3 B. C. 380. *Bayley, J.*; *Exp. Watkins*, 1 Dea. 296; *Smith v. Topping*, 5 B. & Ad. 674; *Townley v. Crump*, 4 A. & E. 58, and *post*, p. 246; *Shaw v. Harvey*, 1 A. & E. 920. The general view of the provision is, to prevent traders from gaining a delusive credit, from a false appearance of their circumstances, to the misleading and deceit of those who may trade with them.

The statute applies only to *goods and chattels*. Hence^(u) it [*233] was *holden, in *Horn v. Baker*, 9 East. 215, that vats and stills belonging to a distillery, and which were fixed to the freehold, were not affected by the statute, and the same doctrine was laid down in *Clarke v. Crownshaw*, 3 B. & Ad. 804, as to the machinery and things affixed to the freehold of a mill and iron forge; in *Coombs v. Beaumont*, 5 B. & Ad. 72, as to a steam engine in a colliery; and in *Exp. Lloyd*, 1 Mont. & Ayr. 494, as to a steam engine, &c., erected for purposes of trade and fixed to the freehold; in the case of an equitable mortgage. See also *Exp. Wilson*, 2 Mont. & Ayr. 61. Choses in action^(x) have been holden to fall within the description of goods and chattels; as also debts;^(y) and if left in the disposal of the bankrupt, he is the proprietor. So a right to print a newspaper;^(z) so mortgages or sales upon condition

(t) This act was repealed by stat. 6 Geo. IV. c. 105. The present act is the 3 & 4 Will. IV. c. 55, amended by stat. 5 & 6 Will. IV. c. 56.

(u) See this section, *post*, tit. "Shipping."

(x) *Ryal v. Rolle*, 1 Vezey, 348; 1 Atk. 165, S. C.; 1 Wils. 260, S. C.; recognized in *Belcher v. Capper*, 4 M. & Gr. 551; 5 Scott's N. R. 257.

(y) Per Lord Eldon, C., in *Exp. Ruffin*, 6 Ves. 128.

(z) *Longman v. Tripp*, 2 N. R. 67.

(1) This proviso is new. Before this act, where A., the owner of a ship, duly assigned his interest in it to B. as a security for a debt, and B. became the registered owner, but by his permission A. continued to have the same in his possession, order, and disposition, until he became bankrupt; it was holden, (*Hay v. Fairbairn*, 2 B. & A. 193; see also *Robinson v. M'Donnell*, S. P., *post*, tit. "Shipping,") that A.'s assignees were entitled to the ship.

of goods, as well as absolute sales,(a) and a mortgage by one partner to another of a moiety of stock in trade, is not distinguishable from a mortgage to a stranger,(b) if the mortgagor is suffered to continue in possession as visible owner.

The principal difficulty in deciding questions on this clause lies in ascertaining whether the bankrupt is reputed owner or not. When this fact is settled, the application of the statute is easy; for from the reputed ownership false credit arises; from that false credit arises the mischief, and to that mischief the remedy of the statute applies. These questions have much more of fact in them than law;(c) and hence it seems proper to leave it to the jury(d) to say whether, under the circumstances, the bankrupt had the reputed ownership of the goods at the time. Whether the trader was at the time of his bankruptcy the reputed owner of particular property is a question of fact, depending upon a consideration of all the circumstances attending the possession of such property.(e)

Cases within the Statute.—A., a brewer,(f) in partnership with B., mortgaged to C., in trust for B. his, viz. A.'s moiety of the utensils, stock in trade, debts, profits, &c., for securing a sum of money lent to him by B., but continued in possession of the stock, &c., and received the debts as if in partnership with B., and afterwards became a bankrupt; it was holden by Lord *Hardwicke*, Ch., assisted by *Burnet*, J., *Parke*, C. B., and *Lee*, C. J.; 1st, On the authority of the case of *Stevens v. Sole*, cited 1 Atk. 170, that a conveyance of goods and chattels, by way of mortgage, or with condition *of redemp- [*284] tion, was within the statute, and that the mortgagee or vendee upon condition was "true owner and proprietor," within the meaning of that statute. 2ndly, That "goods and chattels" included debts; and in this case notice of the assignment of the debts to the partner not having been given, the assignees of the bankrupt were entitled to dispose of them for the benefit of the creditors in general. 3rdly, That the mortgage to C., in trust for B. the partner, was not to be distinguished from a mortgage to a stranger, under the circumstances of this case, the trustee not having interfered. That if it had been intended to take the case out of the statute, B., when he became entitled to A.'s moiety, should have had the sole and not a joint possession only: that A., having continued in possession after the conveyance as visible partner, and received debts, &c., by the permission of B., had the order and disposition of the goods and chattels, and was one of the reputed owners as much as B. Another point was made,(g) whether B., by the loan to A. his partner, did not gain a special lien on A.'s moiety of the

(a) *Ryal v. Rolle*, ubi sup.; *Hall v. Gurney*, 3 Doug. 356.

(b) *S. C.*

(c) Per *Buller*, J., in *Walker v. Burnell*, Doug. 319, recognized by *Lawrence*, J., in *Horn v. Baker*, 9 East, 241.

(d) *Lawrence*, J., 9 East, 241.

(e) *Edwards v. Scott*, 1 M. & Gr. 962; 2 Scott's N. R. 266. See *Duncan v. Chamberlayne*, 11 Sim. 123; *West v. Reid*, 2 Hare, 249; *Exp. Arkwright*, 3 Mont. D. & D. 129.

(f) *Ryal v. Rolle*, 1 Vezey, 348; 1 Atk. 165; 1 Wils. 260, cited in *Smith v. Smith*, 4 Tyr. 53.

(g) 1 Vezey, 373.

partnership effects; but it was determined that he had not any such lien, there not being any authority or precedent for it after a bankruptcy; and that it was a different consideration what a court of equity might do between the parties themselves, while both remained capable of transacting for themselves. Also, it was agreed by the court, that mortgages of lands and fixtures were not affected by the statute.

This statute applies(*h*) to a secret partner, who, after the dissolution of partnership, permits his share of partnership property to continue in the possession of the bankrupt. Bills of exchange are "goods and chattels" within the meaning of this statute.(*i*) In trover, for a dyer's plant,(*k*) it appeared that the plaintiff had sold the plant to B., for which he gave the plaintiff two promissory notes, one payable in one year, and the other in two years from the time of the sale. At the expiration of the first year, B., finding it inconvenient to pay the note then due, by indenture agreed to assign and deliver the plant to plaintiff, in consideration of his delivering up the notes; but it was stipulated in the deed that A. should let the plant to B. for a term of years at a certain rent; B. covenanted to pay the rent quarterly, to keep the plant in repair, and not to assign it without the consent of the plaintiff. The deed contained a proviso that B. should deliver the plant, and that the plaintiff might take possession of the same on failure in the payment of the rent. There was a memorandum, also, that B. had put the plaintiff into possession, by the delivery of one winch in the name of the whole. Afterwards B. became a bankrupt, and the defendant, [**235*] *being chosen assignee, took possession of the plant as part of the effects of B. The court were of opinion, that this case was within the statute, and Lord *Mansfield* said that he had not any doubt that this was a new experiment to defeat the bankrupt laws. The law had said,(*l*) that a trader could not mortgage his effects and at the same time keep possession. What was the case here? the bankrupt sold and kept possession, and paid interest for the money; if this contrivance were suffered, it would open a door to avoid the statutes; and therefore, it ought not to be allowed to prevail. So where B. kept a coffee-house,(*m*) and a creditor, after taking in execution all the household furniture and other articles belonging to the coffee-house, let them by deed to B. for a term of years, who covenanted not to remove them without the creditor's consent; B. having continued in possession under this deed for several years, until the time of his bankruptcy, the assignees were holden to be entitled to the property under this statute, the bankrupt having had such a possession as necessarily created a reputation of ownership. The bankrupt being the reputed owner and appearing to have the order and disposition of the goods, the court considered him as having taken upon himself the sale, order, and disposition, within the meaning of this statute, which terms they observed were only incidental to reputed ownership.

(*h*) *Exp. Enderby*, in *re Gilpin*, 2 B. & C. 389, recognized by *Tindal*, C. J., *Exp. Chuck*, 8 Bingham 472. See also *Smith v. Watson*, 2 B. & C. 401.

(*i*) *Hornblower v. Proud*, 2 B. & A. 327.

(*k*) *Bryson v. Wylie*, B. R. H. 23 Geo. III. 1 Bos. & Pul. 83, n.

(*l*) In *Ryal v. Rolle*, 1 Atk. 165.

(*m*) *Lingham v. Biggs*, 1 Bos. & Pul. 82. See *Mallett v. Green*, 8 C. & P. 382.

There are two classes of cases where property demised to the bankrupt has been held to pass to his assignees under this statute: the first is, where the bankrupt has once been the owner, and the other where he has not. The evidence required to establish reputed ownership in each of these cases is different. In the former case, when it is once proved that the bankrupt has been the owner, and has continued in possession until the act of bankruptcy, the presumption is, that he then continued in possession, in the character of owner; and therefore proof of those facts is *prima facie* evidence that the bankrupt is both reputed and real owner. Such was the foregoing case of *Lingham v. Biggs*, and the following of *Lingard v. Messiter*, 1 B. & C. 308; 2 D. & R. 495.(n) Trover for machinery: the plaintiff proved that the bankrupt had once been the real owner of the goods in question, and that he continued in possession until the act of bankruptcy. The defendant proved that, long before the bankruptcy, the goods had been seized under an execution, at the suit of a creditor, by the sheriff, and that they were conveyed, by bill of sale, to the creditor; and that he afterwards demised them, at an annual rent, to the bankrupt. Soon after the bill of sale was executed, the creditor's initials were marked on the goods. It was holden, that this was not evidence of the notoriety of the change of property, and consequently that there was no evidence to go to the jury that the bankrupt had ceased to be the *reputed owner. But in a case where the property had [*286] been demised to a person who never had been the owner, and he became bankrupt, the mere possession might not be sufficient to induce others to consider him as owner. See further on this point, *Storer v. Hunter*, 3 B. & C. 368, cited and distinguished in *Clark v. Crownshaw*, 3 B. & Ad. 808. Trover for goods:(o) it appeared that the defendants were bankers, to whom B., a mercer, resident in Cumberland, had given a warrant of attorney, to secure certain advances which they had made to him. Judgment having been entered, a writ of *fi. fa.* was sued out thereon, and a warrant directed, on 7th May, to two of B.'s shopmen, there being no bound bailiffs in Cumberland. The shopmen were desired to take possession of all B.'s stock in trade under it. Having got the warrant, they remained in the shop till night, when they locked it, and carried away the key. But on the Monday morning they again opened it: and, although B. did not interfere, business was carried on apparently as usual. On the evening of this day, B. committed an act of bankruptcy. A commission of bankruptcy was sued out against him on the 14th of the same month. The goods were afterwards sold by public auction under the warrant, the shopmen having remained in possession from the time it was delivered to them. Lord *Ellenborough*, C. J. "How can the possession of servants be adverse to that of their master? The goods were certainly under the order, disposition, and control of the bankrupt, when the bankruptcy happened, and therefore passed to his assignees, notwithstanding the execution. I remember an execution in the North, where the warrant

(n) Recognized in *Leake v. Loveday*, 5 Scott's N. R. 908; 4 M. & Gr. 972.

(o) *Jackson v. Irvin*, 2 Campb. 49.

was delivered to a gentleman's butler, who continued to serve up wine, and to wait at his master's table as before. The court has more than once expressed an opinion that there ought to be bound bailiffs in Cumberland, as in other counties. They seem to have supposed here, that a possession, *aliene* to the master's, dissolved the relation between him and his servants; but they were wrong in point of law. Had they delivered the warrant on the 7th to a bound bailiff, and put him in possession, all would have been right." A., a trader and an officer in the East India Company's service,^(p) assigned his privilege of shipping goods from the East Indies to England, to B. for a valuable consideration; and in order to evade the by-laws of the East India Company, which prohibited such assignment, the goods were shipped, entered, warehoused, and sold by the company in A.'s name, and the proceeds carried to his account: but before A. received those proceeds from the company, he became a bankrupt. It was holden, that his assignees were entitled to recover the amount in an action for money had and received, against the company, this being such a possession as fell within the statute.

It was a question whether the enacting part of the 11th [*237] section *of stat. 21 Jac. I. c. 19, which corresponded with that now under consideration, was restrained by the preamble; but it was holden, that it extended to the goods of other persons remaining in the possession of the bankrupt, as well as those which were originally the bankrupt's property. Hence, where it appeared that the plaintiff having kept a public house,^(q) and had a license, said she was married to one Penrice, whose name she afterwards entered in the books of the excise-office with a note in the margin "married," from which time Penrice had the license, and continued in the possession of the house and goods until he committed an act of bankruptcy; the court were of opinion that this case was within the statute, on two grounds: 1st. That the statute extended to the goods of other persons as well to those which were originally the bankrupt's property: 2ndly. That after a solemn declaration by the plaintiff that she was married to Penrice, and that these were the goods of Penrice in her right, she should never be allowed to say that she was not married to him, and that the goods were her sole property. So where household furniture, the separate property of the wife of B.^(r) and of her children by a former husband, were, upon her marriage with B., assigned to the plaintiffs, as trustees, in trust to suffer B. to enjoy them, on condition that he should pay the plaintiffs, for the use of the children of his wife by her former husband, a certain sum by yearly instalments; and, notwithstanding several defaults in payment of those instalments, the bankrupt was permitted by the trustees to remain in possession of those goods, until the evening before he committed an act of bankruptcy, when they repossessed themselves of the

(p) *Gordon v. E. I. Company*, 7 T. R. 228.

(q) *Mace v. Cadell*, Cowp. 232.

(r) *Darby v. Smith*, 8 T. R. 82, recognized by Sir W. Grant, M. R., in *Caffray v. Darby*. 6 Ves. 496, 7.

goods; it was holden, that the trustees had suffered the bankrupt to have the possession, order, and disposition of the goods, *down to the time of his bankruptcy*, and therefore the case fell within the very words, as well as the meaning, of the statute. But the goods must be in the possession of the bankrupt *at the time of his bankruptcy*, otherwise the statute does not apply.^(s) A., a termor for years of lands, had built thereon a rectifying distil-house,^(t) where he carried on the business of a distiller in partnership with B. A., finding it to be a losing concern, withdrew from the business, and thereupon leased to B., his former partner, and one C., the premises, together with the *stills, vats, and utensils* proper for carrying on the business, and which had been used by A. and B. Under this lease B. and C. continued in possession of the property, carrying on the trade in the same manner as was done before, until they became bankrupts. It did not appear that there was any usage in the trade for letting such utensils. The question arising, whether the bankrupts, under the **above-men-* [*238] *tioned* circumstances, had the reputed ownership of the moveable utensils of the trade before and at the time of the bankruptcy, and had thereby acquired the real ownership by the statute for the benefit of their creditors; the court were of opinion that they had; Lord *Ellenborough*, C. J., observing, that “the true object of the statute was to make the *reputed* ownership of goods and chattels in the possession of bankrupts, at the time of their bankruptcy, the *real* ownership of such goods and chattels, and to subject them to all the debts of the bankrupt; considering that such reputed ownership would draw after it the real sale, order, alteration, and disposition of the goods. The stills, it appeared, were fixed to the freehold; and as such would not pass to the bankrupt’s assignees, under the description of ‘goods and chattels’ in the statute.^(u) But as to the vats and utensils, there was nothing in the case to rebut the reputed ownership following the possession of the bankrupts after the dissolution of the old firm, when the business was continued to be carried on by the bankrupts alone, in the same manner as it followed the possession of the antecedent partnership, when the trade was carried on by A. and B. If, as in some manufactories, where the engines necessary for carrying on the business are known to be let out to the several manufacturers employed upon them, there had been a known usage in this trade for distillers to rent or hire the vats and other articles used by them for the purpose of distilling, the possession and use of such articles would not in such a case have carried the reputed ownership. But in the absence of such an usage, there was nothing stated in the case which qualified the reputed ownership arising out of the possession and use of the things in their trade. The world would naturally give credit to the traders on their reputed property; and the person who permitted them to hold out to the world the appearance of their being the real owners, ought to be answerable for the consequences, and was so intended to be by the statute.”

^(s) *Jones v. Dwyer*, 15 East, 21. See *ante*, p. 232.

^(t) *Horn v. Baker*, 9 East, 215, recognized in *Boydell v. M^r Michael*, 1 Cr. M. & R. 177, cited in *Trappes v. Harter*, 2 Cr. & M. 182, 3.

^(u) Accord on this point *Clarke v. Crownshaw*, 3 B. & Ad. 805.

Machinery, erected for the purposes of trade (calico printing) in a neighbourhood, (Catterall, near Garstang, in the county of Lancaster,) where machinery of such description is commonly removed, and which was capable of removal without injury, was holden, (x) not as belonging to the inheritance, but as part of the personal estate, and consequently "goods and chattels" which would pass to the assignees.

A custom, (y) that purchasers of hops from hop-merchants should leave them in the merchant's warehouse, for the purpose of re-sale, upon rent, undistinguished from the merchant's stock, is not such a custom of trade as will prevent the hops from becoming the property [*239] *of the merchant's assignees, in case of bankruptcy, as being in his possession, order, and disposition.

A., a spirit merchant, sold to B., (z) a wine merchant, several casks of brandy, some of which, at the time of sale, were in A.'s own vaults, and others in the vaults of a regular warehouse-keeper. It was agreed between the parties, that the brandies should remain where they were, until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. It was notorious to the persons carrying on the wine trade, at the place where the parties resided, that this sale had taken place, but no notice of such sale had been given to the warehouse-keeper, with whom some of the casks were deposited. A. having become bankrupt, while the brandies remained where they were originally deposited, it was holden, that the whole of them passed to his assignees, as goods in his possession, order, and disposition, by the consent and permission of the true owner, within the statute. So, where a person having bought a pipe of sherry of a wine merchant, permitted it to remain in his cellar for the purpose of ripening; and the merchant afterwards became bankrupt; it was holden, (a) that it passed to the assignees. *Secus*, if the wine be set apart in a particular bin and marked with the buyer's seal, and entered in the bankrupt's books as the buyer's property. (b) Where a person entitled to take out letters of administration neglected to do so, but remained in possession of the goods of the intestate, and being so in possession became a bankrupt, and a creditor of the intestate afterwards took out letters of administration and claimed the goods from the assignees, it was holden, (c) that those goods were within the statute. A consent given by an assignee for creditors brings the case within the operation of the statute as well as a consent given by any other owner. Hence goods allowed to be in the order and disposition of a bankrupt as reputed owner, by the consent of his assignee, are liable to be seized, upon a subsequent insolvency, by the assignee of the Insolvent Debtors Court. (d)

(x) *Trappes v. Harter*, 2 Cr. & M. 153; 3 Tyrw. 603, S. C.

(y) *Thackthwaite v. Cock*, 3 Taunt. 487, cited and distinguished in *Watson v. Peache*, 1 Bingh. N. C. 336.

(z) *Knowles v. Horsfall and others*, 5 B. & A. 134. See *Lingard v. Messiter*, 1 B. & C. 315, and *ante*, p. 235.

(a) *Tanner v. Barnett, Kenyon*, C. J., Peake's Add. Cases, 98.

(b) *Exp. Merrable*, 1 Glynn & Jamieson, 402, Sir John Leach, V. C.

(c) *Fox v. Fisher*, 3 B. & A. 135. See also in *re Thomas*, 1 Phill. 159; 3 M. D. & D 40.

(d) *Butler v. Hobson*, 4 Bingh. N. C. 290; 5 Sc. 798.

2. *Cases not within the statute.*—First, this clause does not relate to goods which the bankrupt has in *auter droit*, as executor or administrator.(1) Hence, where a trader married a woman who was in possession of goods as administratrix to her former husband, and afterwards became a bankrupt, it was holden by Lord *Hardwicke*, Ch., that this was not within the statute,(e) because the administratrix *had [*240] the goods in *auter droit*, and the husband could not have them in any better right, and therefore they were not liable to the debts of the second husband; for the meaning of the statute (if it was possible to put any meaning upon some clauses of this statute which were very darkly penned,) was only with regard to goods which the bankrupt had in his own right.

Or as factor or trustee.—A trader in London having money of J. S.(f) (who resided in Holland) in his hands, bought South Sea Stock, as factor for J. S., and took the stock in his own name, but entered it in his account-book as bought for J. S., after which the trader became bankrupt; it was holden by Lord *Parker*, that this stock was not liable to the bankruptcy.(2) So where the bankrupt is intrusted, as a mere trustee.(g) What passes to the assignees of a bankrupt is the property in which the bankrupt has an equitable as well as a legal interest.(h) If the assignees can show the legal interest, and an immediate equitable interest in the bankrupt, they may sue.(i) “If at the time of the act of bankruptcy, the bankrupt possessed a possibility of interest, for which a benefit to his creditors might result, if he had the legal interest in any property, and it was uncertain whether he would hold any part of that property, or if any, what part, as a trustee for others, the whole would pass by the assignment: it could not remain in the bankrupt subject to be transferred on a future contingency: and if it did pass to the assignees, it could not be divested out of them in whole or in part by the happening of events subsequent to the bankruptcy, which

(e) *Exp. Marsh*, 1 Atk. 159; and see *Exp. Ellis*, 1 Atk. 101, and 3 Burr. 1366, Lord *Mansfield*, C. J.

(f) *Exp. Chion*, 3 P. Wms. 187, n. (A).

(g) *Carpenter v. Marnell*, 3 B. & P. 40.

(h) Per *Alderson*, B., in *Parnham v. Hurst*, 8 M. & W. 750.

(i) Per *Rolfe*, B., in *S. C.*

(1) If an insolvent receives, before his assignment, bonds as an executor, and converts them into money, which is blended with his other effects, no preference is due to the estate of testator. *Nevius v. Disborough*, 1 Green, 344.

(2) Where a merchant consigns goods to a factor in London who receives them, the factor, in this case, being only a servant or agent for the merchant beyond sea, cannot have any property in such goods; neither will they be affected by the bankruptcy. Per Lord *King*, Ch., in *Godfrey v. Furzo*, 3 P. Wms. 186. “This statute does not extend to the case of factors or goldsmiths who have the possession of other men’s goods merely as trustees, or under a bare authority, to sell for the use of their principal; but the goods must be such as the party suffers the trader to sell as *his own*.” Per Lord *Mansfield*, delivering the opinion of the court in *Mace v. Cadell*, Cowp. 233. In *Horn v. Baker*, 9 East, 243, *Lawrence*, J., commenting on the preceding passage, observed that the last expression, *viz.* “that the goods must be such as the party suffers the trader to sell as his own,” was evidently used in contradistinction to the case of factors, &c., who sold for other persons, and not for themselves. And he (Lord *Mansfield*) could not have meant to lay it down generally: for that, *viz.* the case of *Mace v. Cadell*, was not the case of a sale.

might make them hold the whole or some specific part as [*241] trustees merely, for *there is no provision in the statute which takes a right out of the assignees that has once been vested in them." (k)

Goods in the possession of a factor, (l) from the known nature of his employment, can *seldom* leave room for any question as to the purpose for which they are in his possession. But with respect to another species of property, namely, bills of exchange or notes, the possession of these is more equivocal: for being generally looked upon as cash, and delivered or remitted to an agent or banker generally in that way, and upon a general account between the parties, they will be considered in that light; and, as being blended with the general mass of his property, will, in case of his becoming a bankrupt, pass by the assignment under the commission, *unless they appear to have been specially appropriated to some particular purpose*. What will amount to a specific appropriation is a question of fact, and therefore depends upon the various circumstances of each particular case. From the following cases the reader will be able to form a general idea of the nature of a specific appropriation and its limits.

A correspondent of the bankrupt, (m) before his bankruptcy, drew bills on him, and desired him to place them to a *particular account*, in the name of a third person, distinguished from their general account by a *particular letter*, and which the bankrupt said he would do. The correspondent also drew other bills on other persons to *answer the former bills*, and remitted the latter for that purpose to the bankrupt, with directions to place these *to the same account*. The former bills, not having been paid by the bankrupt, were sent back, protested, and paid by the correspondent; and the latter bills, which had been remitted to answer them, remained at the time of the bankruptcy in the possession of the bankrupt unnegotiated. This was holden to be a specific appropriation.—See also *Exp. Oursell*, Amb. 297. In a case of bills remitted to B., a banker, (n) after an account transmitted by him to C., his correspondent, on the balance of which account C. was indebted for bills (accepted by B. and then outstanding,) which C. had drawn upon B. under an agreement to make remittances to answer the same when due; the bills remitted to answer the acceptances (which were not paid by the banker, but by the correspondent himself after the bankruptcy of B.,) were considered as in the nature of goods in the possession of a factor: and, therefore, that they belonged to the correspondent, subject to B. the banker's lien for the balance due to him at the time of the bankruptcy: and that, having been deposit- [*242] ed by the bankrupt with *another banker, who had set them short in the bankrupt's book, they were the same as if still in the possession of the bankrupt. An agreement having been entered

(k) Per *Littledale*, J., delivering judgment of court, in *Carvalho v. Burn*, 4 B. & Ad. 382; 1 Nev. & M. 700. Affirmed on error, in Ex. Ch. 1 A. & E. 883; 4 Nev. & M. 889.

(l) *Cullen's B. L.* 225.

(m) *Exp. Dumas*, 2 Ves. 582, and 1 Atk. 232.

(n) *Zinck v. Walker*, Bl. R. 1154.

into by B.,(o) a trader residing in London, to purchase of C., his correspondent at Manchester, all the light gold which should be sent by the latter from Manchester to London, and to accept bills at two months for the money due upon the sale, and to accept, from time to time, other bills drawn by C. for his own convenience, but that in such case C. should remit value to the amount of such acceptances, to answer together with the light gold for the different bills so drawn : B. became a bankrupt, and C., being at the time of the bankruptcy considerably indebted upon the balance of the account, but ignorant of an act of bankruptcy committed, sent a quantity of light gold and some bills, in order to enable the bankrupt to pay his acceptances for him when they should become due. C. afterwards paid the amount of the bankrupt's acceptances for him to the holders, and claimed the gold and bills as against the assignees. There were no other accounts between the parties, but upon these dealings, which had been carried on in the manner stated for some years. This was held to be a specific appropriation, like the case of principal and factor, and the agreement was distinguished into different parts ; of which, though the first was merely a contract for a bargain and sale, the latter part was considered as a contract, of which the effect was, that the bankrupt should become the banker of his correspondent and accept his bills, the latter remitting the value to the amount, in light gold and bills : and to which latter part of the contract the other had no other relation than as incidentally ascertaining the rate at which the gold was to be taken. The plaintiff, by letter, requested permission of B.(p) to place in his hands bills which had a long time to run, and to be allowed to draw without renewals at shorter dates, and desired B. to calculate the sum to be drawn for, allowing commission. The bills of long date, indorsed by the plaintiff, were included in this letter ; to which B. returned an answer, saying, that agreeably to the plaintiff's wishes, he had *discounted* the bills, and then specified the amount for which the plaintiff might draw upon him as desired. The plaintiff drew bills accordingly on B., who accepted the same, but shortly afterwards became a bankrupt, and these acceptances were dishonoured. The bills received from the plaintiff remained in the hands of B. at the time of the bankruptcy, unnegotiated ; but the assignees of B. possessed themselves of these bills, and received the amount of them. An action for money had and received having been brought by the plaintiff against the assignees, it was holden, that it would lie ; for the application to the bankrupt was not to sell bills of long date for those of shorter date, but to place *those long bills in the hands of the bankrupt, upon [*243] condition of being allowed to draw short bills upon him ; and, though in his answer he used the term *discount*, yet he assented to the terms of the first letter, and used that word merely as a mode of ascertaining what he was to receive for the accommodation. The bills, therefore, having been deposited upon a condition, and that condition not having been complied with, and they remaining in specie in

(o) *Took v. Hollingsworth*, 5 T. R. 215 ; S. C. in error, 2 H. Bl. 501.

(p) *Parke v. Eliason*, 1 East's R. 544.

the hands of the bankrupt at the time of the bankruptcy, the plaintiff might have brought trover for them against the assignees; but they having parted with the bills, and received the value, this action for money had and received would well lie in lieu of trover to recover the bills. See further on this point, *Giles v. Perkins*, 9 East, 12; *Exp. Sargeant*, 1 Rose, 153; *Bent v. Puller*, 5 T. R. 494; *Jombart v. Woollett*, 2 My. & Cr. 389.

A., B., C., and D., were partners in a banking-house at Liverpool, (q) and C. and D. also carried on a separate mercantile concern in London. J. S., having accepted bills payable at the house of C. and D., employed A., B., C., and D. to get them paid accordingly, and agreed to deposit with them good bills indorsed by him for the purpose of enabling them so to do; A., B., C., and D. debited J. S. in account for his acceptances, and credited him for all the bills which he deposited; some of the bills so deposited by J. S. were remitted by A., B., C. and D., to C. and D. upon the general account between the two houses, and before any of the acceptances of J. S. became due, both houses failed, and J. S. was obliged to pay his own acceptances; it was holden, 1st, that the assignees of C. and D. were entitled to retain against J. S. the bills remitted to them by A., B., C., and D.: held, also, that it made no difference that one of the bills remitted did not arrive in London until after the bankruptcy of C. and D., though sent by A., B., C., and D. before the event. The ground on which this decision proceeded, appears to have been this; that C. and D., notwithstanding their partnership with A. and B., were parties capable of acquiring a property in the bills in question, as capable as any third party: that they had acquired such property without reproach, and in truth in pursuance of that agreement upon which they were delivered to the banking-house; C. and D. were therefore to be considered as third persons with whom the bills had been negotiated. (1) A banker has a lien for the amount of his balance upon a check paid in by a customer on his running account. (r)

[*244] *Secondly, this statute does not extend to goods of which the bankrupt has merely a temporary custody. (2) As where a trader having sold goods which were lying on a quay, (s) it was agreed between him and the vendees, that the goods should be removed, and lodged in a warehouse until the vendees should give orders for the

(q) *Bolton v. Puller*, 1 Bos. & Pul. 539.

(r) *Scott v. Franklin*, 15 East, 428.

(s) *Ex parte Flynn*, 1 Atk. 185.

(1) If A. deposit bills indorsed in blank with B., his banker, to be received when due, and B. raises money upon them by pledging them with C., another banker, who is not acquainted with the circumstances under which the bills came into the hands of B., and afterwards B. becomes bankrupt, A. cannot maintain trover for the bills against C. *Collins v. Martin*, 1 Bos. & Pul. 648.

(2) "Contrary to the express words of the statute, factors have been excepted out of it for the sake of trade and merchandize." Per Lord Hardwicke, Ch., in *Ex parte Dumas*, 1 Atk. 234; 2 Ves. 585. "By the course of trade, bankers and factors must have the goods of other people in their possession, and therefore this does not hold out a false credit to the world." Per Buller, J., in *Bryson v. Wylie*, 1 Bos. & Pul. 84, n.

shipping the same off as opportunity offered, they having none at that time; and accordingly the trader caused the goods to be removed into a warehouse of his own, for the purpose of this agreement. A few weeks after the trader became a bankrupt; the goods still remaining in his warehouse. This was holden not to be within the statute; because it was a mere temporary custody of the goods, and it could not, with any propriety, be said that they were in the order, disposition, or power of the bankrupt.

Thirdly, the statute does not extend to those cases where the property has been delivered to the vendee, as fully as the nature of such property will admit.⁽¹⁾ As where a trader having borrowed of the defendant a sum of money,^(t) gave him a bond for 1200*l.*, and on the same day, as a collateral security, assigned to him the bills of lading, and policies of insurance of the cargo of a ship then at sea; the policies of insurance were indorsed to the defendant, but the bills of lading were not. The trader became a bankrupt, and a bill in equity was filed by the plaintiff, as his assignee, for the goods, insisting on the circumstance of the defendant's not having been put in possession of them at the time. But Lord *Hardwicke*, Ch., was clearly of opinion, that the defendant was entitled to retain possession of every thing until his debt was satisfied, because every thing which could show a right to the cargo being delivered over to the defendant, the bankrupt could no longer be said to have the order and disposition of it; and, therefore, the case did not fall within the meaning of this statute. So where a trader,^(u) being indebted to the defendant, in consideration of the defendant advancing him a further sum, agreed to assign the cargo of a ship then homeward bound, of which he had received letters of advice, and to deposit the policy of insurance on the goods in the hands of the defendant, and, as soon as the bills of lading were transmitted to him, to indorse and deliver the same over to *the defendant. The policy and letters of advice were de- [*245] posited with the defendant accordingly, and the bill of lading was indorsed over to him as soon as it arrived, but not till after an act of bankruptcy committed by the trader. On the arrival of the ship the goods were delivered to the defendant. Trover having been brought by the assignees of the bankrupt; it was holden, that the preceding case of *Brown v. Heathcote*, applied strongly to the present; and, although in that case there was an *assignment* of the bill of lading, and here only an *agreement* to assign, yet that did not make any difference, as neither conveyed more than an equitable title. Goods were sent from London to Sutherland upon sale and return, and a letter inclosing an invoice, requested the buyer to return such as were not approved in as short a time as possible. The goods arrived at the shop of the buyer on the evening of the 13th of November, and on

(t) *Brown v. Heathcote*, 1 Atk. 160.

(u) *Lempriere v. Pasley*, 2 T. R. 485.

(1) See *Manton v. Moore*, 7 T. R. 67, and *ante*, 209, which, though not decided on this statute, affords an useful illustration of the principle here insisted on.

ments thereon, in case such warrant of attorney shall be given to confess judgment in B. R., or such a true copy thereof as aforesaid, in case such warrant of attorney shall be given to confess judgment in any other court, shall, within twenty-one days after execution, be filed, together with an affidavit of the time of execution, with the clerk of the docquets and judgments in B. R." And by s. 2, if at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney under which he shall be duly found and declared a bankrupt, then, unless such warrant of attorney, or a copy thereof, shall have been filed as aforesaid, within twenty-one days from execution, or unless judgment shall have been signed, or execution issued, on such warrant of attorney within the same period, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against

[*248] the assignees.(1) The *3rd section contains a similar provision for rendering a *cognovit actionem* void as against assignees of a bankrupt unless filed. But this statute does not affect the security for all purposes: but only renders it inoperative against assignees of a bankrupt;(d) and it does not extend to warrants of attorney executed by insolvent debtors. See 11 Geo. IV. & 1 Will. IV. c. 38.

By stat. 6 Geo. IV. c. 16, s. 81, it was enacted, that all conveyances by, and all contracts and other dealings and transactions by and with, any bankrupt, *bond fide* made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt *bond fide* executed or levied more than two calendar months before the issuing of such commission, should be valid, notwithstanding any prior act of bankruptcy; provided the person so *dealing*(e) with such bankrupt, or at whose suit or on whose account such execution or attachment should have issued, had not, at the time of such conveyance, &c., notice of any prior act of bankruptcy; provided also, that where a commission had been superseded, if any other commission should issue against any person comprised in such first commission, within two calendar months next after it should have

(d) *Green v. Gray*, 1 D. P. C. 350.

(e) See *Pearson v. Graham*, 6 A. & E. 903, 4.

(1) "The stat. 6 Geo. IV. c. 16, s. 81, is no repeal of the stat. 3 Geo. IV. c. 39, s. 1. The stat. of 6 Geo. IV. is confined to executions *bond fide* issued. The stat. of 3 Geo. IV. declares executions issued under such circumstances as the present to be fraudulent and void as against the assignees. I think, therefore, that this execution, issuing after an act of bankruptcy, under circumstances which render it fraudulent under the stat. 3 Geo. IV., is not under the protection extended by the stat. 6 Geo. IV. to executions *bond fide* executed." Per *Abbott, C. J.*, in *Wilson v. Whitaker*, M. & Malk. 8. Under the second section of the 3 Geo. IV. c. 39, a warrant of attorney is void as against the assignees of a bankrupt, unless it be filed, or judgment be signed upon it within twenty-one days after its date, although the petitioning creditor's debt was not contracted until after the expiration of the twenty-one days. *Everett v. Wells*, 2 M. & Gr. 269; 2 Scott's N. R. 525. The twenty-one days are to be reckoned exclusively of the day of execution; hence, a warrant executed on the 9th of December, was holden to be duly filed on the 30th. *Williams v. Burgess*, 12 A. & E. 635; 4 P. & D. 443.

been superseded, no such conveyance, &c., should be valid, unless made, &c., more than two calendar months before the issuing of the first commission.^(f) N. "This section⁽¹⁾ applied to all *executions levied more than two months before the issuing [*249] of the commission, whether founded on judgments after verdict, or on judgments by default or confession, the words being general, and not in any way limited or qualified: the 108th section, (see *post*, p. 258,) applied only to executions on judgments by default or confession, or *nil dicit*, where the seizure had taken place within the two calendar months before the issuing of the commission. This construction will reconcile the two sections of the act. The 108th section, however obscure in its terms originally, has now received a judicial construction which makes it tolerably clear. The creditor, who has issued execution on a judgment after verdict, though within the two months, is entitled to a preference if the seizure was before an act of bankruptcy; but where the judgment is by default or confession, then, to entitle the creditor to a preference, there must have been a sale as well as a seizure." Per *Parke, J.*, 4 B. & Ad. 263-4. See also *Crosfield v. Stanley*, 4 B. & Ad. 87.

Goods of a bankrupt were seized under an execution at the suit of a creditor, before ten o'clock in the forenoon of the 13th of August; the commission of bankrupt issued between twelve and one o'clock on the 13th of October following; it was holden,^(g) that the execution was valid, inasmuch as it had been levied more than two calendar months before the issuing the commission.⁽²⁾ N. B.—Where the transaction amounts to an act of bankruptcy, in itself, it is not protected by this section; *e. g.*, a transfer of goods made voluntarily and in contemplation of bankruptcy, though made more than two months before the issuing of the commission, and in satisfaction of a *bond fide* debt, is not protected; for by the 3rd section, such fraudulent transfer is made an act of bankruptcy. *Bevan v. Nunn*, 9 Bingham 107. [In this case of *Bevan v. Nunn*, *Ib.* 112, *Tindal, C. J.*, expressed an opinion, that the payment of a debt to a creditor, by way of preference, was not an act of bankruptcy. This question came before the Court of Review, in the case of *ex parte Simpson, in re Hunt*, Nov. 13. The Chief Judge, *Knight Bruce, V. C.*, (after communicating with Chief Justice *Tindal*, who retained his former opinion,) decided, that a *payment* of money by a trader to a creditor, by way of fraudulent preference, might of itself

(f) See *Shaw v. Harvey*, 1 A. & E. 920.

(g) *Godson v. Sanctuary*, 4 B. & Ad. 255. See also *Cowie v. Harris*, 1 M. & Malk. 141.

(1) According to *Bayley, J.*, in *Wymer v. Kemble*, 6 B. & C. 482, this section only applies where there has been a prior act of bankruptcy; and according to *Tindal, C. J.*, delivering opinion of the court in *Bevan v. Nunn*, 9 Bingham 112, the clause does not apply to any case, unless where a former act of bankruptcy is assumed to have been committed.

(2) The assignment under the Rhode Island Insolvent law takes effect only from the time it is made. It is the transfer which vests the property in the assignee for the creditors. If petitioner fail to prosecute his petition, or discontinue it, his person and property are as liable as if he had not applied; and if after judgment of the court he fail to assign, it is liable to be taken on execution. *Hunter v. U. S.*, 5 Peters, 173.

be a "gift, delivery, or transfer of any of his goods or chattels," within the meaning of the 6 Geo. IV. c. 16.]

But now, by stat. 2 & 3 Vict. c. 11, s. 12, [4th June, 1839,] all conveyances by any bankrupt *bond fide* made before the date and issuing of the fiat shall be valid, notwithstanding any prior act of bankruptcy, provided the person to whom such bankrupt so conveyed, had not at the time of such conveyance notice of any prior act of bankruptcy: and by s. 13, of the same act, no purchase from any bankrupt *bond fide* and for valuable consideration, where the purchaser had notice at the time of purchase of an act of bankruptcy, shall be impeached by reason thereof, unless the commission shall have been sued out within twelve calendar months after such act of bankruptcy.^(h) N. This act does not extend to Ireland. And by 2 & 3 Vict. c. 29, [19th July, 1839,] reciting the 6 Geo. IV. c. 16, s. 82, and 2 & 3 Vict. c. 11, all contracts,

dealings, and transactions,⁽ⁱ⁾ by and with any bankrupt, [*250] really and *bond fide* made *before the date and issuing of the fiat, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bond fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy; provided also, that nothing herein contained shall be deemed to give validity to any payment made by any bankrupt being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt by way of such fraudulent preference.^(k) In a case where an act of bankruptcy having been committed on the 6th of July, 1839, a *bond fide* execution was issued on the 8th, under which the goods of the bankrupt were seized: the foregoing statute was passed on the 19th, and on the 24th a fiat in bankruptcy issued, under which the plaintiffs were chosen assignees; it was holden,^(l) that the assignees must take the property subject to the new law, and that the execution was protected by the statutes. And in a subsequent case^(m) it was holden, that this statute has a retrospective operation, so as to protect the sheriff from liability in respect of a *bond fide* execution levied on the goods of a bankrupt, without notice of the act of bankruptcy, even when the seizure and sale took place, and the fiat issued, before the passing of the act; but the assignees were not appointed until afterwards: and, in a still more recent case, it was decided that the statute does not apply to a case where the assignees were appointed before its

(h) See sect. 7 of stat. 5 & 6 Vict. c. 122, *ante*, p. 198.

(i) *Turquand v. Vanderplank*, 10 M. & W. 180.

(k) See *post*, p. 254.

(l) *Edmonds v. Lawley*, 6 M. & W. 285.

(m) *Nelstrop v. Scarisbrick*, 6 M. & W. 684, recognizing *Luckin v. Simpson*, 8 Scott, 676; 6 Bingh. N. C. 353.

passing.(n) This statute only protects transactions which were valid in themselves from being impeached by the artificial relation of the title of the assignees. Therefore where a trader committed an act of bankruptcy, by procuring his goods to be taken in execution, the transaction was decided to be invalid, and not to be within the meaning of the statute 2 & 3 Vict. c. 29, although the execution was *bond fide* levied by the judgment creditor.(o) It has been since decided that the words "*bond fide* executed and levied," mean *bond fides* of the creditor, and that an execution *bond fide* levied must be considered to be an execution perfected, and which is rendered valid by the statute, though in itself an act of bankruptcy.(p) Under this statute a deposit of a policy of assurance by way of security for a debt, made previously *to the commission of an act of bankruptcy by the depositor, [*251] and notified to the insurance company by the party with whom the deposit was made, previously to the issuing of the fiat, though subsequently to the act of bankruptcy, was holden valid as against the assignees, it not appearing that at the time the notice was given to the company, the party giving it was aware of an act of bankruptcy having been committed.(pp)

"The effect of the statute 2 & 3 Vict. c. 29, is to wipe out the act of bankruptcy altogether, except where the creditor has notice of it; and to substitute the fiat for it in all cases where the creditor has no notice of it."(q) Notice to a sheriff's officer, in possession under a *fi. fa.*, of an act of bankruptcy committed by the defendant, is not notice to the execution creditor within this statute.(r) Notice of a docket having been struck, is not notice of a prior act of bankruptcy within the meaning of this statute.(s)

By stat. 6 Geo. IV. c. 16, s. 82, all *payments*(1) really and *bond fide* made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any *creditor* of such bankrupt, (such payment not being a fraudulent preference of such *creditor*), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bond fide* made, or which shall hereafter be made, to any bankrupt before the date of issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed: and such *creditor* shall not be liable to refund the same to the assignees of such bankrupt, provided the person so *dealing*(t) with the said bankrupt had not, at the

(n) *Moore v. Phillips*, 7 M. & W. 536.

(o) *Hall v. Wallace*, 7 M. & W. 353. See *Green v. Steer*, 1 Q. B. 707; 1 G. & D. 499.

(p) Per Parke, B., in *Belcher v. Magnay*, 12 M. & W. 109.

(pp) In *re Styant*, 1 Phill. 105.

(q) Per Parke, B., in *Ramsey v. Eaton*, 10 M. & W. 24.

(r) *Ramsey v. Eaton*, 10 M. & W. 22.

(s) *Hocking v. Acraman*, 12 M. & W. 170.

(t) See *Pearson v. Graham*, 6 A. & E. 904.

(1) These words, "'payments really and *bond fide* made,' must mean payments of money not intended to be reclaimed by the party." Per Tindal, C. J., in *Gibson v. Muskett*, 4 M. & Gr. 170; 3 Scott's N. R. 434.

time of such payment by or to such bankrupt, notice of any bankruptcy by such bankrupt committed. And by sect. 83, the issuing of a commission shall be deemed notice of a prior act of bankruptcy, (if an act of bankruptcy had been actually committed before the issuing the commission,) if the adjudication of the person against whom such commission has issued shall have been notified in the *London Gazette*, and the person so affected by such notice may reasonably be presumed to have seen the same. Notice to the principal is notice to all his agents, if there be reasonable time to communicate that notice to his agents; *Mayhew v. Eames*, 3 B. & C. 601. Hence, notice to the Bank of England is notice to all its branch banks; *Willis v. The* [*252] *Bank of *England*, 4 A. & E. 21. Under sect. 82, payments really and *bond fide* made are valid, even in cases where the contract or transaction, upon which they are made, has taken place within two calendar months before the commission. See *Coles v. Robins*, 3 Camp. 183. *Cash v. Young*, 2 B. & C. 413. The same point was decided in *Hill v. Farnell*, 9 B. & C. 45, where a library of books had been purchased of a hop-merchant and paid for, without notice that the hop-merchant had at that time committed an act of bankruptcy, on which a commission was afterwards, and after the sale of the books, taken out.(u) So giving cash for a bank(x) post bill. A payment in goods is a payment within the meaning of this section. Hence where the bankrupt, after repeated applications for payment of a previous debt, but after a secret act of bankruptcy, delivered goods *bond fide* in part payment; it was holden to be protected. *Cannan v. Wood*, 2 M. & W. 465. "A *bond fide* payment imports something different from and additional to an actual payment; the words *bond fide* were inserted by the legislature to raise the question, whether the money had been paid honestly and fairly in the course of an honest transaction." Per *Tindal*, C. J., *Devas v. Venables*, 3 Bingham N. C. 403. Where B., having committed a secret act of bankruptcy, assigned chattels to the defendant, as a security for money lent to B. by the defendant, in trust to permit B. to use them till March, 1833, and then, if the debt were unpaid, to sell them in discharge thereof. In October, 1832, and within two months of this assignment, a fiat issued against B.; it was holden, that this could not be considered as a payment protected by the 82nd section: the word payment applied to a payment of a debt, and not to a loan of money upon the security of a transfer of goods. *Cannan v. Denew*, 10 Bingham 292. So where a bankrupt having, within two months before the fiat, deposited chattels by way of pledge, in consideration of an advance of money; it was holden, that the transaction, though *bond fide* and without notice of an act of bankruptcy, was not protected.(y)

By stat. 6 Geo. IV. c. 16, sect. 84, no person or body corporate, or public company, having in their possession or custody any money, goods, wares, merchandizes, or effects, belonging to any bankrupt, shall be en-

(u) And see *Bishop v. Crawshay*, 3 B. & C. 415; *Ward v. Clarke*, 1 M. & Malk. 499; and *Cook v. Caldecott*, *ib.* 522; *ante*, 205, n.

(x) *Willis v. The Bank of England*, 4 A. & E. 21, n.

(y) *Wright v. Fearnley*, 5 Bingham N. C. 89; affirmed in Ex. Ch. 6 Bingham N. C. 446.

dangered by reason of the payment or delivery thereof to the bankrupt or his order; provided such person or company had not, at the time of such delivery or payment, notice that such bankrupt had committed an act of bankruptcy. And by sect. 85, if any accredited agent of any body corporate or public company shall have had notice of any act of bankruptcy, such body corporate shall be hereby deemed to have had such notice.

By sect. 86 (re-enacted by stat. 2 & 3 Vict. c. 11, s. 13, *ante*, p. 249) no purchase from any bankrupt *bonâ fide*, and [*253] for valuable consideration, where the purchaser had notice at the time of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months after such act of bankruptcy.

By sect. 87, no title to any real or personal estate sold under any commission, or under any order in bankruptcy, shall be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the suing out of the commission, or in any of the proceedings under the same, unless the bankrupt shall have commenced proceedings to supersede the said commission, and duly prosecuted the same within twelve calendar months from the issuing thereof.(z) The words "claiming under" the bankrupt, do not include the assignees under a subsequent commission.(a)

By sect. 108, no creditor having security for his debt, or having made any attachment in London, or any other place, by virtue of any custom there used, of the goods of the bankrupt, shall receive upon such security or attachment more than a rateable part of such debt; except in respect of any execution or extent served and levied, by seizure upon, or any mortgage or lien upon, any part of the property of such bankrupt before the bankruptcy; provided that *no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors.* This proviso limits the exception, and the exception applies only to cases falling within the first part of the section, *viz.* those of creditors having security. Per Lord Tenterden, C. J., 6 B. & C. 484, *Wymar v. Kemble*. In this case the goods of the debtor had been seized under a *fi. fa.* sued out upon a judgment of *non sum informatus*, and delivered to the creditor under a bill of sale by the sheriff; then a bankruptcy followed; and it was holden, that he had ceased to be a creditor, having been paid by means of the execution before the bankruptcy. So, where after seizure and before bankruptcy, the debtor pays the money to the sheriff's officer, the debt is thereby extinguished, and although the money is in the hands of the sheriff at the time of the bankruptcy, and paid over to the execution creditor afterwards, the assignees cannot recover. *Morland v. Pellatt*, 8 B. & C. 722. But where the sheriff had made

(z) See *Earl Granville v. Danvers*, 7 Sim. 121.

(a) *Gould v. Shoyer*, 6 Bingh. 738.

a seizure before act of bankruptcy, but the goods remained in his hands unsold at the time of the bankruptcy, it was holden that the sheriff was not justified in paying over to the creditor money received by him as the proceeds of the sale, after the bankruptcy.
 [*254] **Notley v. Buck*, 8 B. & C. 160. See further on this subject, in *re Washbourn*, 8 B. & C. 444. *Goldschmidt v. Hamlet*, 6 Scott, N. R. 962.(1)

An execution founded on a warrant of attorney or cognovit is still within the operation of this 108th section, and not protected against the effect of an act of bankruptcy or a fiat before the sale, though the seizure had taken place before the act of bankruptcy.(b) When an execution by *fi. facias* on a judgment on a warrant of attorney (not given by way of fraudulent preference) was executed by seizure, after a secret act of bankruptcy, but not completed by sale of the goods seized before the issuing of the fiat, which was subsequent to the passing of the 2 & 3 Vict. c. 29; it was holden, that the execution creditor was not entitled to the benefit of it as against the assignees of the bankrupt; the stat. 2 & 3 Vict. c. 29, not having had the effect of rendering valid such executions so as to entitle the execution creditor to the benefit of them against the assignees, nor repealed the 108th section of the statute 6 Geo. IV. c. 16;(c) the right of the assignees to the goods seized, or the proceeds, may be enforced by an action of trover against the sheriffs who sold after the fiat.(d)

These decisions must, it is conceived, lead to an early interference on the part of the legislature; for to avoid the risk of having executions defeated, it has now become the practice of sheriffs to sell the property seized immediately after an execution is levied, and thus in most cases a very great sacrifice is the consequence.(e) But where a creditor on a judgment founded upon a warrant of attorney, issued execution thereon, and seized and sold the goods of the debtor under a *fi. fa.* without notice of any act of bankruptcy committed by the debtor, and on the day after the sale, a fiat in bankruptcy issued against the debtor; it was holden, that the assignees were not entitled to recover from the creditor the proceeds of the sale, inasmuch as, at the time of the fiat, he was not a creditor of the bankrupt within this section.(f)

(b) Per Parke, B., in *Cheston v. Gibbs*, 12 M. & W. 126; citing *Whitmore v. Robertson*, 8 M. & W. 463; and *Skey v. Carter*, 11 M. & W. 571.

(c) *Whitmore v. Robertson*, 8 M. & W. 463; *Rawdon v. Wentworth*, 10 M. & W. 36; *Skey v. Carter*, 11 M. & W. 571; 5 Scott's N. R. 877.

(d) *Cheston v. Gibbs*, 12 M. & W. 111, recognizing *Rawdon v. Wentworth*, *supra*.

(e) See preface to Montagu and Ayrton's Law of Bankruptcy, second edition.

(f) *Ramsey v. Eaton*, 10 M. & W. 22.

(1) By the 63d section of the bankrupt law of the United States, passed the 25th April, 1800, c. 173, [xix.] it is enacted, "that nothing contained in this act, shall be taken or considered to invalidate or impair any lien existing at the date of this act, upon the lands or chattels of any person who may have become a bankrupt." Under this section, it was held, that debts due on judgments docketed previous to the enactment of the statute, remain a lien on the lands then held by the bankrupt, and have a priority in payment out of the lands affected by them, before the general creditors, the assignment passing such lands subject to all judgments so docketed, if the judgment creditor has not come in under the commission. *Livingston v. Livingston*, 2 Caines' Rep. 300.

The stat. 1 Will. IV. c. 7, s. 7, reciting so much of the 108th section of the statute of 6 Geo. IV. (*ante*, p. 253) as there is printed in italics, and also, that by reason of such provision, plaintiffs had been and might be deterred from accepting a cognovit actionem, with stay of execution, whereby the expense of further proceedings in such action might have been and may be saved or diminished, for remedy thereof enacts; "that no judgment signed or execution issued after the passing of that act [11th March, 1831,] on a cognovit actionem after declaration filed, or delivered, or judgment by default, confession, *or nil [*255] dicit, according to the practice of the court in any action commenced adversely, and not by collusion for the purpose of fraudulent preference, shall be deemed within the foregoing provision." An execution sued out upon a final judgment, after judgment by nil dicit, falls(*g*) within this proviso, which compromises all judgments by default, and cannot be restrained to judgments by default by the consent or the collusion of the parties; and the words "obtained by default, confession, or nil dicit," apply to a judgment obtained before, as well as after, the passing of the act. The statute 1 Will. IV. c. 7, s. 7, does not extend to a judgment on a warrant of attorney, though given without collusion or intention of fraudulent preference.^(h)

A plaintiff in execution upon a judgment by confession ceases to be a creditor, having security for his debt within the 108th section of statute 6 Geo. IV. c. 16, when the goods seized under that execution are sold, even though an act of bankruptcy be committed before the return of the writ.⁽ⁱ⁾

VIII. *Of Actions which may be brought by the Assignees of a Bankrupt, p. 255, and in what manner they ought to sue, p. 260, Actions against Assignees, p. 262.*

By stat. 5 & 6 Vict. c. 122, s. 26, if the assignees commence any action or suit for any money due to the bankrupt's estate, before the time allowed by this act for the bankrupt to dispute the fiat shall have elapsed, (see sect. 24) any defendant in any such action or suit shall be entitled, after notice given to the assignees, to pay the same, or any part thereof, into the court in which such action or suit is brought; and all proceedings with respect to the money so paid into court shall thereupon be stayed until the time aforesaid shall have elapsed: and if within that time the bankrupt shall not have commenced such action, suit, or other proceeding as aforesaid, and prosecuted the same with due diligence, the money shall be paid out of court to the assignees, but otherwise shall abide the event of such action, suit or other proceeding as aforesaid, and upon such event shall be paid out of court either to the assignees or the person adjudged bankrupt, as the court shall direct; and after such payment made so into court, it shall

(*g*) *Cuming v. Welsford*, 4 M. & P. 238; 6 Bingham 502.

(*h*) *Crosfield v. Stanley*, 4 B. & Ad. 87; 1 Nev. & M. 668.

(*i*) *Higgins v. M^r Adam*, 3 Y. & J. 1, recognizing *Wymar v. Kemble*.

not be lawful for the person so adjudged bankrupt to proceed against the defendant for recovery of the same money.

See stat. 7 & 8 Vict. c. 111, ss. 8, 9, *ante*, p. 224, 5, respecting actions by assignees of a company made bankrupt under the provisions of that act.

[*256] *The assignees of a bankrupt can recover such things only as the bankrupt had both a legal and equitable(*j*) right in. See *ante*, p. 240.

1. *Money had and received*.—An action for money had and received will lie against a creditor of the bankrupt, (*k*) who, after the act of bankruptcy, takes out execution against the goods of the bankrupt, and receives from the sheriff the money arising from the sale of the goods; for the law supposes the creditor to have received the same for the use of the assignees in whom the property of the goods is vested, and thence implies a promise to pay. So where a trader became a bankrupt by lying in prison two months (now 21 days) after an arrest; (*l*) it was holden, that his assignees might maintain an action for money had and received against a person who, after the arrest, and before the expiration of the two months, having had notice that a commission would be sued out against the trader, sold his goods and paid him the produce.

In cases of this kind, the assignees have an election to bring either trover or assumpsit. In trover they may recover the full value of the goods at the time they were taken, though the sale may not actually have produced more than half their worth: but in assumpsit, the assignees, considering the party selling the goods as their agent, are entitled to recover only what was produced by the sale of the goods. (*m*) If the assignees bring assumpsit, they affirm the contract, and the defendant, if a creditor of the bankrupt, may set off his debt. (*n*) But the assignees cannot affirm the act of the bankrupt as their agent in part, and avoid it as to the rest. (*o*)

A. agreed in writing with B. and C., on behalf of themselves and D., as partners in trade, to serve them, B. and C., and the survivor of them, for seven years, as their foreman, and not to engage in trade on his own account during that period without their consent; and B. and C. agreed to pay him wages after a fixed rate weekly, as long as he should serve them faithfully; it was holden, (*p*) that the right of action for a breach of this agreement, that the dismissal of A. without a reasonable cause, passed to the assignees of A. on his bankruptcy, as being part of his personal estate whereof a profit might be made.

By the law of England, (*q*) if not contradicted by the laws of the country where the property may be, the commissioners may dis-

(*j*) Per Parke, B., in *Mogg v. Baker*, 3 M. & W. 197.

(*k*) *Kitchin v. Campbell*, 3 Wils. 304; 2 Bl. Rep. 827.

(*l*) *King v. Leith*, 2 T. R. 141; and see *ante*, p. 216, (*s*).

(*m*) Per Grose and Buller, Js., in *King v. Leith*, 2 T. R. 144, 145.

(*n*) *Smith v. Hodson*, 4 T. R. 211, recognized in *Russell v. Bell*, 8 M. & W. 277.

(*o*) *Wilson v. Poulter*, Str. 859; *Brewer v. Sparrow*, 7 B. & C. 313, per Bayley, J., S. P.

(*p*) *Drake v. Beckham*, (Ex. Ch. reversing judgment of the Court of Ex.) 11 M. & W. 315.

(*q*) *Hunter v. Potts*, 4 T. R. 182; *Phillips v. Hunter*, 2 H. Bl. 402.

pose of the personal property of the bankrupt resident here, *although such property be in a foreign country. Hence [*257] where the defendant being resident in England, and a creditor of the bankrupt in England, after the assignment of the bankrupt's estate, and with full knowledge thereof, attached, and afterwards received, by a remittance, money due to the bankrupt in Rhode Island in North America; it was holden, that the assignees might recover the same from the defendant, in an action for money had and received to their use. So where, after an act of bankruptcy committed, (r) but before the assignment, a creditor of the bankrupt in England, and resident in England, with knowledge of the act of bankruptcy, made an affidavit of debt in England, by virtue of which he attached, and after the assignment received, money due to the bankrupt in one of the British plantations in America; it was holden that the assignees might recover the same in an action for money had and received. (1) A., after

(r) *Sill v. Worswick*, 1 H. Bl. 665.

(1) The bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States. Hence, creditors who have attached the property of their debtor in this country, according to the laws of a particular state of the Union, are entitled to a priority over the claim of his assignees for the benefit of the general creditors under a foreign bankrupt law. And whether the assignees derive their title under a foreign bankrupt law, or the bankrupt laws of this country, the United States are entitled to the priority of payment secured to them by the acts of Congress of March 3d, 1797, c. 368, [lxxiv.] and of March 2d, 1799; c. 128, s. 65, over the claim of the assignees suing for the benefit of the private creditors of the bankrupt. *Harrison v. Sterry*, 5 Cranch, 289.

The assignee of a bankrupt duly appointed pursuant to the laws of the state where the bankrupt lives, may maintain an action in that character in any other state of the Union, the laws of which are not repugnant to his recovery. *Goodwin v. Jones*, 3 Mass. Rep. 514, 517. And in the Supreme Court of New York it has been determined, that the assignees under a foreign bankrupt law (out of the United States) may collect the debts due to the bankrupt in the courts of this country, though it must depend upon the *lex fori* whether in point of form the suit must be directly in their own names, or as trustees using the name of the bankrupt. *Bird v. Caret*, 2 Johns. Rep. 342. But it seems difficult to reconcile this decision with that of the Supreme Court of the United States, in the case of *Harrison v. Sterry*, cited above.

The reader will find all the learning on this subject collected in the very able opinion of Mr. Chancellor *Kent*, in *Holmes v. Remsen*, 4 Johns. Ch. Rep. 460, where the judgment of the Supreme Court of Pennsylvania, in the case of *Milne v. Moreton*, 6 Binney's Rep. 353, is examined, and its principles are controverted. The decision in *Holmes v. Remsen*, although supported with the ability and learning which have distinguished the opinions of Chancellor *Kent*, is nevertheless at variance with the doctrines maintained by every other court of the Union, of which there is any report; while the judgment of the Supreme Court of Pennsylvania, in *Milne v. Moreton*, delivered by the late Chief Justice *Tilghman*, has received universal approbation. The following passage from Chancellor *Kent's* Commentaries, states with clearness and accuracy, the decisions in other states.

"Whatever consideration might otherwise have been due to the opinion in that case, (*Holmes v. Remsen*,) and to the reasons and decisions on which it rested, the weight of American authority is decidedly the other way; and it may now be considered as a part of the settled jurisprudence of this country, that a prior assignment in bankruptcy under a foreign law, will not be permitted to prevail against a subsequent attachment by an American creditor, of the bankrupt's effects found here; and our courts will not subject our citizens to the inconvenience of seeking their dividends abroad, when they have the means to satisfy them under their own control. This was the rule in Maryland, prior to our revolution, according to the opinion of Mr. Dulany, reported in *Burk v. M'Lean*, 1 Har. & M'Hen. 230; and afterwards, in 1790, it was decided in *Wallace v. Patterson*, 2

an act of bankruptcy committed by B., received the amount of a draft drawn by B. on his banker, in favour of A., for a *bona fide* debt. The plaintiffs, as assignees of B., brought an action against the banker for a larger sum of money belonging to the bankrupt, in which action the banker attempted to set off the before-mentioned sum, which he had paid to A.; but it appearing that the banker had paid the money to A. with full knowledge of the bankruptcy, the set-off(s) was disallowed. The plaintiffs then brought an action for money had and received against A. to recover the amount of the draft; but it was holden,(t) that the action would not lie; for, although the plaintiffs had at first an election whether they would bring the action against the banker or A., yet having in the former action, against the banker, insisted that the money had not been paid on their account, and that it was void, they could not in the present action be permitted to contradict it, and insist that the payment was made on their account.

(s) *Vernon v. Hankey*, 2 T. R. 113.

(t) *Vernon v. Hanson*, 2 T. R. 287.

Id. 463, that property of the bankrupt could be attached here, notwithstanding a prior assignment in bankruptcy in England. The same doctrine was declared in Pennsylvania. (*Milne v. Moreton*, 6 Binney, 353,) after an elaborate discussion of the question. The court in that state considered that an assignment abroad by act of law, had no legal operation *extra territorium*, and that they were bound to look to their own law. The same doctrine was declared in North Carolina, as early as 1797. *M'Niel v. Colquhoun*, 2 Haywood, 24. In South Carolina, the same question arose in the case of the *Assignees of Topham v. Chapman*, in 1817, 1 Const. Rep. 283; and the court in that case followed some prior decisions of their own; and the case of *Taylor v. Geary*, decided in Connecticut as early as 1787, (Kirby's Rep. 313,) and they held that law, justice, and public policy, all combined to give a preference to their own attaching creditors. The point arose in the Supreme Court, in Massachusetts, in *Ingraham v. Geyer*, in 1816, (13 Mass. Rep. 146,) and they would not allow even a voluntary assignment by an insolvent debtor in another state, to control an attachment in that state of the property of the insolvent, made subsequent to the assignment and before payment to the assignees; and the court denied that any such indulgence was required by the practice or comity of nations. The opinion in the case of *Holmes v. Remsen*, was also ably questioned by one of the judges of the Supreme Court of this state, in a suit at law between the same parties; *Platt, J.*, in 20 Johns. Rep. 254. And still more recently in the Supreme Court of the United States, (*Ogden v. Saunders*, 12 Wheaton, 213,) the English doctrine, (for it is there admitted to be the established English doctrine,) was peremptorily disclaimed in the opinion delivered on behalf of the majority of the court." 2 Kent's Comm. 330, 408, 8th ed.

To this list of authorities may be added that of the Supreme Court of Louisiana. *Mitchell v. M'Millan*, 3 Martin's Rep. 676. Since the first publication of Chancellor Kent's Commentaries, the Supreme Court of Massachusetts, upon solemn argument has determined in exact conformity with the decision in *Milne v. Moreton*, that the assignment by the foreign commissioners had no operation in Massachusetts as against a citizen of that state. *Blake v. Williams*, 6 Pick. 286. In the opinion of the court, in that case, delivered by C. J. Parker, the subject is examined both upon reason and authority, and the weight of the latter, at least, is shown to be decisively in opposition to the opinion expressed in *Holmes v. Remsen*.

It appears from the case of *Abraham v. Plestora*, 3 Wend. 538, Court of Errors, 1829, that even in New York, the law is now considered to be settled against the doctrine promulgated in *Holmes v. Remsen*. And it was said by three members of the court, that the assignment did not operate a legal transfer of the personal property of the bankrupt in this country, even as between the assignee and the bankrupt. The assignee of a foreign bankrupt cannot sue in his own name in Virginia. *Blano v. Drummond*, 1 Brockenb. C. C. R. 62. An assignment under the insolvent law of Pennsylvania, does not pass lands in Ohio. 1 Ohio, 380. See Story's Conf. Laws, §§ 395, 428; 3 Burge on Col. & For. Law, ch. 20, p. 777.

Covenant.—In covenant for rent on an indenture, (u) brought by the assignees of the lessor (a bankrupt,) the lessee cannot plead that the lessor *nil habuit in tenementis*: for the assignees succeed to all the rights of the bankrupt, and consequently may claim the benefit of that estoppel, which would have operated between the lessor and lessee. By indenture of lease, reciting, that the lessee had purchased certain fixtures on the premises on condition of their being repurchased, it was agreed between the lessor and lessee, and the lessor covenanted, that on the expiration or other sooner determination of the term, he (the lessor) would take the fixtures at such price as they should be appraised at by two competent persons, one to be named by each side: the lessee became bankrupt, and his assignee declined the lease (which was delivered up,) but required the fixtures to be repurchased; and brought covenant against the lessor for not appointing an appraiser: it was holden, (x) that as by 6 Geo. *IV. c. 16, s. 75, the bankrupt, [*258] on delivering up the lease, was discharged from all the covenants on his part, performance of the covenant in question could not be enforced by the assignee of the bankrupt against the lessor. For the remedies given to assignees for the recovery of rents by debt or distress, and for enforcing the observance of all covenants and agreements in respect of lands of which the commissioner has the power of disposition, under the 3 & 4 Will. IV. c. 74, see the 67th section of that statute.

Debt.—The assignees of a bankrupt may bring an action of debt on the stat. 9 Ann. c. 14, against the winner, for (y) money lost at play by the bankrupt before his bankruptcy, and the assignees of a bankrupt are allowed to sue both in the *debet* and *detinet*, because the whole property of the bankrupt is vested in them by law. (z)

Tort.—A right of action for an injury to the body or feelings of a trader, arising from a tort, independent of contract, does not pass to his assignees; *e. g.* for an assault and battery or for slander, or for the seduction of a child or servant. (a)

Where defendant, a leaseholder for a long term, put N. in possession under an agreement to grant a lease when N. should have paid a sum of money for the furniture, which he was to do by instalments in three years, in the mean time paying rent at certain days to defendant, subject to distress for non-payment. Defendant received rent from N., but omitted to pay the superior landlord, who distrained on N. for arrears due from defendant, N. having become bankrupt; it was holden, (b) that the damage incurred by the distress was a cause of action on which his assignees might sue; for though a right of action for an injury to the person does not pass to assignees, yet an injury to bankrupt's personal property does. It appears to have been the

(u) *Parker v. Manning*, 7 T. R. 537.

(x) *Kearsey v. Carstairs*, 2 B. & Ad. 716.

(y) *Brandon v. Pate*, 2 H. Bl. 368.

(z) Per Buller, J., in *Winter v. Kretchman*, 2 T. R. 46.

(a) Per Lord Denman, C. J., delivering judgment in Ex. Ch. in *Drake v. Beckham*, 11 M. & W. 319.

(b) *Hancock v. Caffyn*, 8 Bingh. 358.

intention of the legislature to give assignees all the remedies in respect of the property which they were entitled to under the former acts, and that they should have power (as they had under those acts) to sue upon contracts made with the bankrupt, and for injuries affecting his property, (c) though not for mere personal wrongs, and such causes of action as would abate by his death. Hence assignees may maintain (d) an action for unliquidated damages which have accrued before the bankruptcy by non-performance of a contract. So where B. before his bankruptcy hired a carriage of M. and let it to defendant, who sent it back to B. damaged, and C. repaired it with the assent of B., and after B.'s bankruptcy proved the amount of the repairs under B.'s commission; it was holden, (e) that B.'s assignees had a right of action against the defendant; but as it did not appear that B.'s estate had paid or was ever likely to pay any dividend, they were entitled to nominal damages only. A right of action of trespass for seizing and taking the plaintiff's goods under a false and unfounded claim of a debt; whereby the plaintiff was injured in his business and believed by his customers to be insolvent, and certain lodgers left his house, does not pass to the plaintiff's assignees on his bankruptcy. (ee)

Trover.—The reader should be reminded that by the statute 2 & 3 Vict. c. 29, *ante*, p. 249, all executions against the goods of a bankrupt *bonâ fide* levied before the date of the fiat, as well as contracts, dealings, and transactions *bonâ fide* made before that date, are put upon the same footing as payments made by, or to a bankrupt, were under the 6 Geo. IV. c. 16, s. 82, *ante*, p. 251, and are declared to be valid, notwithstanding any prior act of bankruptcy, if levied or made without notice of any prior act of bankruptcy. In order, however, to bring a case within the provisions of the new act, it is essential that the transaction be a valid one. (f) The following cases which occurred before the passing of the new act must therefore be considered with reference to its provisions; but as the new act differs from the 6 Geo. IV. c. 16, s. 81, only as to the time allowed for making executions, contracts, and dealings, valid, they are still retained.

If *after an act of bankruptcy*, but before commission, a person sue out execution against the goods of the bankrupt, under which the sheriff makes a seizure, and then within two months a commission issues, and afterwards the sheriff sells the goods, the assignees may maintain trover against the sheriff; (g) (1) and so where the sheriff seizes, sells, and

(c) See *Spence v. Rogers*, 11 M. & W. 191.

(d) *Wright v. Fairfield*, 2 B. & Ad. 727, recognized in *Gibson v. Carruthers*, 8 M. & W. 321.

(e) *Porter v. Vorley*, 9 Bingh. 93.

(ee) *Brewer v. Dew*, 11 M. & W. 625.

(f) *Hall v. Wallace*, 7 M. & W. 353, *ante*, p. 250.

(g) *Cooper v. Chitty*, 1 Burr. 20, and 1 Bl. Rep. 65; *Lazarus v. Waithman*, 5 Moore, 313; *Carlisle v. Garland*, 7 Bingh. 298, affirmed on error in Exc. Ch. 10 Bingh. 452; 1 Cr. & M. 31; 4 Scott, 587, *S. C.*; affirmed on error in D. P. 4 Bingh. N. C. 7; 3 M. & W. 152; *Dillon v. Langley*, 2 B. & Ad. 131; in *Dillon v. Langley*, it did not appear that the sheriff, at time of seizure, or when sale began, knew of the act of bankruptcy.

(1) See stat. 1 & 2 Will. IV. c. 58, (Interpleader Act,) enabling the sheriff to come in

pays over the money before commission and before notice^(h) of the bankruptcy; but the assignees cannot maintain trespass,⁽ⁱ⁾ for officers and ministers of justice cannot be made trespassers by relation. In like manner the assignees may bring trover against the party suing,^(k) if proved a party to the conversion by giving bond to the sheriff, and receiving the money levied. Or if the party accompany the officer in levying the goods,^(l) *though the produce of the goods [*260] remain in the hands of the sheriff's broker. But assignees having once affirmed the acts of a person who wrongfully sold the property of bankrupt, cannot afterwards maintain^(m) trover against such person. Where S. obtained bills of exchange from the defendant upon a fraudulent representation, that a security given by him to the defendant, (which was void,) was an ample security, and, on the next day, having resolved to stop payment, informed the defendant that he had repented of what he had done, and had sent express to stop the bills, and would return them, and three days afterwards committed an act of

(h) *Potter v. Starkie*, Exchr. M. T. 1807. (See report from Mr. Justice Williams's MS. note in 4 Scott, 718,) cited 4 M. & S. 260, recognized in *Price v. Helyar*, 4 Bingh. 603. *Balme v. Hutton*, on error from Ex. in the Exch. Ch. 9 Bingh. 471, S. P. [*Potter and another, assignees, &c., v. Starkie*, Lancaster Sum. Ass. 1807, MSS. Mr. Justice Williams.

Trover against sheriff. (Conversion by, without notice, where act of bankruptcy before seizure.) In this case, a writ of *fi. fa.* was delivered to the sheriff one day, the bankruptcy was committed on the next, and the seizure on the third. The commission was not sued out, nor the assignment executed until after the sale. Wood, Baron, directed the jury, that as the execution was not completed by the delivery, but by the seizure, and as an act of bankruptcy had intervened before that time, the goods were no longer those of bankrupt, but of his assignees, by relation, and that the sheriff was guilty of a conversion.

Richardson, in Mich. Term, obtained a rule *nisi* in the Exchequer, on the ground that the sheriff having acted only in obedience to the writ, and without notice, was not liable in this form of action. He cited *Cooper v. Chitty*, 1 Burr. Bl. R., and *Timbrell v. Mills*, Bl. R. 205, to show that till there was some notorious act, like commission or assignment, (of which, perhaps, the sheriff is bound to take notice,) the sheriff is bound to obey the writ. That he could not have returned *nulla bona*, the property not being out of the bankrupt until assignment; and that *Cooper v. Chitty* is founded solely on this distinction, viz.—the sale being there after the assignment; for the seizure is there said to be innocent.

Williams, *contra*, endeavored to show, that the grounds of distinction (as taken by Lord Mansfield in *Cooper v. Chitty*,) between that case and the present were, in truth, not maintainable; that this is obvious from Lord Mansfield alternately taking and abandoning them; that the sale follows the nature of the seizure, and is, in truth, no new transaction; and that, therefore, the seizure was the conversion, or there was none at all. That there was no notice in the cited case, though Lord Mansfield, extrajudicially, talked of length of time so that this supposed distinction fails. Further, he showed, that *Timbrell v. Mills* was, as to the point decided, wholly irrelevant, and objected to the supposed dictum as not being found in the report of *Cooper v. Chitty*; and concluded, that the sheriff having taken goods not alluded to in the writ, but the goods of other persons, was guilty of a conversion, the point of property in the plaintiffs having been conceded early in the argument; and of this opinion was the court, and discharged the rule, on the ground, (as I afterwards heard from Richardson,) that according to the authority of *Cooper v. Chitty*, the property must be considered as divested by the bankruptcy.]

(i) *Smith v. Milles*, 1 T. R. 475.

(k) *Rush v. Baker*, Bull. N. P. 41; Str. 96, and MSS. S. C.

(l) *Menham v. Edmonson*, 1 Bos. & Pul. 369.

(m) *Brewer v. Sparrow*, 7 B. & C. 310.

and protect himself against disputed claims to property; and see *Fenwick v. Laycock*, 2 Q. B. 108.

bankruptcy, after which he returned to the defendant all the bills, (except one which had been discounted,) and also two bank-notes, part of the proceeds of such discount, and the defendant delivered back the security, and afterwards a commission of bankruptcy issued against S., the assignees under which commission brought trover against the defendant for the bills and bank-notes: held, that the defendant was entitled to retain them.(n) Assignees may maintain trover for goods sold by a bankrupt after an act of bankruptcy, although they have demanded payment for them. The very taking of goods(o) from one who has no right to dispose of them is a conversion.

The assignees are entitled to recover in trover goods *bond fide* seized by an execution creditor under a *fieri facias*, on a judgment, upon a warrant of attorney, after a secret act of bankruptcy, but not sold until after the date and issuing of the fiat,(p) and notice thereof; and the stat. 2 & 3 Vict. c. 29, does not protect such an execution. See *ante*, p. 254.)

In what manner the Assignees ought to sue.—All the assignees who are living must join in the action.(q) In actions brought by the assignees, they may declare generally as assignees of the estate of A. a bankrupt, according to the form of the statute, concerning bankrupts, without setting forth the act by which the trader became a bankrupt,(r) or the proceedings under the commission.(s) So a declaration on a *scire facias*,(t) by the assignees of a bankrupt, stating generally, that he became a bankrupt within the meaning of the statute, and that his goods and effects were duly assigned to the plaintiffs, is sufficient, without stating the trading, act of bankruptcy, &c., because a *scire facias* is an action. The assignees cannot make themselves parties to the record in any intermediate stage of the proceedings,(u) but it [*261] must be immediately *after judgment, and before any other proceeding has taken place, though an interlocutory judgment is sufficient for this purpose. Hence where plaintiff, after judgment against him *and* writ of error allowed, becomes a bankrupt, the assignees ought to go on with the writ of error in the bankrupt's name, the writ of error being a proceeding after the judgment; and if the assignees, instead of adopting this method, sue out a *sci. fa.* in their own names to compel an assignment of errors, the court will quash it. If the assignees bring an action upon a contract made by the bankrupt before his bankruptcy, it is incumbent on them to sue as assignees, and so to state themselves in the declaration.(1) But where the contract is

(n) *Gladstone v. Hadwen*, 1 M. & S. 517. See further *Taylor v. Plumer*, 3 M. & S. 562.

(o) *Hurst v. Gwennap*, 2 Stark N. P. C. 306. Lord *Ellenborough*, C. J., whose opinion was afterwards confirmed by the court.

(p) *Skey v. Carter*, 11 M. & W. 571, affirming, on error in Exch. Ch., judgment of B. R.

(q) *Snelgrove v. Hunt*, 2 Stark. N. P. C. 424, *Abbott*, C. J.

(r) *Pepys v. Low*, Carth. 29.

(s) *Lawson v. Lamb*, Lut. 274.

(t) *Winter v. Kretchman*, 2 T. R. 45.

(u) *Kretchman v. Beyer*, 1 T. R. 463.

(1) In an action by trustee of an insolvent debtor suing as trustee, on the general issue, he must prove his character and authority as such. *Winchester v. The Union Bank*, 2 Gill & J. 73.

made by the bankrupt after his bankruptcy, (x) and before he has obtained his certificate, as all his property is then vested in the assignees, he will be considered as their agent; and, in such case, it is not necessary that they should state themselves to be assignees in the declaration; in like manner as where an executor brings an action on a contract made *by himself* respecting the goods of the testator, he need not name himself executor. In actions of assumpsit brought by the assignees on contracts made with the bankrupt, there are two ways in which the promises may be laid in the declaration: 1st, As having been made to the bankrupt (y) before his bankruptcy; and, 2ndly, As having been made to the plaintiffs as assignees. (z) In an action brought by the assignees of a bankrupt, (a) the plaintiffs declared on an account stated *with the bankrupt*, whereon the defendant was found in arrear £ , and being so in arrear, he promised to pay the plaintiffs as assignees. On the general issue pleaded, the evidence was, that the account was stated with the bankrupt, and the defendant promised to pay him, but there was not any evidence of a promise to the assignees. Lord *Hardwicke*, C. J., was of opinion, that the declaration was supported by the evidence, and the plaintiffs had a verdict. On a motion for a new trial, the court concurred in opinion with the chief justice: *Lee*, J., observing, that he was not aware of any case, where, on a declaration framed in this manner, it had been holden necessary to prove an express promise to the assignees; because when the account was proved to be stated with the bankrupt, there was a sufficient consideration: a debt was created to the bankrupt which was transferred to the assignees by the statute; and this was evidence of a promise to the assignees so as to entitle them to this demand, standing in the place of the bankrupt. Assignees under a joint commission against two partners, may recover (b) in the same action debts due to the partners jointly and debts due to them separately; for being assignees of the two partners, they are *assignees also of each. The assignees under a joint com- [*262] mission against A. and B., in suing on a separate contract entered into with A., may describe themselves generally as assignees of A. without noticing the name of B. (c) A. and B. were partners, A. committed an act of bankruptcy, and afterwards, but before the bankruptcy of B., the sheriff seized goods which had belonged to A. and B., under an execution against them: it was holden, (d) that the assignees of A. and B. under a joint commission could not, suing as such, recover A.'s share of the property therein. A trader being seised of an estate for life with a power of appointment, remainder in default of appointment to himself in fee, after having committed an act of bankruptcy made an appointment in favour of S. J.; it was holden, (e) that all

(x) *Evans v. Mann*, Cowp. 569.

(y) *Rig v. Wilmer*, Str. 697, adjudged on demurrer to declaration.

(z) *Fashion v. Dormet*, 7 Vin. Abr. 140, tit. "Creditor and Bankrupt," pl. 16.

(a) *Skinner v. Rebow*, T. 8 & 9 Geo. II. B. R. MSS.

(b) *Graham v. Mulcaster*, 4 Bingham. 115.

(c) *Stonhouse v. De Silva*, 3 Campbell. 399.

(d) *Hogg and another v. Bridges and another*, 8 Taunt. 200.

(e) *Doe d. Coleman v. Britain*, 2 B. & A. 93; and see *Badham v. Mee*, 7 Bingham. 695; *Jones v. Winwood*, 3 M. & W. 653; *Hole v. Escott*, 2 Keen, 444; 4 M. & Cr. 187.

his interest having passed to his assignee under a bargain and sale executed by the commissioners, the appointment was void: and therefore that the assignee might maintain an ejectment.(1) The assignees of a bankrupt may maintain an action in their own names only for a chose in action belonging to the wife of the bankrupt, *e. g.* a promissory note given to her *dum sola*; and in such action the defendant cannot set off a debt due to him from the bankrupt.(f)

By stat. 5 & 6 Vict. c. 122, s. 31, if any person adjudged bankrupt after the commencement of this act shall at the time of his bankruptcy be a member of a firm, it shall be lawful for the court authorized to act in the prosecution of the fiat against such bankrupt to authorize the assignee, upon his application, to commence or prosecute any action at law or suit in equity in the name of such assignee and of the remaining partners against any debtor of the partnership; and such judgment, decree, or order, may be obtained therein as if such action or suit had been instituted with the consent of such partner: and if such partner shall execute any release of the debt or demand for which such action or suit is instituted, such release shall be void; provided that every such partner shall have notice given him of such application, and be at liberty to show cause against it, and if no benefit is claimed by him by virtue of the said proceedings shall be indemnified against the payment of any costs in respect of such action or suit in such manner as such court upon his application shall direct; and that it shall be lawful for such court, upon the application of such partner, to direct that he may receive so much of the proceeds of such action or suit as such court shall direct.

Actions against Assignees.—By stat. 6 Geo. IV. c. 16, s. 44, “Every action brought against any person *for any thing done in* [*263] **pursuance of this act*(2) shall be commenced within three calendar months next after the fact committed; and the defendant may plead the general issue and give this act and the special matter in evidence, and that the same was done by authority of this act; and if it shall appear so to have been done, or that such action was com-

(f) *Fates v. Sherrington*, 11 M. & W. 42.

(1) By the bankrupt act of the United States of 1800, c. 173, [xix.] s. 13, upon the death of an assignee, the right of action for a debt due to the bankrupt, vests in the executor or administrator of the assignee. *Richards v. Maryland Ins. Co.*, 8 Cranch, 84. And the right of action which the bankrupt has against a sheriff, for not levying an execution at his suit, is transferred to the assignee of the bankrupt, by the assignment of his estate and effects. *Sullivan v. Bridge*, 1 Mass. Rep. 511. But the assignees of a bankrupt are not entitled to come in and prosecute a *real* action commenced by the bankrupt. *Forbes v. Thompson*, *Ib.* 134.

Under the bankrupt act of the United States of 1800, c. 173, [xix.] it was held, that when a dividend has been made by the commissioners, each creditor whose claim has been allowed, is entitled to his dividend, and no court is authorized to prevent his receipt of it, or to cause it to be distributed among the other creditors; nor have the commissioners any power over a dividend they have once declared. *Selfridge v. Richardson*, 4 Mass. Rep. 95.

(2) As to what shall be said to be *in pursuance of an act*, see *Smith v. Shaw*, 10 B. & C. 277, *post*, tit. “Imprisonment,” and *Wallace v. Smith*, 5 East, 122, *ante*, 97, n.; *Sellick v. Smith*, 2 O. & P. 284; *Gaby v. Wilts and Berks Canal Company*, 3 M. & S. 580; *Theobald v. Crichmore*, 1 B. & A. 227.

menced after the time before limited for bringing the same, the jury shall find for the defendant: and if there be a verdict for the defendant, or if the plaintiff shall be nonsuited, or discontinue his action after appearance thereto, or if, upon demurrer, judgment shall be given against the plaintiff, the defendant shall recover double costs." "The true construction of the foregoing clause appears to be this: if the assignee does an act directed by the statute, but does it erroneously, he is protected: but if he does the act as the result of his ownership of that which was the bankrupt's property, and not by the direction of the statute, that is not done in pursuance of the statute, and he is responsible for it." Per *Bayley, J.*, delivering judgment of the court in *Edge v. Parker*, 8 B. & C. 701, recognizing *Carruthers v. Payne*, 5 Bingh. 270. See also, *Worth v. Budd*, 2 B. & Ad. 177, where it was holden, that assignees are not entitled to double costs under the latter part of this section, and there is not any distinction between the case of a general assignee and an official assignee. The official assignee is not, therefore, entitled to notice of action by the alleged bankrupt for seizing his goods under the fiat; for the right he exercises in seizing the goods is a right belonging to him by virtue of his property in them, and not of any special power given to him by the Bankrupt Acts; *Knight v. Turquand*, 2 M. & W. 101. Formerly, when a dividend was declared, it was considered that a right of action against the assignees accrued to every creditor for his proportion; (g) and it was holden, that assumpsit might be maintained against the assignees of a bankrupt by a creditor for his share of a dividend, under an order of the commissioners; and in such action the proceedings before the commissioners were conclusive evidence of the debt, and the assignees could not set off a debt due from the plaintiff, for the sum proved must be taken to be the balance due; but now by stat. 6 Geo. IV. c. 16, s. 111, no action for any dividend shall be brought by any creditor who has proved under the commission, against the assignees of the estate of such bankrupt, for the amount of any dividend declared by the commissioners; but in cases of refusal by the assignees to pay such dividend, the creditor entitled to the same may petition the Lord Chancellor, *who may order pay- [*264] ment thereof, with interest for the time that such dividend shall have been withheld, and the costs of the application.

IX. Of Actions by the Bankrupt.

An uncertificated bankrupt has a special property in goods acquired by himself after his bankruptcy, (h) and may maintain trover for them against strangers. So if an order for the delivery of goods, (i) belonging to A. but in the possession of B., be given by A. to an uncertificated bankrupt, in payment of a debt due from A. to the bankrupt after his bankruptcy, and B. refuses to deliver the goods, the bankrupt may maintain trover against him. In cases of this kind, however, the bank-

(g) *Brown v. Bullen*, Doug. 407, per *Kenyon*, C. J., 6 T. R. 549, S. P.

(h) *Webb v. Fox*, 7 T. R. 391.

(i) *Fowler v. Down*, 1 Bos. & Pul. 44.

Before the recent stat. 5 & 6 Vict. c. 122, s. 39, it was required that the certificate should be signed by a certain proportion of the creditors of the bankrupt; but it is no longer requisite that any of the creditors should sign, the granting of the certificate being vested, by sect. 39, in the discretion of the commissioners, who may either refuse it altogether, or annex such conditions thereto as the justice of the case may require.

By stat. 5 & 6 Vict. c. 122, s. 42, (u) any bankrupt who shall after such certificate shall have been confirmed be arrested or have any action brought against him for any debt, claim, or demand, proveable under the fiat against such bankrupt, shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act, and the special matter in evidence; and such bankrupt's certificate, and the confirmation thereof, shall be sufficient evidence of the trading bankruptcy fiat, and other proceedings precedent to the obtaining such certificate; and if any such bankrupt shall be taken in execution or detained in prison for such debt, claim, or demand, where judgment has been obtained before the confirmation of his certificate, it shall be lawful for any judge of the court wherein judgment has been so obtained, on such bankrupt's producing his certificate, to order any officer who shall have such bankrupt into custody by virtue of such execution, to discharge such bankrupt without exacting any fee.

[*267] * By stat 6 Geo. IV. c. 16, s. 127, if any person who shall have been so discharged by such certificate, or who shall have compounded with his creditors, or who shall have been discharged by an insolvent act, shall become bankrupt, and have obtained such certificate, unless his estate shall produce, (after all charges,) sufficient to pay every creditor under the commission 15s. in the pound, such certificate shall only protect his person from arrest and imprisonment; but his future estate and effects (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife, and children,) shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing the commission.

The foregoing 127th section does not entitle a creditor to proceed against the bankrupt after a second certificate, for a debt which he might have proved under the commission; and if the creditor brings an action for such debt, the certificate(x) will be a bar. Debt on bond—Plea, bankruptcy: The defendant had since the date of the bond been discharged under an Insolvent Act, but the bond had not been inserted in the schedule; a commission of bankrupt had afterwards issued against him, under which he obtained his certificate before the day on which the stat. 6 Geo. IV. c. 16, received the royal assent, but his estate had not produced 15s. in the pound. The court was of opinion, (y) that there were not any words in the 127th section by which the right of

(u) This section is similar to the 126th sect. of stat. 6 Geo. IV. c. 16.

(x) *Robertson v. Score*, 3 B. & Ad. 338, recognized in *Elston v. Braddick*, Ex. Feb. 21st, 1834, 2 Mont. & Ayr. 436, n.

(y) See *Carew v. Edwards*, 4 B. & Ad. 351.

a creditor, situated as the plaintiff was, to sue the bankrupt and recover a judgment, and have execution against his effects, was *specifically* and *expressly* taken away, or the effects of a bankrupt, situated as the defendant was, were specifically and expressly vested in his assignees; and, consequently, the certificate was no bar. They added, that these grounds of their judgment left the case of *Robertson v. Score* wholly untouched. Where A. had obtained his certificate under a second bankruptcy before the statute 6 Geo. IV. c. 16 came into operation, it was holden^(z) to be a valid defence, in trover for goods, that the goods were in the disposition of A., against whom a fiat issued in 1836, under which the defendant converted as assignee; although A. had not paid 15s. in the pound under the second commission; for this section is not retrospective so as to apply when the second certificate was obtained before the act came into operation; but it does apply where the second *certificate* was obtained after the act came into operation, although the second commission was before.^(a) A party who has taken possession of the goods of an intestate after his death, cannot *set [*268] up a defence to an action of trover by the administrator, that the intestate had been first insolvent and then bankrupt, and had not paid 15s. in the pound under the fiat, and that therefore the property in the goods vested absolutely in the assignees; the goods having been acquired by the intestate after the bankruptcy, and he having been allowed by the assignees to retain possession of them.^(b)

The 127th section vests the future estate in the assignees absolutely,^(c) and does not leave the bankrupt a right of action subject to their interference.

It is sufficient for the defendant to pursue the words of the statute, and to aver that the cause of action accrued before he became a bankrupt, without averring that the defendant had conformed, according to the bankrupt statute,^(d) or that the defendant became a bankrupt before the commencement of the suit.^(e) By a certificate obtained under a joint commission, separate as well as joint debts are discharged.^(f) In like manner by a certificate obtained under a separate commission, joint debts as well as separate debts are discharged.^(g) Formerly, indeed, doubts were entertained whether a certificate under a separate commission, against one partner, would not discharge the other partner; and, therefore, it was held necessary to provide against such discharge by stat. 10 Ann. c. 15. That statute is now repealed; but by stat. 5 & 6 Vict. c. 122, s. 37,^(h) *ante*, p. 265, 6, no certificate shall release or discharge any person who was partner with the bankrupt, at the

(z) *Benjamin v. Belcher*, 3 P. & Da. 317; 11 A. & E. 350. See *Elston v. Braddick*, 2 Cr. & M. 435; 4 Tyr. 122; *Butler v. Hobson*, 4 Bingh. N. C. 290; 5 Bingh. N. C. 128.

(a) *Young v. Rishworth*, 3 Nev. & P. 585; 8 A. & E. 470.

(b) *Fyson v. Chambers*, 9 M. & W. 460.

(c) *Young v. Rishworth*, 3 Nev. & P. 585; 8 A. & E. 470.

(d) *Willan v. Giordani*, Co. B. L. 5th edit. p. 518, in which *Paris v. Salkeld*, 2 Wils. 139, was overruled.

(e) *Tower v. Cameron*, 6 East, 413; *Howard v. Poole*, Str. 995; Dav. 431.

(f) *S. C. Wickes v. Strahan*, Str. 1157; *S. P. Horsey's case*, 3 P. Wms. 25.

(g) *Exp. Yale*, 3 P. Wms. 24, n.

(h) This section is similar to sect. 121 of the 6 Geo. IV. c. 16.

time of his bankruptcy, or who was then jointly bound, or had made any joint contract with the bankrupt. This general plea of bankruptcy may be supported by evidence of a certificate allowed after bill filed, and before plea pleaded,⁽ⁱ⁾ the cause of action having accrued before the bankruptcy; but the certificate cannot be given in evidence under the general issue, for the debt still exists, and as the certificate only operates as a special discharge from it under the statute, the defendant must avail himself of this discharge in the manner prescribed by the statute.^(k) Where the bankrupt is sued for a cause of action accruing before his bankruptcy, and pending the suit and before trial obtain his certificate, he must plead^(l) it, *puis darrein continuance*; and if he neglects to do so, and judgment is obtained against him, he will not be permitted to plead his certificate to an action on such judgment. A bankrupt, who obtained his certificate after issue [*269] and before judgment, having, after judgment, been *rendered in discharge of his bail, was holden entitled to his discharge on a summary application, although he had not pleaded his certificate *puis darrein continuance*.^(m) See new rules as to plea *puis darrein continuance*, ante, p. 141.

The certificate will operate as a discharge⁽ⁿ⁾ of such debts only as are due at the time when the act of bankruptcy is committed; and the foregoing remark as to the time when the certificate was obtained must be attended to. But if an action be commenced against a bankrupt *after* the bankruptcy, for a debt due *before* the bankruptcy, and a verdict found for the plaintiff, and afterwards the bankrupt obtains his certificate; the *costs* of such action, as well as the original debt, are proveable under the commission. *Willet v. Pringle*, 2 Bos. & Pul. N. R. 190. The costs bear relation to the original debt; hence where plaintiff before the bankruptcy of the defendant sued him for a debt, and went on with the suit after such bankruptcy, and had judgment, and defendant obtained his certificate, and afterwards brought a writ of error, which was non-prossed, and costs of non-pros in error awarded against him; it was holden, that the certificate discharged the defendant from these costs. *Scott v. Ambrose*, 3 M. & S. 326. Debts proveable under the commission, and debts to be discharged by the certificate, are convertible terms; and the debts not due at the time of the act of bankruptcy, except in the cases specially provided for by the statute, are not affected by the commission. Hence where a debt accrues after an act of bankruptcy and before the issuing of the commission,^(o) the bankrupt will remain liable, although he has obtained his certificate, and cannot avail himself of the general plea of bankruptcy.⁽¹⁾ By 6 Geo. IV. c. 16, s. 51, any person who shall have

(i) *Harris v. James*, 9 East, 82.

(k) *Gowland v. Warren*, 1 Campb. 363.

(l) *Todd v. Maxfield*, 6 B. & C. 105.

(m) *Humphreys v. Knight*, 6 Bingh. 572.

(n) *Bamford v. Burrell*, 2 Bos. & Pul. 1.

(o) *Todd v. Maxfield*, 6 B. & C. 105.

(1) An action pending against a certificated bankrupt, commenced before the act of

given credit to the bankrupt upon valuable consideration, for any money or other matter or thing, which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note, or other negotiable security or not, shall be entitled to prove such debt, bill, &c. as if the same was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive, at the rate of five per cent. to be computed from the declaration of a dividend to the time such debt would have become payable. And by sect. 56, if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may apply to the commissioners to set a value upon such debt, and the commissioners are to ascertain the value, and to admit such person to prove the amount and to receive dividends thereon; or if such value shall not be so *ascertained before the contingency shall have happen- [*270] ed, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed.(p)

A right to maintain covenant(q) for unliquidated damages is not a contingent debt capable of proof under this section; nor a right to maintain an action for not accepting(r) and paying for a quantity of oil, contracted for, at a certain price, and to be delivered at a future day.(1)

By marriage settlement, S. covenanted to cause a sum of money to be paid to his wife's trustees within twelve months after his own death, in trust to pay her the interest for her life in case she survived him, and afterwards the principal to their children; but if they had not any children, then to the survivor of them, that is S. and his wife, his or her representatives. It was holden,(s) that this was a debt on a con-

(p) See *Yallop v. Ebers*, 1 B. & Ad. 698.

(q) *Atwood v. Partridge*, 4 Bingh. 209.

(r) *Boorman v. Nash*, 9 B. & C. 145. See *Green v. Bicknell*, 8 A. & E. 701, *post*, p. 274.

(s) *Exp. Tindal*, cor. Lord Brougham, C., *Tindal*, C. J., and *Littledale*, J., reversing the

bankruptcy, on a demand which was or might have been proved under the commission, cannot be prosecuted to judgment, unless the certificate has been obtained by fraud, or the bankrupt has concealed effects exceeding the value of one hundred dollars, under the bankrupt law of the United States of 1800, c. 173, [xix.] s. 34. *Payson v. Payson*, 1 Mass. Rep. 283.

(1) So where defendant assigned to plaintiff a policy of insurance on defendant's life, and covenanted to pay the annual premiums, and if he did not, and plaintiff paid them, to repay plaintiff: the defendant afterwards became bankrupt, and obtained his certificate; a premium accruing due after the bankruptcy, and being unpaid by defendant, and plaintiff having paid it, and not been repaid; it was holden, that defendant was not discharged from liability for these breaches of covenant, by sect. 56 and 121 of stat. 6 Geo. IV. c. 16. *Toppin v. Field*, 4 Q. B. 386; in which the case of *Atwood v. Partridge*, 4 Bingh. 209, was recognized.

tingency proveable under the foregoing section. So where plaintiffs having taken B. in execution for a debt, discharged him upon the following undertaking of the defendant:—"In consideration of your discharging B. out of custody, I undertake that he shall pay the debt due to you by four half-yearly instalments;" it was holden, that the unpaid instalments might have been proved under the fiat in bankruptcy against the defendant, and that the defendant's certificate was a bar to an action upon the contract for instalments becoming due since his bankruptcy.(t) But where in an action between the same parties on this agreement for the instalments accruing due after the fiat, it appeared that B. had kept alive his debt to the plaintiffs by executing a warrant of attorney previous to his discharge, and that the defendant's undertaking was given with reference to B.'s liability, and as a collateral security for the payments of the instalments secured by the warrant of attorney, and that no instalment had become due before the fiat, it was holden that there was no debt due from the bankrupt at the issuing of the fiat which could have been proved under it, and therefore that the certificate was no bar to the action.(u) The instalments of an annuity for the payment of which a bankrupt is surety(x) only, and

which he covenants to pay in case of the default of the grantor, [*271] are not, when they become due after his bankruptcy, *proveable. N. The 54th section enables an annuity creditor of a bankrupt to prove the value of the annuity against the grantor. An annuity not proveable under sec. 54, is not proveable under sec. 56 of this act.(y)

A debt due on a judgment signed in an action for *damages* after an act of bankruptcy committed by defendant, and a commission issued thereon, is not discharged by the certificate, *though the verdict was obtained before the bankruptcy.*(z) So a bankruptcy of plaintiff occurring after verdict for the defendant, and before judgment, the subsequent certificate is no bar to an execution for the costs of the action.(a) Verdict for defendant in July. Commission against plaintiff in August; judgment against him, and certificate for him in Mich. T. ensuing: it was holden,(b) that the plaintiff was liable to an execution for costs, notwithstanding the 56th section. So where plaintiff became bankrupt after nonsuit, but before judgment signed.(c) Plaintiff obtaining judgment against bankrupt for debt proveable under commission, is entitled to prove for the costs, though not taxed at the time of the bankruptcy.(d) But if the acceptor of a bill of exchange not due become bankrupt,(e) and the indorser be afterwards obliged to take up

decision of Lord *Lyndhurst*, who had reversed the decision of the Vice Chancellor,⁸ Bingham. 402.

(t) *Lane v. Burghart*, 1 Q. B. 933; 1 G. & D. 311.

(u) *Lane v. Burghart*, 3 M. & Gr. 597; 4 Scott's N. R. 287.

(x) *Thompson v. Thompson*, 2 Bingham. N. C. 168.

(y) *Exp. Vanheythuysen*, 2 Mont. & Ayr. 519.

(z) *Buss v. Gilbert*, 2 M. & S. 70.

(a) *Walker v. Barnes*, 5 Taunt. 778; 1 Marsh. 345, S. C.

(b) *Bird v. Moreau*, 4 Bingham. 57.

(c) *Haswell v. Thorogood*, 7 B. & C. 705.

(d) 6 Geo. IV. c. 16, s. 58.

(e) *Joseph v. Orme*, 2 Bos. & Pul. N. R. 180.

the bill on account of non-payment by the acceptor, he may prove the amount under the commission; and consequently if the acceptor afterwards obtain his certificate, he will be discharged from the debt.(1) So where a verdict is obtained in vacation, against a trader, who, after the first day of next term, but before final judgment is signed, becomes bankrupt; it is holden, that the judgment signed in the same term relates to the first day of the term, and that the debt thereby created is barred by the certificate; and this rule holds, whether the verdict be in an action of assumpsit(*f*) or tort.(*g*)

Before the year 1819, a debt for which a person was merely liable as surety, but which was not paid until after the bankruptcy of the principal, was not proveable under the commission, and consequently was not barred by the certificate;(*h*) but now by stat. 6 Geo. IV. c. 16. s. 52,(*i*) any person who, at the issuing the commission, shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt,(*k*) either to the sheriff or to the action, if he shall have paid the debt, or any part thereof in discharge of the whole debt, (although he may have paid the same after the *commission issued,) if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the said commission, which such creditor possessed or would be entitled to in respect of such proof; or if the creditor shall not have proved under the commission, such surety, or person *liable*, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable, or bail, after an act of bankruptcy committed by such bankrupt; provided that such person had not, when he became such surety, or bail, or liable, notice of any act of bankruptcy by such bankrupt committed. By the foregoing section, the certificate of a bankrupt is a bar, not only to an action at the suit of the surety for the recovery of money paid in discharge of the original debt, but to any action for the consequential damage accruing from the non-payment, by the bankrupt, of the original debt when due; and, therefore, when the acceptor of an accommodation bill brought an action against the drawer, who had become bankrupt, for not providing him with funds to pay the bill when due, whereby he had incurred the costs of an action, and was obliged to sell an estate, in order to raise money to pay the bill, the certificate was held to be a good bar.(*l*) But where R. C. borrowed a sum of money, and gave the

(*f*) *Exp. Birch*, 4 B. & C. 880.

(*g*) *Greenway v. Fisher*, 7 B. & C. 436.

(*h*) *Chilton v. Wiffin*, 3 Wils. 13; *Young v. Hockley*, 3 Wils. 346; 2 Bl. R. 839, S. C.; *Vanderheyden v. De Paiba*, 3 Wils. 528.

(*i*) See corresponding section, 49 Geo. III. c. 121, s. 8, but now repealed.

(*k*) This is new; see *Hewes v. Mott*, 6 Taunt. 329.

(*l*) *Van Sandau v. Corsbie*, 3 B. & A. 13.

(1) A surety on a promissory note, who pays it after the discharge of the principal under an insolvent law, is not bound by his discharge. *Paxson v. Haster*, 6 Halst. 410.

lenders a bond, by which he and four others bound themselves jointly and severally, in a penalty, for the regular payment of interest, and for the discharge of the principal, and all interest which might be due at the end of five years, or, if sooner called upon, then at twenty-one days after demand. One of the co-obligors of R. C. became bankrupt, and obtained his certificate. At the time of the bankruptcy, a forfeiture had accrued by non-payment of interest, but it was not insisted upon, and the interest was subsequently paid up. After the certificate, R. C. was called upon for the principal, but did not pay, and payment was enforced from the three co-obligors, who had continued solvent. In an action by one of them against the party who had been bankrupt for contribution, it was holden,^(m) that they could not have proved under the commission by sect. 52 of the Bankrupt Act, and therefore, that the certificate was no answer to the action.

A. had indorsed a bill for the accommodation of B., the prior indorser; B. became bankrupt, and obtained his certificate; A. was called on to pay the bill after the bankruptcy: it was holden, that although A. could not be considered as surety for the debt of B., inasmuch as he was liable primarily to the holder as indorser, that is, as principal, and not surety, on failure of B., the prior indorser; yet A. was a "person liable" for the debt of B. within the act.⁽ⁿ⁾ Where a sum of money being due from A. to B. C. at B.'s request, and for his accommodation, drew a bill on A. for the amount, which A. accepted; and C. then indorsed the bill and gave it to B., who indorsed and negotiated it. B. having subsequently become bankrupt, and the bill having been dishonoured and paid by C.; it was holden, that the amount of the bill was proveable by C., for C. was surety for the debt of the bankrupt, contracted by his obtaining credit on the bill indorsed by C. although he was not an immediate surety, but only on the default of the acceptor; and consequently that C.'s right of action against B. for the amount of the bill was barred by the certificate.^(o)

A plaintiff cannot by voluntarily delaying payment of a debt till after a final dividend has been made, deprive defendant of the benefit of his certificate. Thus, when a debt was due before bankruptcy, but the creditor did not prove it, nor did the plaintiff compel the creditor to prove it for the plaintiff's benefit; it was held, that the certificate of the debtor was a bar against the plaintiff who had paid as surety.^(p)

The plaintiff accepted a bill of exchange,^(q) payable at a future day, for the accommodation of the defendant. Afterwards, and before the bill became due, the defendant committed an act of bankruptcy. The bill was dishonoured. A commission issued, but was shortly afterwards superseded. A meeting of the defendant's creditors was then held,

(m) *Clements v. Langley*, 5 B. & Ad. 372; 2 Nev. & Man. 269.

(n) *Bassett v. Dodgin*, 9 Bingh. 653, recognizing *Exp. Lloyd*, 1 Rose, 6; and *Exp. Fong*, 3 Ves. & Beames, 40.

(o) *Haigh v. Jackson*, 3 M. & W. 598; and see *Filbey v. Lawford*, 3 M. & Gr. 477; 4 Scott's N. R. 208, 611, in which the case of *Bassett v. Dodgin* is relied upon by Tindal, C. J.

(p) *Jackson v. Magee*, 3 Q. B. 48; 2 G. & D. 402.

(q) *Stedman v. Martinnant*, 13 East, 427.

and time was given him. The plaintiff then accepted another bill, for the purpose of taking up the former dishonoured bill, including also interest and stamp. This last bill was indorsed by J. S. as an additional security to the holders, who required it. Afterwards an effectual commission issued upon the original act of bankruptcy, under which the defendant obtained his certificate. The plaintiff, at a subsequent day, when the second bill became due, paid it. It was holden, that the giving of the second acceptance for the prior debt did not discharge the original debt for which the plaintiff had become surety before the act of bankruptcy; and in paying that second bill the plaintiff was only paying the same debt which he was liable to pay as surety for the defendant upon the first bill; and consequently that this was a case within the 8th section of the stat. 49 Geo. III. c. 121, by which the surety for a debt proveable under commission, though not paid by him until after the issuing of the commission, shall stand in the place of the original creditor as to the whole of the debt so paid. The act, however, provided, that it should not extend to a person who, when *he became surety, had either notice in fact of the act [*274] of bankruptcy committed, or implied notice from the issuing of the commission, though such commission were afterwards superseded. But the plaintiff's case did not fall within this proviso, for his suretyship had commenced before the issuing of the commission, afterwards superseded. The debt was not affected with the implied notice: it was a debt, therefore, proveable under the commission, and was consequently barred by the certificate. A contingent debt secured by a penalty, as to indemnify a parish against the maintenance of a bastard, is not a debt proveable under the commission, and the obligee is not therefore discharged by his certificate(r) from expenses incurred subsequent to his bankruptcy. The plea of bankruptcy is not a plea to the action, but a personal discharge only;(s) hence, where an action of assumpsit was brought against A. and B. jointly as partners, and A. pleaded a judgment recovered, and B. pleaded his bankruptcy, and thereupon the plaintiff entered a *nolle prosequi* as to B.; it was holden, that the plea of bankruptcy only discharged B., and further, that the entry of the *nolle prosequi* as to B. did not discharge the action as to A.; for it was not like a retraxit, which is a total relinquishment of the suit.(1) Where the plaintiff's demand rests in damages, and cannot be ascertained without the intervention of a jury, it cannot be proved under the defendant's commission.(2) Hence, bankruptcy is not any plea in bar to an

(r) *Overseers of St. Martin's-in-the-Fields v. Warren*, 1 B. & A. 491. As to contingent debts, see stat. 6 Geo. IV. c. 16, s. 56, *ante*, p. 269.

(s) *Noke and another v. Ingham*, 1 Wils. 89.

(1) If a bankrupt, before his bankruptcy, receive money on a promise to put it out on bond and mortgage, which he neglects to do, he is not liable in a special action on the case, the demand being provable under the commission. *Hatten v. Speyer*, 1 Johns. Rep. 37.

A person hiring a house for a year, during which time he becomes bankrupt, and is discharged, and occupying it after his discharge, will be liable for the use and occupation since his bankruptcy. *Hendricks v. Judah*, 2 Caines' Rep. 25.

(2) See *Dusau v. Murgatroyd*, 1 Wash. C. C. R. 13.

action of trespass for mesne profits, because the damages are uncertain.(t) Nor to an action in tort(u) against a broker for selling out plaintiff's stock contrary to orders. Nor to an action of trover, though the conversion happened before the bankruptcy.(x) Nor to a breach of covenant(y) which gives the plaintiff a claim for unliquidated damages, and which damages may vary according to circumstances. Upon the same principle it has been holden,(z) that the difference between the contract price of a cargo of whale oil of merchantable quality, which certain persons had agreed to purchase of the plaintiffs, but had refused to accept, and the market price of the oil at the time of refusal, could not be proved under a fiat of bankruptcy issued against those persons upon an act of bankruptcy committed subsequent to the refusal. For though in many cases in chancery, proof has been admitted of the value of *stock* agreed to be transferred at a given day, those cases must be regarded as exceptions to the rule, which is, generally speaking, that no claim of this nature shall be proveable as a debt, for which the intervention of a jury is necessary.(a) Nor could the bankruptcy [*275] of the lessee be *pleaded in bar to an action of covenant brought against him, for rent arrear, subsequent to his bankruptcy.(b) By stat. 6 Geo. IV. c. 16, s. 75,(c) any bankrupt entitled to any lease, or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained; and if the assignees decline the same, shall not be liable, in case he deliver up such lease or agreement to the lessor or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined: and if the assignees shall not (upon being thereto required,) elect whether they will accept or decline such lease, or agreement for a lease, the lessor, or person so agreeing as aforesaid, or any person entitled under such lessor or person so agreeing, shall be entitled to apply by petition to the Lord Chancellor, who may order them so to elect and to deliver up such lease or agreement, in case they shall decline the same, and the possession of the premises, or may make such order therein as he shall think fit. A parol contract is within this clause,(d) and in such a case, an offer by the bankrupt to deliver up possession is equivalent to a delivery of the lease or agreement. If a lessee covenants not to assign, and becomes bankrupt, and his assignees take to the lease, his covenant is discharged by the foregoing section, although a breach of it had become impossible, by reason that he no longer had the subject-matter respecting which the

(t) *Goodtitle v. North*, Doug. 583.

(u) *Parker v. Crole*, 5 Bingh. 63.

(x) *Parker v. Norton*, 6 T. R. 695, recognized in *Parker v. Crole*, 5 Bingh. 63.

(y) *Atwood v. Partridge*, 4 Bingh. 209.

(z) *Green v. Bicknell*, 8 A. & E. 701; 3 Nev. & P. 634.

(a) Per Lord Denman, C. J., delivering judgment of the court in *Green v. Bicknell*, 8 A. & E. 701; 3 Nev. & P. 634.

(b) *Auriol v. Mills*, 4 T. R. 94; *Briggs v. Sowry*, 8 M. & W. 729.

(c) See corresponding section, 49 Geo. III. c. 121, s. 19; and see *post*, tit. "Covenant."

(d) *Slack v. Sharpe*, 8 A. & E. 366; 3 Nev. & P. 390; *Briggs v. Sowry*, 8 M. & W. 729.

covenant was made. And therefore, if he comes in again, as assignee of his assignees, he shall not be charged with this covenant, and it is no breach if he assigns.(e) Where it was found that the assignees entered upon the premises for the purpose of completing contracts for repairs to carriages let on hire, the bankrupt being tenant from year to year, it was holden,(f) that the assignees continued liable until that tenancy was regularly determined.

In assumpsit on a promise to pay plaintiff a certain sum per week(g) for the support of an illegitimate child the plaintiff had had by the defendant, bankruptcy having been pleaded, Lord *Ellenborough* held, that as to any arrears which had accrued before the bankruptcy, the bankruptcy would operate as a discharge, but as no proof of subsequent arrears would have been admitted under the commission, the defendant was liable for such arrears. B. sold a ship to A., with a covenant that he had a good title, though in fact he had none:(h) afterwards B. became a bankrupt, and A. *sustained damages by paying the value of the [*276] ship to the true owner; it was holden, in an action on the covenant by A. against B., stating the special damage, that B.'s certificate was no bar. This plea of bankruptcy(i) will not avail a person against whom a second commission of bankruptcy is issued, unless he has paid 15s. in the pound under that commission, although the creditor who sues him has signed the certificate: for by stat. 6 Geo. IV. c. 16, s. 127, (which see, *ante*, p. 267,) the *person* only of the bankrupt is protected, if his effects are not sufficient to pay 15s. in the pound. It must appear, affirmatively, that the estate has produced 15s. in the pound; evidence that it will probably produce so much is(k) not sufficient. If a defendant rely on a certificate under a second commission of bankruptcy,(l) under which he has not paid 15s. in the pound, it will be sufficient for the plaintiff, in order to deprive him of the benefit of it, to produce the proceedings under the former commission, and prove that he submitted to it, without proving the trading, act of bankruptcy, and other facts, which are necessary to support the commission as against third persons. An action against a bankrupt,(m) who has obtained his certificate under a second commission, on a cause of action accruing before his second bankruptcy, may be maintained, before a dividend has been made, or the period allowed for making it is elapsed, if evidence be adduced to show, that it is not probable, from the state of the effects in the hands of the assignees, that the bankrupt will be able to pay 15s. in the pound. The proving a debt under a commission issued against a person who had before compounded with his creditors, and whose estate under the commission had not nor would produce 15s. in the pound, but who, before he became a bankrupt, paid the creditors with whom he

(e) *Doe d. Cheere v. Smith*, 5 Taunt. 795.

(f) *Ansell v. Robson*, 2 Cr. & J. 610.

(g) *Millen v. Whittenbury*, 1 Camb. 428.

(h) *Hammond v. Toulmin*, 7 T. R. 612.

(i) See *Philpott v. Corden*, 5 T. R. 287; *Thornton v. Dallas*, Doug. 46, and 5 Geo. II. c. 30, s. 9.

(k) *Coverley v. Morley*, 16 East, 225.

(l) *Haviland v. Cook*, 5 T. R. 655; 3 Esp. N. P. C. 195.

(m) *Jelfs v. Ballard*, 1 Bos. & Pul. 467.

compounded, the full amount of their debts, was held to discharge the bankrupt in respect of his future estate and effects from an action for the debt so proved.⁽ⁿ⁾(1) Heretofore a verbal promise to pay a debt barred by the certificate was binding,^(o) but now, by stat. 5 & 6 Vict. c. 122, s. 43,^(p) "no bankrupt, after his certificate shall have been confirmed, shall be liable to pay or satisfy any debt, claim, or demand, from which he shall have been discharged by virtue of such certificate, or any part of such debt, &c., upon any contract, promise, or agreement made or to be made after the suing out of the fiat, unless such contract, promise, or agreement be made in writing, signed by the bankrupt, or by some person thereto lawfully authorized in writing by such bankrupt." In

the case of an express promise after certificate, the plaintiff [*277] is not bound to declare specially,^(q) but may declare on *the original cause of action; and if the bankruptcy be pleaded, the plaintiff may give the subsequent promise in evidence. To *scire facias* upon a judgment in assumpsit, by the original plaintiff, defendant pleaded specially the plaintiff's bankruptcy, and that the causes of action in the original suit accrued before plaintiff became bankrupt. On special demurrer, on the ground that the plea did not show whether the judgment was recovered before or after the bankruptcy; the plea was holden^(r) to be bad: for that it did not appear, but that the bankruptcy might have been pleaded in bar of the original action.

Evidence of the Plea of Bankruptcy.—The only evidence required to support the general plea of bankruptcy is the production of the certificate and the confirmation thereof.^(s) By stat. 5 & 6 Vict. c. 122, s. 88,^(t) no bankrupt shall be entitled to the certificate under this act, and the certificate, if obtained, shall be void in the following cases: first, if the bankrupt has lost, by any sort of gaming or wagering, in one day, 20*l.*, or within one year next preceding his bankruptcy, 200*l.*; or, secondly, if within one year next preceding his bankruptcy, he has lost 200*l.* by any contract for the purchase or sale of any government

(n) *Read v. Sowerby*, 3 M. & S. 78.

(o) *Trueman v. Fenton*, Cowp. 544.

(p) This section is similar to sect. 131 of stat. 6 Geo. IV. c. 16.

(q) *Williams v. Dyde*, Peake's N. P. C. 68, cites *Russell v. Hardman*, S. P.

(r) *Baylis v. Hayward*, 4 A. & E. 256.

(s) See stat. 5 & 6 Vict. c. 122, s. 42, *ante*, p. 266.

(t) See corresponding section in stat. 6 Geo. IV. c. 16, s. 130; and see stat. 5 Geo. II. c. 30, s. 12, but now repealed.

(1) Nothing done under a commission will protect the bankrupt, but a certificate of discharge. Hence, where the assignee wasted and embezzled the whole of the bankrupt's estate, and refused to render any account to the commissioners, or to the creditors, whereby the creditors received nothing under the commission; it was held, that a creditor was not thereby barred from recovering his demand in an action against the bankrupt, though such creditor had concurred in the appointment of the assignee, and had previously constituted him his attorney for the purpose of collecting his debt. *Whitney v. Crafts*, 10 Mass. Rep. 23. Nor is the issuing of the commission a bar to an action at law to recover a debt proved under the commission, although the creditor has actually received a dividend, unless the bankrupt has obtained his certificate. But if a creditor, who had proved his debt, should also sue at law, while the commission was open, so that the bankrupt might obtain a certificate, the court of law in which the action was brought might grant continuances at their discretion, which would operate as a temporary bar. *Lummus v. Fairfield*, 5 Mass. Rep. 248; *Kingston v. Wharton*, 2 S. & R. 208; *Yates v. Hollingsworth*, 5 Har. & Johns. 216.

or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered in pursuance of such contract; or, thirdly, shall, after an act of bankruptcy committed, or in contemplation of bankruptcy, or with intent to defeat the object of this or any other statute relating to bankrupts, have concealed, destroyed, altered, mutilated, or falsified, or caused to be concealed, destroyed, altered, mutilated, or falsified, any of his books, papers, writings or securities; or made, or been privy to making, any false or fraudulent entries, in any book of account or other document, with intent to defraud his creditors; or, fourthly, shall have concealed any part of his property; or, lastly, if any person having proved a false debt under the fiat, the bankrupt being privy thereto, or afterwards knowing the same, shall not have disclosed the same to the assignees within one month after such knowledge. The preceding clauses, being penal, are construed strictly. A certificate (granted previous to the stat. 5 & 6 Vict. c. 122, s. 39, *ante*, p. 266) is void, if signature of one of the creditors has been obtained by a promise from the bankrupt to pay that creditor his whole debt.^(u) By stat. 6 Geo. IV. c. 16, s. 105,^(x) if any assignee indebted to the estate of which he is such assignee, in respect of money retained or employed by him, become bankrupt, if he shall obtain his certificate, it shall only have the effect of freeing his person from arrest and imprisonment; but his *future effects, (his tools of trade, [*278] necessary household goods, and the necessary wearing apparel of himself, his wife, and children excepted,) shall remain liable for so much of his debts to the estate of which he was assignee, as shall not be paid by dividends under his commission, together with lawful interest for the whole debt. By stat. 6 Geo. IV. c. 16, s. 59,^(y) no creditor who has brought any action, or instituted any suit against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, *or have any claim entered upon the proceedings under such commission*, without relinquishing such action or suit; and in case such bankrupt shall be in prison or custody at the suit of or detained by such creditor, he shall not prove or claim, without giving a sufficient authority in writing for the discharge of such bankrupt; and the proving or claiming a debt, under a commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so *proved* or claimed, provided that such creditor shall not be liable to the payment to such bankrupt, or his assignees, of the costs of such action or suit, so relinquished by him, and that where any such creditor shall have brought any action or suit against such bankrupt, jointly with any other person, his relinquishing such action or suit against the bankrupt, shall not affect such action or suit against such other person. Provided also, that any creditor who shall have so elected to prove or claim, if

(u) *Phillips v. Dica*, 15 East, 248.

(x) See 49 Geo. III. c. 121, s. 6, but now repealed.

(y) See corresponding section, in stat. 49 Geo. III. c. 121, s. 14, now repealed; and see *Keikie v. Hewson*, 4 M. & Gr. 618; 5 Scott's N.R. 484.

the commission be afterwards superseded, may proceed in the action as if he had not so elected, and in bailable actions shall be at liberty to arrest the defendant *de novo*, if he has not put in bail below, or perfected bail above, or if the defendant has put in or perfected such bail, to have recourse against such bail, by requiring the bail below to put in and perfect bail above, within the first eight days in term, after notice in the *London Gazette* of the superseding such commission, and by suing the bail upon their recognizance, if the condition thereof is broken. A party does not bring his case within the act, so as to amount to an election(z) to prove under the commission, unless he has proved his debt, or had his claim *entered on the proceedings* under the commission.

It seems that proving a debt under a commission was an election within the stat. 49 Geo. III. c. 121, s. 14, which deprived the creditor of his remedy by action against the bankrupt(a) in the cases excepted in stat. 5 Geo. II. c. 30, s. 9. But that clause did not extend to pre-

[*279] vent a creditor who proved a joint debt under a commission against one partner, from suing the others.(b) The *drawer of a bill of exchange, who had paid the amount to the holder after a commission of bankruptcy issued against the acceptor, might sue the acceptor before he had obtained his certificate, and arrest him upon the bill, notwithstanding the holder had proved the bill under the commission.(c) Two parcels of goods were sold at different times, and paid for by bills; the vendee afterwards becoming bankrupt, the vendors proved, under the commission, for the amount of the first parcel, they then holding the bill given in payment for the same; the bill for the other parcel having been negotiated by them prior to the bankruptcy, and being at the time of the bankruptcy outstanding, was afterwards dishonoured: it was holden,(d) that the vendors were not precluded by the stat. 49 Geo. III. c. 121, s. 14, from suing the bankrupt for the amount of the last parcel of goods. Declaration(e) upon four bills of exchange. Plea in bar, that defendant was indebted to plaintiff in divers large sums of money for goods sold; and that, for securing to the plaintiffs the said several sums of money, defendant, before his bankruptcy, accepted a bill of exchange drawn by the plaintiffs, for and in payment of one of the said several sums of money in which he was so indebted as aforesaid; and that he had accepted each of the several bills of exchange for which the action was brought, in payment of one other of the several sums of money in which he so stood indebted as aforesaid. The plea then stated that defendant had duly become bankrupt; and that the bills of exchange mentioned in the declaration were proveable under the commission; and that the plaintiffs, being creditors of the defendant for the amount of the money comprised in all the several bills, proved the amount of one bill only

(z) *Augarde v. Thompson*, 2 M. & W. 617.

(a) *Read v. Sowerby*, 3 M. & S. 78.

(b) *Heath v. Hall*, 4 Taunt. 326. See also *Young v. Glass*, 16 East, 252.

(c) *Mead v. Braham*, 3 M. & S. 91.

(d) *Watson v. Medex*, 1 B. & A. 121; *Bridget v. Mills*, 4 Bingh. 18, S. P.; *Exp. Schlenger*, cor. *Lyndhurst*, C. L. I. H. 13 Dec. 1828; S. P. upon Geo. IV. c. 16, s. 59.

(e) *Harley and another v. Greenwood*, 5 B. & A. 95.

under the commission, and thereby made their election to take the benefit of the commission, not only with respect to the debt proved, but also as to the bills and debts mentioned in the declaration. Held, upon demurrer, that this plea could not be supported; first, because the proof of a debt under the commission of bankruptcy cannot be pleaded in bar to an action at law brought for the same debt; secondly, that the election of the creditor to take the benefit of the commission, is confined by the 49 Geo. III. c. 121, s. 14, to the debt actually proved, and does not extend to distinct debts ejusdem generis due at the same time.

Of Discharge by Certificate in Foreign Country.—What is a discharge of a debt in the country where it is contracted, is a discharge of it everywhere. This principle was recognized in *Hunter v. Potts*, 4 T. R. 182. Hence, if a bankrupt in Ireland obtain his certificate there, and come into England, he will be discharged by such certificate from a debt contracted in Ireland, prior to the commission.(f)

*So where the defendant gave the plaintiff, at Baltimore, in [*280] America, where both were resident, a bill of exchange drawn by the defendant upon a person in England, which bill was afterwards protested here for non-acceptance,(ff) and the defendant afterwards, while he was resident abroad, became a bankrupt there and obtained a certificate of discharge by the law of that state; it was holden, that such certificate was a bar to an action here upon an implied assumpsit to pay the bill in consequence of the non-acceptance in England; *Lawrence, J.*, observing, that when the plaintiff agreed to take the bill in question, the promise in effect was this, to pay the money in America, if it were not paid here. Then the bill having been refused acceptance here, the implied promise to pay the money arose in America, and consequently the defendant's certificate was a bar to the demand. But a discharge under a commission of bankrupt in a foreign country, is not any bar to an action for a debt contracted *here* with a subject of this country.(g) A debt contracted in England, by a trader(h) residing in Scotland, is barred by a discharge under a sequestration issued in conformity to the 54 Geo. III. c. 137, in like manner as debts contracted in Scotland.(1) A certificate obtained by a bankrupt under an

(f) *Ballantine v. Golding*, Co. B. L. 5th Edit. 499. See *Pedder v. M'Master*, 8 T. R. 609.

(ff) *Potter v. Brown*, 5 East, 124.

(g) *Smith v. Buchanan*, 1 East's R. 6.

(h) *Sidaway v. Hay*, 3 B. & C. 12.

(1) It is a rule, founded on the comity of nations and reasons of public convenience, that the *lex loci contractus* governs as to the validity, nature, and construction of the contract; but in general, the remedy on the contract is to be pursued according to the *lex fori* of the place where the suit is brought. It is, therefore, evident, that if the contract be made in a particular state, and to be executed there, a discharge under the bankrupt or insolvent law of that state will be effectual wherever the suit may be brought on the contract. *Baker v. Wheaton*, 5 Mass. Rep. 509; *Proctor v. Moore*, 1 Mass. Rep. 198; *Van Reimsdyk v. Kane*, 1 Gallis. Rep. 371, 377; *Sheffelin v. Wheaton*, Ib. 414; *Hicks v. Brown*, 12 Johns. Rep. 142; *Miller v. Holl*, 1 Dall. Rep. 229; *Smith v. Brown*, 3 Binney's Rep. 201.

But if the contract is to be executed in a place different from that where it is made, the law of the place of execution will apply, it being considered as made with a view to

Irish commission, since stat. 6 & 7 Will. IV. c. 14, bars all his liabilities, both to his Irish and English creditors.(i) A certificate obtained

(i) *Ferguson v. Spencer*, 1 M. & Gr. 987; 2 Scott's N. R. 229. See *Lewis v. Owen*, 4 B. & A. 654.

that law. *Baker v. Wheaton*, 5 Mass. Rep. 509. And when the contract is made in one state, the discharge obtained in another, and the action brought in a third, it is no bar. *Smith v. Smith*, 2 Johns. Rep. 235. The maker of a promissory note, payable in Pennsylvania, is not discharged under a special bankrupt act of Maryland, of which state he was a citizen. *Frey v. Kirk*, 4 Gill & J. 509. So, also, where the contract is made in the state where the action is brought, a discharge in another state is no bar; both the *lex loci contractus* and the *lex fori* concurring to forbid it. *Van Raugh v. Van Arsdale*, 3 Caines' Rep. 154. And where the discharge is limited to protect the person only of the debtor from arrest and imprisonment, it has been held no bar to a suit brought in another state. *White v. Canfield*, 7 Johns. Rep. 116; *Sicard v. Whale*, 11 Johns. Rep. 194; *Peck v. Hozier*, 14 Johns. 346. *Beers v. Haughton*, 9 Peters, 329. *Woodhull v. Wagner*, 1 Bald. 299; *Thibault v. Basarilbasso*, Ib. 14; *Boston Type Foundry v. Wallack*, 8 Pick. 186. But see *contra*, *Pugh v. Bussell*, 2 Blackf. 366; S. C. Ib. 394.

The above rule as to the validity and effect of a discharge under the bankrupt or insolvent laws of any state in this Union, in which, or with a view to the laws of which a contract is made, must be taken subject to the interpretation which ought to be put upon that clause of the constitution of the United States, which declares that no state shall make any law impairing the obligation of contracts. Under this clause it has been determined by the Supreme Court of the United States, that an act of a state legislature, which not only liberates the person of a debtor, but discharges him from all liability for any debt contracted previous to his discharge, so far as it attempts to discharge the contract itself, is a law impairing the obligation of contracts, and is not a good plea in bar of an action brought upon such contract. *Sturges v. Crowninshield*, 4 Wheat. Rep. 122; *M'Mellen v. M'Neil*, Ib. 209; *Farmers and Mechanics' Bank v. Smith*, 6 Wheat. 131. A distinction has been taken, in this respect, in the Supreme Court of New York, between a law existing at the time when, and the place where the contract is made, and one enacted subsequent to the making of the contract. The latter is admitted to be unconstitutional; but it is supposed by the learned judges of the state court in the case alluded to, that citizens of the same state, entering into contracts, are to be understood as making them in reference to the existing laws of that state, and as tacitly consenting that the contract shall be governed or modified by such laws; and, therefore, if at the time of entering into such a contract, there is a law of the state, under which the debtor may be discharged from his debts on a *cessio bonorum*, it is not a law impairing the obligation of contracts within the meaning of the constitution of the United States. *Mather v. Bush*, 16 Johns. Rep. 233. How far this distinction is sound, and whether it will be adopted by the Supreme Court of the United States, it does not become the editor to express any opinion in this place.

This question came up in the Supreme Court of the United States, in the case of *Ogden v. Saunders*, 12 Wheat. 213, where it was held, by a majority of the court, that the power granted to Congress by the constitution to establish uniform rules on the subject of bankruptcy throughout the United States, does not exclude the right of the state to legislate on the same subject, except when the power is actually exercised by Congress, and the state laws conflict with those of Congress. That a state bankrupt or insolvent law, which discharges both the person of the debtor and his future acquisitions of property, is not "a law impairing the obligation of contracts, so far as respects debts contracted after the passage of such law. But a certificate of discharge under such law, cannot be pleaded in bar of an action brought by a citizen of another state in the courts of the United States, or of any other state than that where the discharge was obtained." See also, to the same effect, *Whittemore v. Adams*, 2 Cowen, 626; *Sebring v. Mesereau*, 9 Id. 344; *Wett v. Follett*, 2 Wend. 457; *Glen v. Humphreys*, 4 W. C. C. R. 424; *Fairchild v. Shivers*, Id. 443; *Riston v. Content*, Ib. 476; *Wood v. Malin*, 5 Halsted, 208. The judges of the Supreme Court, who were in the minority on the general question as to the constitutionality of the state insolvent laws, concurred in the opinion of Mr. Justice Johnson, in *Ogden v. Saunders*. Whatever principles are established by that opinion are no longer open to controversy, but the settled law of the court. *Boyle v. Zacharie*, 6 Peters, 348. See also, *Smith v. Parsons*, 1 Ohio, 107; *Pugh v. Bussell*, 2 Blackf. 394; *Norton v. Cook*, 9 Conn. 314; *Pitkin v. Thompson*, 13 Pick. 64; *Agnew v. Platt*, 15 Id. 417; *Betts v. Bagley*, 12 Id. 572; *Braynard v. Marshall*, 8 Id. 194. But if a

under a commission of bankrupt in England, is a bar to an action brought in the supreme court at Calcutta, ^(k) for a debt contracted by the bankrupt at Calcutta, previously to his bankruptcy, although the creditor had not any notice of the commission, and was resident at Calcutta.

Set-off.—By stat. 6 Geo. IV. c. 16, s. 50, where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy, committed by such bankrupt, before the credit given to, or the debt contracted by, him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively: and every debt or demand hereby made proveable against the estate of the bankrupt, may also be set off against such estate; provided that the person claiming the set-off had not, when such credit was given, notice of the act of bankruptcy. Notice of having stopped payment is not sufficient to exclude a party from the benefit of this clause; ^(l) it must be notice of an act of bankruptcy.

The corresponding section, stat. 5 Geo. II. c. 80, s. 28, varied from the foregoing, the language thereof being, "mutual credit, or mutual debts," &c., at any time before such person became a *bankrupt. ^(m) The 50th section of 6 Geo. IV. c. 16, gives [*281] a right of set-off in the case of "mutual credit up to the time ⁽ⁿ⁾ of issuing the commission," and it makes all debts thereby made proveable items of set-off, unless where there was notice of an act of bankruptcy. A bill which forms an item of credit on one side, need not be in the hands of the person claiming it, as an item of credit, at the time of the bankruptcy, ^(o) or at the time of issuing the commission. ^(p) The term mutual credit is not confined to pecuniary demands, liquidated at the time, but extends to cases where the creditor has been intrusted with that which may become productive of value. J. S., being desirous of making a shipment for his own risk or advantage, but not in his own name, represented to the merchants, through whom the shipment was to be made, that the goods were the property of A., and shipped on his account; and A., accordingly, by the desire of J. S., wrote to those merchants, stating the property to be so, and directing them to insure

^(k) *Edwards v. Ronald*, Knapp's Reports of Privy Council Cases, vol. 1, p. 259.

^(l) *Hawkins v. Whitten*, 10 B. & C. 217.

^(m) See *Tamplin v. Diggins*, 2 Camp. N. P. C. 312; *Kinder v. Butterworth*, 6 B. & C. 42; *Bolland v. Nash*, 8 B. & C. 105.

⁽ⁿ⁾ *Sd. arg.* 6 B. & C. 47, 48.

^(o) *Bolland v. Nash*, 8 B. & C. 105.

^(p) *Collins v. Jones*, 10 B. & C. 777.

creditor residing in another state, assent to the discharge, he is bound, as where a citizen of one state, whose debt is specified in the list of creditors, receives a dividend from the estate of his debtor, a citizen of another state, discharged under a bankrupt law. *Clay v. Smith*, 3 Peters, 411; *Pugh v. Bussell*, 2 Blackf. 394; *Woodhull v. Wagner*, 1 Bald. C. C. R. 301. But see *contra*, *Agnew v. Platt*, 15 Pick. 422, where *Clay v. Smith* is commented on, and it is held, that such foreign creditor is not barred by having been a petitioning creditor.

and to advance money to J. S. on the goods, which was done. It was holden, *(q)* that this was a credit given to A. by J. S. by the delivery of the goods, in its nature likely to terminate in a debt, and that therefore J. S. having subsequently become bankrupt, A. was entitled to recover the proceeds of the shipment from the merchants, and to set off against a debt due, from the bankrupt to him, in respect of the advances, it being a case of mutual credit within the statute. A. & Co. being bankers, discounted bills of exchange for B., and gave him immediate credit for them in his account, minus the discount. Afterwards, and whilst the bills were yet running, a balance was struck, upon which the bankers admitted money to be due to B., giving him credit for the bills then running. Shortly afterwards B. became a bankrupt, and the bills were dishonoured. It was holden, in an action against the bankers for the admitted balance, that they were entitled to set off the amount of the dishonoured bills, on the ground of its being a mutual credit within the foregoing clause. *(r)* But where B., being indebted to defendant, previously to his bankruptcy, deposited a bill of exchange with the defendant, not for the satisfaction of the debt, but for the purpose of raising money thereon, and an advance was accordingly made; after the bankruptcy, the assignees tendered to the defendant the amount of the money advanced, and demanded possession of the bill, which being refused, the assignees brought trover for the bill; and it was holden, *(s)* that they were entitled to recover, this not being a case of mutual credit within the statute, the bill having been deposited for a specific [*282] purpose without reference to the *general account. "Mutual credit must mean mutual trust; this attempt of the defendant appears to me a gross breach of trust." Per *Dallas, J.*, 8 Taunt. 23. In an action brought by the assignees of bankers, it was holden, *(t)* that the defendant might set off notes of such bankers taken by him after he knew that they had stopped payment, but before he knew that any of the partners constituting the banking-house had committed an act of bankruptcy. The defendant, however, cannot set off notes of such bankers taken by him after he knew that three of the four partners had committed acts of bankruptcy. The provision with respect to mutual credit is confined to debts between the bankrupt and other parties, or to transactions necessarily ending in debts; it does not apply to a case *(u)* where a cause of action arises for the non-performance of a contract. A defendant, *(x)* may set off a debt due to him from the bankrupt for money lent, against a claim by the bankrupt's assignees on defendant for not accepting pursuant to agreement, a bill of exchange by way of part payment for goods sold and delivered by the bankrupt to the defendant; for the demand is a mere pecuniary demand which the commissioners might have stated in account between the defendant and the bankrupt.

(q) *Easum v. Cato*, 5 B. & A. 861.

(r) *Arbouin v. Tritton*, 1 Holt, N. P. C. 408.

(s) *Key v. Flint*, 1 Moore, (C. P.) 451; 8 Taunt. 21, S. C.

(t) *Dixon v. Cass*, 1 B. & Ad. 343.

(u) *Rose v. Sims*, 1 B. & Ad. 521, cited by *Patteson, J.*, in *Groom v. West*, 8 A. & E. 772.

(x) *Gibson v. Bell*, 1 Bingham, N. C. 743, recognizing the principle in *Sampson v. Burton*, 2 Brod. & Bingham, 94. See also *Groom v. West*, *ubi sup.*

An insurance broker(*y*) who is indebted to the estate of a bankrupt underwriter for premiums, cannot, without a special authority, set off, against that debt, sums due from the underwriter for return of premiums. Where defendants, insurance brokers, effected several policies, some in the name of their own firm, others in the name of their own firm, but on account of their principals, and others in the name and on account of their principals, for which principals they acted under a *del credere* commission, without the knowledge of the underwriters: it was holden, (*z*) that in an action brought against them for premiums by the assignees of one of the underwriters upon these policies, who had become bankrupt, the defendants might set off losses and returns due on all such of those policies as were effected in the names of their own firm, but not on such as were effected in the names of their principals, such losses and returns having become due on those policies before the time when the bankrupt stopped payment, though they had never been adjusted by the bankrupt, but only by the other underwriters between the time of his stopping payment and committing the act of bankruptcy, on which judgment the defendants had given their principals credit for the amount. And the principle is the same, (*a*) whether the broker *act under a *del credere* commission or not, if the [*283] policy be effected in the name of the broker, and he has a lien on the goods insured. (1) The debt to be set off under the statute must be a real *bonâ fide* debt (*b*) due to the defendant, and not a mere colour and contrivance. A mere contract to indemnify against contingent damages (*c*) does not constitute a subject of mutual credit.

The object of this clause is not to avoid cross actions, for none would lie against assignees, and one against the bankrupt would be unavailing; but to do substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate: and the Court of King's Bench in construing this clause (for it is the same in substance in stat. 5 Geo. II. c. 30, and 6 Geo. IV. c. 16,) held, that it did not authorize a set off, where the debt, though legally due from the bankrupt, was really due from him as a trustee for another, and though recoverable in a cross action, would not have been recovered for his benefit. This appears to have been the main ground of the decision in the case of *Fair v. M'Iver*, 10 East, 130; and we think that the principle of that decision was correct. (*d*)

(*y*) *Minett v. Forrester*, 4 Taunt. 541, n.; *Goldschmidt v. Lyon*, 4 Taunt. 534; *Parker v. Smith*, 16 East, 382; *Houston v. Robertson*, Holt, 88, S. P.

(*z*) *Koster v. Eason*, 2 M. & S. 112; see *Thomson v. Redman*, 11 M. & W. 487.

(*a*) *Parker v. Beasely*, 2 M. & S. 423; *Davies v. Wilkinson*, 4 Bingh. 573.

(*b*) *Lackington v. Combes*, 6 Bingh. N. C. 71, recognizing *Fair v. M'Iver*, 16 East, 130.

(*c*) *Abbott v. Hicks*, 5 Bingh. N. C. 578; 7 Sc. 715.

(*d*) Per Parke, B., delivering judgment in *Forster v. Wilson*, 12 M. & W. 191.

(1) Under the bankrupt act of the United States, of 1800, c. 173, [xix.] a joint debt may be set off against the separate claim of the assignee of one of the parties, and a joint debt may be proved under a separate commission. *Tucker v. Oxley*, 5 Cranch, 34. See further as to the right of set-off, under the bankrupt act of the United States, *Marks v. Barker*, 1 Wash. C. R. 178.

XI. *Of the Evidence.*

Formerly, in actions brought by assignees of bankrupts, it was incumbent on them to prove, in all cases; 1. That the bankrupt was a trader. 2. The act of bankruptcy. 3. That the commission was regularly granted. 4. The assignment to the plaintiffs. 5. A right of action in the assignees. But now by stat. 6 Geo. IV. c. 16, s. 90,^(e) it is enacted, that in any action by(1) or against any assignee, or in any action against any commissioner, or person acting under the warrant of the commissioners, for any thing done as such commissioner, or under such warrant, *no proof* shall be required at the trial of the petitioning creditor's debt, or of the trading, or act of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and if plaintiff, before issue joined, give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some and which of such matters; and in such case notice shall have been given, if such assignee, &c., shall prove the matter so disputed, or the other party admit the same, the judge before whom the

[*284] **cause shall be tried*(2) may (if he thinks fit) grant a certificate of such proof or admission, and such assignee, &c., shall be entitled to the costs occasioned by such notice, and such costs shall, if such assignee, &c., obtain a verdict, be added to the costs, and if the other party obtain a verdict, shall be deducted from the costs which such other party would be otherwise entitled to receive. The notice to dispute must be specific, as to which of the three matters, trading, petitioning creditor's debt, or act of bankruptcy, it is intended to dispute; notice to dispute the *bankruptcy* will not suffice.^(f) Assumpsit by assignees of bankrupt against a sheriff to recover the proceeds of goods seized under a *fi. fa.*; the defendant did not give any notice to dispute; the plaintiffs proved that an act of bankruptcy was committed before the levy; and the defendant did not prove any other act of bankruptcy: it was holden,^(g) that the plaintiffs were not bound to prove that a petitioning creditor's debt existed at the time of the act of bankruptcy on which they relied. In assumpsit by assignees for money had and received to their use after the bankruptcy, the defendant pleaded *non assumpsit*, and that the plaintiffs were not assignees, and gave notice to dispute the act of bankruptcy, upon which the party was declared a bankrupt. The plaintiffs proved the act of bankruptcy and the fiat: it was holden, that in the absence of proof of any other act of

(e) See stat. 49 Geo. III. c. 121, s. 10, but now repealed.

(f) *Trimley v. Unwin*, 6 B. & C. 537.

(g) Per *Ld. Tenterden*, C. J., and *Parke*, J., con. per *Bayley*, J., and *Littledale*, J., *Norman v. Booth*, 10 B. & C. 703; *Littledale*, J., seems since this case, to have altered his opinion, per *Coltman*, J., in *Porter v. Walker*, 1 M. & Gr. 694; 1 Scott's N. R. 568.

(1) This section applies to actions of ejectment by an assignee. *Doe d. Johnson v. Liversedge*, 11 M. & W. 517.

(2) Where cause is referred, the judge before whom cause is opened, cannot certify. *Barthrop v. Anderton*, 8 Bingh. 268.

bankruptcy, the defendant by giving notice to dispute the act of bankruptcy only, must be taken to have admitted a trading and a petitioning creditors's debt, co-existent with the act of bankruptcy proved.^(h) Where the commission, adjudication, and assignment were put in, and it was proved that the plaintiff attended the commissioners, passed his accounts, and afterwards endeavoured to get his certificate signed; it was holden,⁽ⁱ⁾ that, as against the plaintiff, this was sufficient evidence of the bankruptcy. On a feigned issue, on an allegation that, at the time of the seizing of certain goods in execution, the plaintiffs in the issue were entitled to the same as against and free from the execution, and that the goods were not liable to be so seized as against such plaintiff: it was holden, that the plaintiffs, who claimed as assignees under the bankruptcy of the judgment debtor, were bound to prove the trading petitioning creditor's debt, and act of bankruptcy, though no notice had been given to dispute those matters under this section of the 6 Geo. IV. c. 16.^(k) By *sect. 91, a similar [*285] provision to that contained in sect. 90, is made with respect to suits in equity; and by sect. 92, if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission,) within two calendar months after the adjudication, or (if he was out of the United Kingdom) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners, at the time of or previous to the adjudication of the petitioning creditor's debt, and of the trading and act of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions or suits brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit.^(kk) It^(l) is only in actions or suits brought by his *own* assignees, for a debt or demand for which he might have sued, that the depositions under a commission against a person are conclusive evidence; but it is immaterial whether the cause of action arose before or after^(m) the act of bankruptcy. The depositions are conclusive in trials⁽ⁿ⁾ at law. And by sect. 93, if the assignees commence any action or suit, for any money so due to the bankrupt, before the time allowed for him to dispute the commission shall have elapsed, and defendant, in any such action or suit, shall be entitled, after notice given to the assignees, to pay the same or any part thereof, into the court in which such action or suit is brought; and all proceedings with respect to the money so paid into court shall thereupon be stayed, and after the time shall have elapsed, the assignees shall have the same paid to them out of court.

In all actions by and against assignees of a bankrupt or insolvent,

(h) *Porter v. Walker*, 1 M. & Gr. 686; 1 Scott's N. R. 568.

(i) *Crofton v. Poole*, 1 B. & Ad. 568.

(k) *Lott v. Melville*, 3 M. & Gr. 40; 3 Scott's N. R. 346.

(kk) See *Alsager v. Close*, 10 M. & W. 576.

(l) *Muskett v. Drummond*, 10 B. & C. 159.

(m) *Fox v. Mahoney*, 2 Tyrw. 285; 2 Cr. & J. 325; recognized in *Kitchener v. Power*, 3 A. & E. 232.

(n) *Young, Assignee of Ireland, v. Timmins*, 1 Cr. & J. 149.

the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue,^(o) unless specially denied.

Where notice had not been given to dispute the commission, and with the commission the proceedings were put in, upon which there did not appear a sufficient petitioning creditor's debt; it was holden,^(p) that the validity of the commission could not be disputed.

In trover,^(q) by the assignees of a bankrupt, laying the possession in themselves as assignees, pleas that the plaintiffs are not assignees, and were not possessed as assignees, put in issue the trading, the petitioning creditor's debt, and the act of bankruptcy; and these [*286] *must be proved, if notice to dispute them be given. It is not sufficient to prove the fiat and assignments to the plaintiffs.

By sect. 94, if the commission be afterwards superseded, persons from whom the assignees have recovered, or who have, without action, *bonâ fide* delivered up possession of any real or personal estate to the assignees, or paid any debt claimed by them, are discharged from claims by the bankrupt, provided the requisite notice to try the validity of the commission had not been given.

The statute 2 & 3 Will. IV. c. 114, s. 1, directs that the records and proceedings under former commissions shall be removed into the Court of Bankruptcy. Any one judge may, upon application, direct any commission^(r) heretofore issued to be entered on record. A similar provision is made with respect to fiats,^(s) adjudications of bankruptcy, appointments of assignees, depositions, or other proceedings, which must be strictly attended to; for unless the fiats, &c., are duly entered of record, pursuant to this provision, they cannot be received in evidence in any court of law or equity.^(t) In the case of the death of witnesses, the depositions so entered of record, or duly authenticated copies, may be read^(u) in evidence. The ninth section enacts, that upon the production in evidence of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, depositions, or other proceeding in bankruptcy, purporting to be sealed with the seal of the Court of Bankruptcy, or of any writing purporting to be a copy of any such document, and purporting to be sealed as aforesaid, the same shall be received as evidence of such documents respectively, and of the same having been so entered of record, without any proof thereof: provided that all fiats, and proceedings under the same, which may have been entered of record before the passing of this act, shall and may, upon the production thereof, with the certificate thereon, purporting to be signed by the person so appointed to enter proceedings in bankruptcy, or by his deputy, be received as evidence of the same having been duly entered of record.

By stat. 5 & 6 Vict. c. 122, s. 25, in the event of the death of any witness deposing to the petitioning creditor's debt, trading or act of

(o) R. G. H. T. 4 Will. IV. 21.

(p) *Macbeath v. Coates*, 4 Bingh. 34.

(q) *Buckton v. Frost*, 8 A. & E. 844, adopting *Butler v. Hobson*, 4 Bingh. N. C. 290.

(r) 2 & 3 Will. IV. c. 114, s. 4.

(s) Sect. 5.

(t) Sect. 8.

(u) Sect. 7.

bankruptcy under any fiat in bankruptcy already issued, or hereafter to be issued, the deposition of any such deceased witness purporting to be sealed with the seal of the Court of Bankruptcy, or a copy thereof purporting to be so sealed, shall in all cases be receivable in evidence of the matters therein respectively contained.

Having in the 2nd, 3rd, and 4th sections of this chapter, enumerated the different trades which render persons liable to the bankrupt law, and also the several acts of bankruptcy mentioned in the *statute, it will be unnecessary to repeat them here. I shall [*287] proceed, therefore, to the examination of the third head, viz. the proof relating to the commission or fiat, only observing that, with respect to the act of bankruptcy, proof must be given that it was antecedent to the commission; but, if that appear, it will be sufficient, although the act was committed so recently before the commission, and at such a distance from London, that it could not have been known in London at the time when the commission was sued out.(x) Proof of the commission ought to be by showing it under seal [if fiat, under hand of C., M. R., V. C., or M. C., as case may be. See stat. 1 & 2 Will. IV. c. 56, s. 12; *ante*, p. 191, and stat. 2 & 8 Will. IV. c. 114, s. 9; *ante*, p. 286,] the petition to the Chancellor on which it was granted, and the debt of the petitioning creditor or creditors. It is not necessary that the particular species of trading should be set forth in the commission.(y) A commission may be supported on a debt accruing before the bankrupt becomes a trader, and upon an act of bankruptcy committed after he had ceased to be a trader.(z)

A commission founded upon an act of bankruptcy, by lying two months (now 21 days) in prison, cannot be sued out before the expiration of the limited time; the act is not completed before that time, and the affidavit to obtain it would be perjury.(a) A debtor of the bankrupt resisting a claim made by the assignees under the commission against him may give in evidence, in order to defeat such commission, a prior act of bankruptcy, and a sufficient petitioning creditor's debt existing at the time of such prior act of bankruptcy. But neither the bankrupt,(b) nor any person claiming under him, will be permitted to avail himself of this defence,(c) nor will proof of a prior act of bankruptcy avail, unless the petitioning creditor's debt be shown to exist prior to the act of bankruptcy;(d) it is not, however, required to be shown, that the creditor ever meant to take out a commission upon that debt. But see *ante*, p. 227. The circumstance of a creditor having proved a debt under a commission will not estop him from impeaching the commission in an action brought by the assignees against him-

(x) *Hopper v. Richmond*, 1 Stark. N. P. C. 507.

(y) *Bernasconi v. Fairbrother*, 10 B. & C. 555.

(z) *Bailie v. Grant*, D. P. 9 Bingham. 121.

(a) *Gordon v. Wilkinson*, 8 T. R. 507.

(b) *Parker v. Manning*, cited in *Doe v. Boulcot*, 2 Esp. N. P. C. 597; *Mercer v. Wise*, 3 N. P. C. 216.

(c) *Donavan v. Duff*, 9 East, 21.

(d) Per Lord Eldon, C., in *Rex v. Bullock*, 1 Taunt. 88. See also *Miles v. Rawlins*, 4 Esp. N. P. C. 184.

self;(e) nor is it *prima facie* evidence(f) of the validity of the commission. The debt of a creditor who has joined in a petition to supersede a prior commission, and proved his debt under a second commission, coupled with an act of bankruptcy prior to that on which the se-
 [*288] cond commission is founded, may be *set up to defeat such second commission, by a defendant in an action at the suit of the assignees under that commission. *Beardmore v. Shaw*, 1 Bos. & Pul. N. R. 263. See *ante*, p. 227. The act of bankruptcy is to be proved, and not to be presumed.(g) The cause of action must be proved by the assignees in the same manner as if the action had been brought by the bankrupt himself. It is impossible to lay down any rules with respect to this head of proof, which must necessarily be adapted to the nature of the demand. In trover by assignees against a sheriff or creditor, who has seized the bankrupt's goods in execution, after an act of bankruptcy, it is not necessary to prove a demand and refusal;(h) because the property being vested in the assignees from the time of the bankruptcy, the execution is tortious: and where a possession is gained wrongfully, a demand is not necessary. A writ of supersedeas under the great seal, reciting the issuing of a commission on such a day is *prima facie* evidence not only of the issuing of the commission, but also that it issued on that day.(i) By stat. 1 & 2 Will. IV. c. 56, s. 19, the Chancellor, upon the reversal of any adjudication in bankruptcy, may order fiat to be annulled, and such order shall have all the force and effect of a writ of supersedeas.

The fact, that, after a fiat had been sued out, creditors of the bankrupt delivered up to the assignees goods, which they had received from the bankrupt before the fiat, and before the delivery of other goods by the bankrupt to the defendant, was holden(k) not admissible evidence against the defendant in trover brought by the assignees for the last-mentioned goods; for any declaration of their opinion made by the creditors after the fiat, however clearly expressed, could not be received in evidence: consequently, evidence of acts done by them, adduced for the purpose of raising an inference respecting the previous intentions, either of themselves or of the bankrupt, was inadmissible.(1)

(e) *Stewart v. Richman*, 1 Esp. N. P. C. 108.

(f) *Rankin v. Horner*, 16 East, 191.

(g) *Per Parke, B., Ody v. Cookney*, 1 Tyrw. & Gr. 542.

(h) *Rush v. Baker*, M. 8 Geo. II., B. R., MSS. Bull. N. P. 41.

(i) *Gervis v. Grand Western Canal Company*, 5 M. & S. 76.

(k) *Backhouse v. Jones*, 6 Bingh. N. C. 65.

(1) *United States Bankrupt Law, of August 19, 1841.**

AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES.

§ 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That there be, and hereby is established, throughout the United States, a uniform system of bankruptcy, as follows:—All persons whatsoever, residing in any state, district, or territory of the United States, owing debts,

*It is understood that the late Mr. Justice Story drew this act, which embraces the general provisions of the English statutes of bankruptcy. See Bouvier's Bacon's Abridg-

which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, who shall, by petition, setting forth to the best of his knowledge and belief, a list of his or their creditors, their respective places of residence, and the amount due to each other, together with an accurate inventory of his or their property, rights, and credits, of every name, kind and description, and the location and situation of each and every parcel and portion thereof, verified by oath, or, if conscientiously scrupulous of taking an oath, by solemn affirmation, apply to the proper court, as hereinafter mentioned, for the benefit of this act, and therein declare themselves to be unable to meet their debts and engagements, shall be deemed bankrupts within the purview of this act, and may be so declared accordingly by a decree of such court; all persons, being merchants, or using the trade of merchandise, all retailers of merchandise, and all bankers, factors, brokers, underwriters, or marine insurers, owing debts to the amount of not less than two thousand dollars, shall be liable to become bankrupts within the true intent and meaning of this act, and may, upon the petition of one or more of their creditors, to whom they owe debts, amounting in the whole to not less than five hundred dollars, to the appropriate court, be so declared accordingly, in the following cases, to wit: whenever such person, being a merchant, or actually using the trade of merchandise, or being a retailer of merchandise, or being a banker, factor, broker, underwriter, or marine insurer, shall depart from the state, district or territory, of which he is an inhabitant, with intent to defraud his creditors; or shall conceal himself to avoid being arrested; or shall willingly or fraudulently procure himself to be arrested, or his goods and chattels, lands or tenements, to be attached, distrained, sequestered, or taken in execution, or shall remove his goods, chattels, and effects, or conceal them to prevent their being levied upon or taken in execution, or by other process; or make any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods or chattels, credits or evidences of debt: *Provided, however,* That any person so declared a bankrupt, at the instance of a creditor, may, at his election, by petition to such court within ten days after its decree, be entitled to a trial by jury before such court, to ascertain the fact of such bankruptcy; or if such persons shall reside at a great distance from the place of holding such court, the said judge, in his discretion, may direct such trial by jury to be had in the county of such person's residence, in such manner and under such directions as the said court may prescribe and give; and all such decrees passed by such court, and not so re-examined, shall be deemed final and conclusive as to the subject-matter thereof.

"A collector of taxes is a public officer, within the meaning of the bankrupt act, and a debt which he owes the city, in consequence of a defalcation in his office of collector, is a fiduciary debt; 7 Met. 153; (see the article on fiduciary debts, in 6 Law Rep. 337.) If A. delivers money to B. which he promises to pay to C. on the note of A., it is not a debt contracted in a fiduciary capacity, and is not within the provisions of the bankrupt act; 15 Ohio, 58. An infant is entitled to the benefit of the bankrupt act, and the proceedings may be had in his own name; 3 McLean, 317. So may a distiller, on petition of a creditor; 5 Law Rep. 273; and a person engaged in business, requiring the purchase of articles to be sold again, may be regarded as "using the trade of a merchant;" 5 Law Rep. 309. A surety of a postmaster is entitled to a discharge; 3 McLean, 317. The voluntary branch of the bankrupt act applies to debts created both after and before its passage, and is constitutional; 5 Hill, 317; 3 Gilman, 225; 4 Law Rep. 480. Where certain creditors petitioned for a decree of bankruptcy against a debtor, and on the return day of the notice, to show cause why the petition should not be granted

ment, tit. Bankruptcy; Rules and Forms in Bankruptcy, 8vo., Boston, 1842; and Owen on Bankruptcy. For general remarks upon the bankrupt act, and reviews of the conflict of decisions upon some of its provisions, see vols. 4, 5, 6, 7 and 8, Boston Law Reporter. Upon the bankrupt act going into operation in Feb. 1842, it suspended all action upon cases arising under the state insolvent laws, where the insolvent persons were within the provisions of the act; 2 Story, 322; 4 Wheat. 196, 201; 5 Law Rep. 117, 360. The bankrupt act of 1841, was repealed March 3d, 1843—"Provided, That this act shall not affect any case or proceeding in bankruptcy, commenced before the passage of this act, or any pains, penalties, or forfeitures, incurred under the said act; but every such proceeding may be continued to its final consummation in like manner as if this had not been passed." Although the bankrupt act has been repealed, a good many questions growing out of it remain for the state tribunals to dispose of; and its insertion here with notes of cases, for the first time presented in a collected form, may not be unacceptable, to the profession.

said creditors, having compromised with the debtor, moved for leave to withdraw their petition, and that no further proceedings be had thereon; but certain other creditors objected thereto, and moved that the case might proceed; it was held, that the original petition could not be withdrawn, and that the case must proceed; 5 Law Rep. 126. Nor can a voluntary petition for a decree of bankruptcy be withdrawn, and further proceedings stayed, after a decree of bankruptcy has been made, without the concurrence of all whose interest may be affected; 5 Law Rep. 224. A factor, who has sold the goods of his principal and received the money for them, does not owe him a debt created while acting in a fiduciary capacity, within the meaning of the act; 7 Met. 328; 7 Ala. 335; 2 How. U. S. 202; 5 Ired. 259; 6 Humph. 154."

§ 2. *And be it further enacted*, That all future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person, any preference or priority over the general creditor of such bankrupt; and all other payments, securities, conveyances, or transfers of property, or agreements made or given by such bankrupt, in contemplation of bankruptcy, to any person or persons whatever, not being a *bond fide* creditor or purchaser for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act; and the assignee, under the bankruptcy, shall be entitled to claim, sue for, recover, and receive the same as part of the assets of the bankruptcy; and the person making such unlawful preferences and payments shall receive no discharge under the provisions of this act: *Provided*, That all dealings and transactions by and with any bankrupt, *bond fide* made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or affected by this act; *Provided*, That the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act. And in case it shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary, has, subsequent to the first day of January last, or at any other time, in contemplation of the passage of a bankrupt law, by assignment or otherwise, given or secured any preference to one creditor over another, he shall not receive a discharge unless the same be assented to by a majority in interest of those of his creditors who have been so preferred: *And provided, also*, That nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women or of minors, or any liens, mortgages, or other securities on property real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act.

"A voluntary assignment for the benefit of creditors, made after the passage of the bankrupt act, which gives a preference to one creditor over another, is a fraud upon that law, and assignees in bankruptcy are entitled to the property so transferred; 5 Law Rep. 214, 310; 3 McLean, 185; 3 Story, 446; 7 W. & S. 305. A conveyance or transfer by a debtor "in contemplation of bankruptcy," does not necessarily mean in contemplation of his being declared a bankrupt under the statute, but in contemplation of his actually stopping his business, because of his insolvency and incapacity to carry it on; 2 Story, 349; 3 Story, 446, 507. And if a party who fears or believes himself insolvent, but does not contemplate stoppage or failure, and intends to keep on and make his payments, and transact his business, hoping that his affairs may be thereafter retrieved, and in that state of mind makes a sale or payment, without intending to give a preference, and as a measure connected with going on in his business, and not a measure preparatory to, or connected with, a stoppage in business, such sale or payment is not void, as made in "contemplation of bankruptcy," though he immediately afterwards becomes bankrupt; 8 Met. 377. The conveyances or transfers, which are void under § 2, are only so as to persons claiming by virtue of proceedings under the act; 6 Hill, 9; 8 Met. 490. Assignments made within two months prior to the signing of the petition are, *prima facie*, void, as well as a judgment confessed within the above time; 3 McLean, 587; 6 Law Rep. 16. Mortgages made of property, on the same day of a petition for the benefit of the act, are "in contemplation of bankruptcy," and void; 3 Story, 693. If a debtor voluntarily aids a creditor in taking his property, upon a writ of attachment, or in perfecting an attachment previously incomplete, it is an act of bankruptcy within the meaning of the statute; 5 Law Rep. 214, 217. The words "future conveyances," mean those made after the act went into operation; 2 Barr, 148; 5 Law Rep. 457, 462; but see 5 Law Rep. 289. A creditor is never held to be unduly preferred by a bankrupt, unless he understands at the time, that he is dealing with the bankrupt, or with his agent, for security or payment out of the funds of the bankrupt; 3 Story, 507. If a bankrupt, previous to his bankruptcy, transfers a due bill for a valid consideration, his indorsement, made after his bankruptcy, will vest the indorsee with a legal right of action; 8 Ala. 370. As

attachment of property on mesne process, *bonâ fide* made, before a petition filed in bankruptcy by the debtor, is not a lien or security upon the property within the intentment of § 2; 3 Story, 428. The word "lien" means equitable as well as legal liens; 5 Law Rep. 362, 391, 441. Where an attachment is made by creditors, and afterwards, before judgment in the suit, the debtor files his petition in bankruptcy, if the creditor, with knowledge of that, take judgment and levy execution, and the debtor be afterwards declared a bankrupt, the levy and execution are a fraud upon the bankrupt act, and are void; 3 Story, 446. And where a suit is commenced against the bankrupt, and property attached on mesne process, before proceedings in bankruptcy, the certificate in bankruptcy may be pleaded, in bar of further proceedings in the suit; 3 Story, 426. See Pleading, *post*, p. 93. The liens of judgments recovered in the state courts, are protected by § 2, bankrupt act, and the state courts may proceed to enforce the liens according to the state laws, unless the protection of the rights of creditors, who have presented their claims against the estate of the bankrupt, may render the interposition of the district court necessary, in which case the district courts may, through the instrumentality of an injunction on the person, suspend the action of the state courts, and withdraw the subject of controversy for adjudication and settlement; and the decision of the federal courts in such cases will be final; 8 Smed. & Marsh. 703. And a sale of the property of the debtor, after notice of the injunction, renders the officer liable. 8 Smed. & Marsh. 703; 6 Humph. 339; 3 Story, 428."

§ 3. *And be it further enacted*, That all the property and rights of property, of every name and nature, and whether real, personal, or mixed, of every bankrupt, except as is hereafter provided, who shall by a decree of the proper court be declared to be a bankrupt within this act, shall, by a mere operation of law *ipso facto*, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act of assignment, or other conveyance, whatsoever; and the same shall be vested, by force of the same decree, in such assignee as from time to time shall be appointed by the proper court for this purpose; which power of appointment and removal such court may exercise at its discretion, *toties quoties*; and the assignee so appointed shall be vested with all the rights, titles, powers, and authorities to sell, manage, and dispose of the same, and to sue for and defend the same, subject to the orders and directions of such court, as fully, to all intents and purposes, as if the same were vested in, or might be exercised by, such bankrupt before or at the time of his bankruptcy declared as aforesaid; and all suits in law or in equity, then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to their final conclusion, in the same way and with the same effect, as they might have been by such bankrupt; and no suit commenced by or against any assignee shall be abated by his death, or removal from office, but the same may be prosecuted or defended by his successor in the same office: *Provided, however*, That there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture and such other articles and necessities of such bankrupt as the said assignee shall designate and set apart, having reference in the amount, to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of three hundred dollars; and, also, the wearing apparel of such bankrupt, and that of his wife and children; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of said court.

"By a decree of bankruptcy, all the property and rights of property of the bankrupt, subject to all such rights and equities of third persons as are attached to it, are divested from him, and vest in the assignee, as soon as one is appointed; and such decree relates back to the time of the petition; 6 Law Rep. 347; 2 Story, 327, 360, 630; 3 M'Lean, 185, 235; 7 W. & S. 305; 5 Pike, 492, 519; 3 Story, 507; 7 Blackf. 361; 1 Wood. & Min. 26; 8 Ala. 146. Consequently, pending the proceedings in bankruptcy, before or after the decree, an attaching creditor will not be permitted to proceed in his suit against the bankrupt, to trial and judgment, because there can be no party defendant properly before the court; 2 Story, 131; 7 Law Rep. 119. Improvements made upon lands owned by the government, are, by the various statutes upon the subject, regarded as property, and this interest passes to the assignee; 2 Gilm. 664. The inventory of property must, in all cases, designate the property, so that the assignees can find and identify it, and amendments of schedules will be allowed where there is proof that the errors arose from inadvertence; 4 Law Rep. 485, 488. The assignee may maintain an action in his own name, in a state court, for the breach of a contract made with the bankrupt; 10 Met. 239, 583; 3 M'Lean, 571; or, if a suit is pending at the time of the petition in bankruptcy, he has a right to take upon himself the control and management of the same for the benefit of the general creditors; 6 Law Rep. 313. After the bankruptcy of a partner, he cannot be joined as plaintiff with his co-partner, but when such action is brought, the assignee

may be substituted; 3 Barr, 433. The assignee of a dormant partner, under the act, is not entitled to the possession of the partnership effects, as against the attaching creditors of the partnership; 4 Scam. 427. The property of minor children, which had been accumulated by their sole exertions, with their father's consent, and had always stood in their name, does not vest in the assignee of the father; 5 Law Rep. 503. If the assignee of a bankrupt becomes bankrupt, and makes an assignment as such, neither his assignees nor his personal representatives are entitled to an outstanding debt in favor of the original bankrupt, but it must go to a new assignee of the latter; 5 W. & S. 9. The court has no authority to order an allowance to the bankrupt for the support of himself and family; but the assignee may make such allowance, not exceeding the sum of three hundred dollars; and he may also allow the bankrupt any reasonable sum for taking charge of the property; 2 Story, 312. Under the words 'other necessities,' it has been held that the assignee may allow the bankrupt money; 5 Law Rep. 86. Articles of jewelry belonging to a bankrupt, do not come under the description of wearing apparel, and if not set apart by the assignee, must be surrendered to him. But if they belonged to the wife of a bankrupt before marriage, or if presented to her since, and they are such as are suitable to her condition and circumstances in life, they do not vest in the assignee, and may be retained by her; 4 Law Rep. 489; 5 Law Rep. 11. A clock and silver watch are not such furniture or necessities as the assignee may, in his discretion, allow to the bankrupt. Silver spoons and a cow, may or may not be necessities, according to the circumstances and condition of the family; 5 Law Rep. 157. Where property descended to the wife of a bankrupt, before a decree of bankruptcy, and at that time he had not reduced it into possession, the wife is, in equity, entitled to an allowance out of the property for her support, against the assignee of the bankrupt; 5 Law Rep. 453."

§ 4. *And be it further enacted*, That every bankrupt who shall *bona fide* surrender all his property and rights of property, with the exception above mentioned, for the benefit of his creditors, and shall fully comply with and obey all the orders and directions which may from time to time be passed by the proper court, and shall otherwise conform to all the other requisitions of this act, shall (unless a majority in number and value of his creditors, who have proved their debts, shall file their written dissent thereto,) be entitled to a full discharge from all his debts, to be decreed and allowed by the court which has declared him a bankrupt, and a certificate thereof granted to him by such court accordingly, upon his petition filed for such purpose; such discharge and certificate not, however, to be granted until ninety days from the decree of bankruptcy, nor until after seventy days' notice in some public newspaper, designated by such court, to all creditors who have proved their debts, and other persons in interest, to appear at a particular time and place, to show cause why such discharge and certificate shall not be granted; at which time and place any such creditors or other persons in interest, may appear and contest the right of the bankrupt thereto: *Provided*, That in all cases where the residence of the creditor is known, a service on him personally, or by letter addressed to him at his known usual place of residence, shall be prescribed by the court, as in their discretion shall seem proper, having regard to the distance at which the creditor resides from such court. And if any such bankrupt shall be guilty of any fraud or wilful concealment of his property or rights of property, or shall have preferred any of his creditors, contrary to the provisions of this act, or shall wilfully omit or refuse to comply with any orders or directions of such court, or to conform to any other requisitions of this act, or shall in the proceedings under this act, admit a false or fictitious debt against his estate, he shall not be entitled to any such discharge or certificate; nor shall any person, being a merchant, banker, factor, broker, underwriter, or marine insurer, be entitled to any such discharge or certificate, who shall become bankrupt, and who shall not have kept proper books of account after the passing of this act; nor any person who, after the passing of this act, shall apply trust funds to his own use: *Provided*, That no discharge of any bankrupt under this act shall release or discharge any person who may be liable for the same debt as a partner, joint contractor, indorser, surety, or otherwise, for or with the bankrupt. And such bankrupt shall at all times be subject to examination, orally, or upon written interrogatories, in and before such court, or any commission appointed by the court therefor, on oath, or, if conscientiously scrupulous of taking an oath, upon his solemn affirmation, in all matters relating to such bankruptcy, and his acts and doings, and his property and rights of property, which, in the judgment of such court, are necessary and proper for the purposes of justice; and if, in any such examination, he shall wilfully and corruptly answer, or swear, or affirm falsely, he shall be deemed guilty of perjury, and shall be punishable therefor in like manner as the crime of perjury is now punishable by the laws of the United States; and such discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which

are provable under this act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence of itself in favor of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property, or rights of property, as aforesaid, contrary to the provisions of this act, on prior reasonable notice specifying in writing such fraud or concealment; and if, in any case of bankruptcy, a majority, in number and value, of the creditors, who shall have proved their debts at the time of the hearing of the petition of the bankrupt for a discharge as hereinbefore provided, shall at such hearing file their written dissent to the allowance of a discharge and certificate to such bankrupt, or if, upon such hearing, a discharge shall not be decreed to him, the bankrupt may demand a trial by jury upon a proper issue to be directed by the court, at such time and place and in such manner as the court may order; or he may appeal from that decision, at any time within ten days thereafter, to the circuit court next to be held for the same district, by simply entering in the district court, or with the clerk thereof, upon record, his prayer for an appeal. The appeal shall be tried at the first term of the circuit court after it be taken, unless, for sufficient reason, a continuance be granted; and it may be heard and determined by said court summarily, or by a jury, at the option of a bankrupt; and the creditors may appear and object against a decree of discharge and the allowance of the certificate, as hereinbefore provided. And if, upon a full hearing of the parties, it shall appear to the satisfaction of the court, or the jury shall find, that the bankrupt has made a full disclosure and surrender of all his estate, as by this act required, and has in all things conformed to the directions thereof, the court shall make a decree of discharge, and grant a certificate, as provided in this act.

"The fact that the bankrupt, or any one for him, pays money or any other thing to a creditor, to induce him to withdraw objections to the bankrupt's discharge, does not render the certificate and discharge inoperative; 10 Ala. 523. To defeat the decree of bankruptcy upon the ground of fraudulent concealment, the creditor must prove that the bankrupt had property at the time of his application, which he knowingly and intentionally omitted to state in his inventory; 5 Law Rep. 320. The term 'other persons in interest,' designates those who could not prove debts as creditors, and does not embrace, but excludes creditors; 5 Law Rep. 321, 323. The omission, by a petitioner for the benefit of the bankrupt law, to give notice to a creditor, is not of itself, without proof that the omission was fraudulent or intentional, sufficient to invalidate the petitioner's certificate of bankruptcy as against such creditor; 8 Met. 75; 10 Ala. 523; 2 Spear, 80; 1 Richard. 374. Nor is the confession of a judgment to a creditor, with a view to prefer him, invalid under the bankrupt law, if it be not voluntary; but the effect of measures taken by the creditor, or in his power to take, and the burden is upon the party, seeking to avoid the transaction, to show that it was voluntary; 6 W. & S. 128; 5 Hum. 340. An omission, by the bankrupt, to insert some articles of property in his schedule of 'effects, by accident or mistake, is not evidence of 'fraud or wilful concealment,' within the meaning of the act; 12 Shep. 233. Sureties are generally entitled, upon payment of the debt of the principal, to the securities held by the creditor; but in bankruptcy, if the bankrupt give the creditor a security from his own property, the creditor cannot prove his debt without surrendering the security; but if a security from a third person be transferred to the creditor, he may prove his debt without surrendering the security, and may enforce such security against such third person, provided he do not thereby receive more than his claim; 3 Story, 393. The bankruptcy of the principal obligor in a bond, does not discharge the sureties; 10 Ala. 842."

§ 5. *And be it further enacted*, That all creditors coming in and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being *bond fide* debts, shall be entitled to a share in the bankrupt's property and effects, *pro rata*, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid moneys as his sureties, which shall be first paid out of the assets; and any person who shall have performed any labor as an operative in the service of any bankrupt, shall be entitled to receive the full amount of the wages due to him for such labor, not exceeding twenty-five dollars. *Provided*, That such labor shall have been performed within six months next before the bankruptcy of his employer, and all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof ascertained, under the direc-

tion of such court, and allowed them accordingly, as debts *in presenti*; and no creditor or other person, coming in and proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby; and in all cases where there are mutual debts or mutual credits between the parties, the balance only shall be deemed the true debt or claim between them, and the residue shall be deemed adjusted by the set-off; all such proof of debts shall be made before the court decreeing the bankruptcy, or before some commissioner appointed by the court for that purpose; but such court shall have full power to set aside and disallow any debt, upon proof that such debt is founded in fraud, imposition, illegality, or mistake; and corporations to whom any debts are due may make proof thereof by their president, cashier, treasurer, or other officer, who may be specially appointed for that purpose; and in appointing commissioners to receive proof of debts, and perform other duties, under the provisions of this act, the said court shall appoint such persons as have their residence in the county in which the bankrupt lives.

"A judgment in an action arising *ex delicto*, and a judgment arising in an action *ex contractu*, are both debts which are provable against the estate of the bankrupt; 5 Law Rep. 163. Fiduciary debts may be proved, under the bankrupt act, equally with others, if the creditors to whom they are due so elect; and if such creditors prove their debts and take a dividend, they are barred, like other creditors, by the debtor's discharge and certificate. But if the fiduciary debts are not proved under the act, the creditors are not barred; 7 Met. 424; 2 How. U. S. 202. The existence of a fiduciary debt does not preclude the party from taking the benefit of the bankrupt act as to all other debts; 5 Law Rep. 258; 2 How. U. S. 202."

§ 6. *And be it further enacted*, That the district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act and any other act which may hereafter be passed on the subject of bankruptcy; the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity; and for this purpose the said district court shall be deemed always open. And the district judge may adjourn any point or question arising in any case in bankruptcy, into the circuit court for the district, in his discretion, to be there heard and determined; and for this purpose the circuit court of such district shall also be deemed always open. And the jurisdiction hereby conferred on the district court, shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed; to all cases and controversies between such assignee and the bankrupt, and to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy. And the said courts shall have full authority and jurisdiction to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent the circuit courts may now do in any suit pending therein in equity. And it shall be the duty of the district court of each district, from time to time, to prescribe suitable rules and regulations and forms of proceedings in all matters of bankruptcy; which rules, regulations and forms shall be subject to be altered, added to, revised, or annulled, by the circuit court of the same district, and other rules, and regulations, and forms substituted therefor; and in all such rules, regulations, and forms, it shall be the duty of the said courts to make them as simple and brief as practicable, to the end to avoid all unnecessary expenses, and to facilitate the use thereof by the public at large. And the said courts shall, from time to time, prescribe a tariff or table of fees and charges, to be taxed by the officers of the court or other persons for services under this act, or any other on the subject of bankruptcy; which fees shall be as low as practicable, with reference to the nature and character of such services.

"The district court, when sitting in bankruptcy, has jurisdiction over liens and mortgages existing upon the property of bankrupts, so as to inquire into their validity and extent, and grant the same relief which the state courts might, or ought to grant; and of a formal bill in equity, or other plenary proceedings, or of a summary proceeding; 5 Law Rep. 505; 8 Smed. & Mar. 703; 3 How. U. S. 292; 2 Story, 131; 3 M'Lean, 587. See § 11. The equity jurisdiction of the district courts of the United States, under the bankrupt act, is not confined to cases originally arising and pending in the particular court where the relief is sought; 5 Law Rep. 158; 1 How. U. S. 265; 3 Id. 426. (See 7 Law Rep. 312; 8 Id. 344, where the jurisdiction of the United States courts, in matters of bankruptcy, is questioned.) The Supreme Court of the United States has no revising

power over the decrees of the district court sitting in bankruptcy; 3 How. U. S. 292; 1 Id. 181. The phrase in § 6, 'any creditor or creditors, who shall claim any debt or demand under the bankruptcy,' does not mean such creditors only who come in and prove their debts, but all creditors who have a present subsisting claim upon the bankrupt's estate, whether they have a security or not. Such creditors have a right to ask that the property mortgaged shall be sold, and the proceeds applied to the payment of their debts; and the assignee may contest their claim; 3 How. U. S. 292. The petition must be filed in the district where the supposed bankrupt, at the time of filing it, shall reside, or his place of business; and if the district court granting his discharge, has not jurisdiction of the person, by reason of residence or place of business, the discharge is void; 9 Ala. 795. In a case of partnership, either partner may be declared a bankrupt in the district where he resides, or where the partnership is established. But the court first acquiring jurisdiction has exclusive jurisdiction, over all the partners, and all their property, joint and several; 5 Law Rep. 269. The district court has authority to order the sale of the whole or any part of the bankrupt's property, by his consent, even before the declaration of bankruptcy; 5 Law Rep. 17."

§ 7. *And be it further enacted*, That all petitions by any bankrupt, for the benefit of this act, and all petitions by a creditor against any bankrupt under this act, and all proceedings in the case to the close thereof, shall be had in the district court within and for the district in which the person supposed to be a bankrupt shall reside, or have his place of business, at the time when such petition is filed, except where otherwise provided in this act. And upon every such petition, notice thereof shall be published in one or more public newspaper printed in such district, to be designated by such court, at least twenty days before the hearing thereof; and all persons interested may appear at the time and place where the hearing is thus to be had, and show cause, if any they have, why the prayer of the said petitioner should not be granted; all evidence by witnesses to be used in all hearings before such court, shall be under oath, or solemn affirmation, when the party is conscientiously scrupulous of taking an oath, and may be oral or by deposition taken before such court, or before any commissioner appointed by such court, or before any disinterested state judge of the state in which the deposition is taken; and all proof of debts or other claims, by creditors entitled to prove the same by this act, shall be under oath or solemn affirmation as aforesaid, before such court or commissioner appointed thereby, or before some disinterested state judge of the state where the creditors live, in such form as may be prescribed by the rules and regulations hereinbefore authorized to be made and established by the courts having jurisdiction in bankruptcy. But all such proofs of debts and other claims, shall be open to contestation in the proper court having jurisdiction over the proceedings in the particular case in bankruptcy; and as well the assignee as the creditor, shall have a right to a trial by a jury, upon an issue to be directed by such court, to ascertain the validity and amount of such debts or other claims; and the result therein, unless a new trial shall be granted, if in favor of the claims, shall be evidence of the validity and amount of such debts or other claims. And if any person or persons shall falsely or corruptly answer, swear, or affirm, in any hearing, or on trial of any matter, or in any proceedings in such court in bankruptcy, or before any commissioner, he or they shall be deemed guilty of perjury, and punishable therefor in the manner and to the extent provided by law for other cases.

"The petitioner is privileged from arrest on a civil process, pending the proceedings in his petition to be declared a bankrupt; 5 Law Rep. 19, 24, 81. After a petition has been presented for the benefit of the bankrupt law, and before the applicant has been declared a bankrupt, his goods, found upon demised premises, may be distrained and sold by his landlord for the payment of his rent; 8 W. & S. 53. Where one of two defendants was released under the bankrupt act, the suit, as to him, abates; 3 McLean, 487. So where one of two obligors is discharged as a bankrupt, the plaintiff may enter a *nol. pros.* as to him, and proceed to trial against the other; 2 Barr, 16."

§ 8. *And be it further enacted*, That the circuit court, within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the district court of the same district, of all suits at law and in equity, which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt, transferable to, or vested in such assignee; and no suit at law or in equity, shall, in any case, be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of suit shall first have accrued.

"An appeal or writ of error will not lie from the decision of the circuit court, in a

case in bankruptcy adjourned from the district court. The decision of the circuit judge is conclusive on the district judge. 1 How. U. S. 265."

§ 9. *And be it further enacted*, That all sales, transfers, and other conveyances of the assignee, of the bankrupt's property and rights of property, shall be made at such times and in such manner as shall be ordered and appointed by the court in bankruptcy; and all assets received by the assignee in money shall, within sixty days afterwards, be paid into the court, subject to its order respecting its future safe keeping and disposition; and the court may require of such assignee a bond, with at least two sureties, in such sum as it may deem proper, conditioned for the due and faithful discharge of all his duties, and his compliance with the orders and directions of the court; which bond shall be taken in the name of the United States, and shall, if there be any breach thereof, be sued and suable, under the order of such court, for the benefit of the creditors and other persons in interest.

"A purchaser, at a sale made by an assignee in bankruptcy of the bankrupt's effects, acquires only such title as the bankrupt had at the time of his discharge. 7 Smed. & Marsh. 586."

§ 10. *And be it further enacted*, That in order to insure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets, and a reduction of the same to money, and a distribution thereof at as early periods as practicable, consistently with a due regard to the interests of the creditors; and a dividend and distribution of such assets as shall be collected and reduced to money, or so much thereof as can be safely so disposed of, consistently with the rights and interests of third persons having adverse claims thereto, shall be made among the creditors who have proved their debts, as often as once in six months from the time of the decree declaring the bankruptcy; notice of such dividends and distribution to be given in some newspaper or newspapers in the district, designated by the court, ten days at least before the order therefor is passed; and the pendency of any suit at law or in equity, by or against such third persons, shall not postpone such division and distribution, except so far as the assets may be necessary to satisfy the same; and all the proceedings in bankruptcy in each case shall, if practicable, be finally adjusted, settled, and brought to a close, by the court, within two years after the decree declaring the bankruptcy. And where any creditor shall not have proved his debt until a dividend or distribution shall have been made and declared, he shall be entitled to be paid the same amount *pro rata*, out of the remaining dividends or distributions thereafter made, as the other creditors have already received, before the latter shall be entitled to any portion thereof.

§ 11. *And be it further enacted*, That the assignee shall have full authority, by and under the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage or other pledge, or deposit, or lien upon any property, real or personal, whether payable *in presenti*, or at a future day, and to tender a due performance of the conditions thereof. And such assignee shall also have authority, by and under the order and direction of the proper court in bankruptcy, to compound any debts or other claims or securities, due or belonging to the estate of the bankrupt; but no such order or direction shall be made until notice of the application is given in some public newspaper in the district, to be designated by the court, ten days at least before the hearing, so that all creditors and other persons in interest, may appear and show cause, if any they have, at the hearing, why the order or direction should not be passed.

"The act does not necessarily withdraw from the state courts their jurisdiction over the subject of liens; the interest of general creditors, who claim under the act, must be invalid, or the district courts will not interfere; 8 Smed. & Mar. 703. Although, under § 11 of the bankrupt act, the assignee has full authority, under the court, to redeem and discharge any mortgage or other pledge or deposit, or lien upon any property, real or personal, payable *in presenti* or *futuro*, and to tender a due performance of the conditions thereof, yet such assignee's power over the mortgage, pledge, or lien, extends no further than to satisfy it, and thereby release the property; 8 Smed. & Mar. 703; 6 Pa. Law Journal, 261. A judgment creditor, who proves his debt against a bankrupt, thereby surrenders his judgment as a lien on the lands of the bankrupt. 7 Law Rep. 281."

§ 12. *And be it further enacted*, That if any person who shall have been discharged under this act, shall afterward become bankrupt, he shall not again be entitled to a discharge under this act, unless his estate shall produce (after all charges,) sufficient to pay every creditor seventy-five per cent. on the amount of the debt which shall have been allowed to each creditor.

§ 13. *And be it further enacted*, That the proceedings in all cases in bankruptcy shall be deemed matters of record; but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the court, and a docket

only, or short memorandum thereof, with the numbers, kept in a book by the clerk of the court; and the clerk of the court, for affixing his name and the seal of the court to any form, or certifying a copy thereof, when required thereto, shall be entitled to receive as compensation, the sum of twenty-five cents and no more. And no officer of the court, or commissioner, shall be allowed by the court more than one dollar for taking the proof of any debt or other claim of any creditor or other person against the estate of the bankrupt, but he may be allowed, in addition, his actual travelling expenses for that purpose.

§ 14. *And be it further enacted*, That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are herein exempted; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignees shall also keep separate accounts of the joint stock or property of the company, and of the separate estate of each member thereof; and after deducting out the whole amount received by such assignees, the whole of the expenses and disbursements paid by them, the net proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock, for the payment of the joint creditors; and if there shall be any balance of the joint stock, after payment of the joint debt, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective rights and interests therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts; and the certificate of discharge shall be granted or refused to each partner, as the same would or ought to be if the proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone.

"The decree of bankruptcy against one member of a solvent partnership, operates as a dissolution of the partnership, and the assignee becomes tenant in common with the solvent partner; 5 Law Rep. 124. Where one or more of several partners have been declared bankrupts and discharged, a suit cannot be maintained in the name of the several partners, on a note owned by the firm before such bankruptcy; 8 Smed. & Mar. 557. See note to § 3. Where the partners of a firm are insolvent, and there is sufficient ground for a decree of bankruptcy against any member of the firm, the decree will go against all the members of the firm, and all the joint and separate property of the partners will pass to the assignee; 5 Law Rep. 217. But where one partner becomes bankrupt, his assignee can take only that portion of the partnership assets which would belong to the bankrupt after payment of all the partnership debts, and the solvent partner has a lien upon the partnership assets for all the partnership debts, and also for his own share thereof, before the separate creditors of the bankrupt can come in and take anything; 5 Law Rep. 351, 401."

§ 15. *And be it further enacted*, That a copy of any decree of bankruptcy, and the appointment of assignees, as directed by the third section of this act, shall be recited in every deed of lands belonging to the bankrupt, sold and conveyed by any assignees under and by virtue of this act, and that such recital, together with a certified copy of such order, shall be full and complete evidence both of the bankruptcy and assignment therein recited, and supersede the necessity of any other proof of such bankruptcy and assignment to validate the said deed; and all deeds containing such recital, and supported by such proof, shall be as effectual to pass the title of the bankrupt of, in, and to the lands therein mentioned and described to the purchaser, as fully, to all intents and purposes, as if made by such bankrupt himself immediately before such order.

§ 16. *And be it further enacted*, That all jurisdiction, power, and authority, conferred upon and vested in the district court of the United States by this act, in cases in bankruptcy, are hereby conferred upon and vested in the circuit court of the United States for the District of Columbia, and in and upon the supreme or superior courts of any of the territories of the United States, in cases of bankruptcy, where the bankrupt resides in the said District of Columbia, or in either of the said territories.

§ 17. *And be it further enacted*, That this act shall take effect from and after the first day of February next.

"A petition for the benefit of the bankrupt act, was filed in the district court, on the third day of March, 1843, about noon. The act of the third of March, 1843, repealing

*CHAPTER VIII.

BARON AND FEME.(1)

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I. *Of the Liability of the Husband.*

1. *In respect of Contracts made by the Wife before Coverture.* p. 289.
2. *In respect of Contracts made by the Wife during Coverture.* p. 290.
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1. *In respect of Contracts made by the Wife before Coverture.*—The husband is liable to the debts of his wife, contracted by her before the coverture,(2) and the husband and wife may be sued for such debts

the bankrupt act, passed Congress, and was approved by the president, late in the evening of the same day. It was held that the court had jurisdiction of the petition at the time when it was filed and acted upon, and that it had full jurisdiction to entertain all proceedings thereon to the close thereof, according to the provisions of the bankrupt act; 2 Story, 571; 3 M'Lean, 285. The contrary doctrine has been held in some of the district courts; 6 Law Rep. 297; 7 Id. 25." Note to former edition.

(1) The reader is referred to 2 Kent's Com. 129, sect. 28, for an admirable view of the general principles which apply to this title.

(2) A feme sole who had contracted a debt in Rhode Island, where she and the creditor resided, was discharged there under an insolvent law, and afterwards married, having no property, a citizen of Massachusetts, and removed with him to that state. The act provided that no person who should intermarry with a woman discharged under its provisions, should be liable to a greater amount than the property he acquired by her. Held, in an action against the husband and wife, that the husband was not liable. *Pitkin v. Thompson*, 13 Pick. 64.

As to the wife's choses in action, the husband has power to sue for and recover the same, and, when recovered, the money becomes absolutely his own. So he may release and discharge the debts, and change the securities with the consent of the debtor. So he may assign them absolutely for a valuable consideration, but not without. A general assignment in bankruptcy or under the insolvent laws, passes them, subject to the wife's right of survivorship. If he appoints an agent to receive the money, and he receives it

during the coverture ;(a) and in actions for the recovery of such debts, husband and wife must be joined.(b)(1) But if these debts are not recovered against the husband and wife, in the lifetime *of [*290] the wife, the *husband* cannot be charged for them either at law(c) or in equity after the death of the wife. But if the wife survive the husband, an action may be maintained against her for the recovery of these debts;(d) unless during the coverture the husband has been discharged under the Insolvent Debtor's Act, in which case the wife is discharged for ever.(e) A husband is liable for necessities provided for his wife pending a suit in the Ecclesiastical Court and before alimony decreed, although a decree afterwards made direct the alimony to be paid from a date before the time when the necessities were provided for the wife.(f)(2)

The defendant's wife,(g) before marriage, gave a promissory note for 50*l.* to the plaintiff, and afterwards married the defendant, who had with her personal estate to the amount of 700*l.*, part whereof consisted of choses in action. The plaintiff did not during coverture recover judgment upon the note against the husband and wife. The wife died about a year after the marriage. The defendant on her death took out letters of administration. Some of the choses in action had been received by the defendant as husband in the life-time of the wife, the rest he took as her administrator. The plaintiff, finding that the choses in action were not sufficient to satisfy his demand, filed a bill against the defendant, praying that the defendant should be made liable to answer his the plaintiff's demand, for so much as he had received out of the clear personal estate of the wife upon his marriage: Lord *Talbot*, Ch., said, that as on the one hand the husband was by law liable, during the

(a) F. N. B. 120, F.

(b) 7 T. R. 348.

(c) F. N. B. 121, C.; 1 Roll. Abr. 351, (G.) pl. 2.

(d) *Woodman v. Chapman*, 1 Campb. 189, Lord *Ellenborough*, C. J.

(e) *Lockwood v. Saller*, 5 B. & Ad. 303.

(f) *Keegan v. Smith*, 5 B. & C. 375.

(g) *Heard v. Stamford*, 3 P. Wms. 409; Ca. Temp. Talb. 173, S. C.

or if he recovers a judgment in his own name, it becomes absolutely his. The rule is the same in regard to a legacy or distributive share accruing to the wife during coverture. If he dies before he recovers the money or alters the securities, the wife will be entitled to the debts in her own right, without administering on his estate, or holding the same as assets for the payment of his debts. If she dies before he has reduced the chose in possession it does not strictly survive to him; but he is entitled to recover the same to his own use as her administrator, subject only to the payment of her debts *dum sola*. And if he dies after surviving her, his representatives, and not her next of kin, are entitled to the administration. See *Schuyler v. Hoyle*, 5 Johns. Ch. 196; *Haviland v. Bloom*, 6 Id. 178; *Whitaker v. Whitaker*, 6 Johns. Rep. 112; *Hoskins v. Miller*, 2 Dev. N. C. Rep. 360; *Kenny v. Udall*, 5 Johns. Ch. 464; *Siter's case*, 4 Rawle, 468; *Hartman v. Dowdell*, 1 Id. 279; *Wintercast v. Smith*, 4 Id. 182; *Southwork v. Packard*, 7 Mass. 95; *Forrest v. Warrington*, 2 Dessaus. 262; *Griswold v. Penniman*, 2 Conn. 564; *Cornwall v. Hoyt*, 7 Id. 420; *Winslow v. Crocker*, 17 Maine, 29.

(1) An action does not lie against husband alone without express assumption for services rendered or money lent to wife *dum sola*, nor can her guardian sue both in such case at law. His remedy is in the Orphans' Court. *Case v. Wunder*, 5 Watts, 97.

(2) *S. P. Cunningham v. Irwin*, 7 S. & R. 287. A wife has a right to maintenance, and if during her petition for divorce and alimony, the husband conveys his land to a grantee *mala fide* to defraud her, the conveyance is void. *Franker v. Brown*, 2 Blackf. 295.

coverture, to all the debts contracted by his wife, *dum sola*, whatever their amount might be, ^(h) although she did not bring him a portion of one shilling; so, on the other hand, it was certain, that if such debts were not recovered during the coverture, the husband, as such, was not chargeable, let the fortune he received with his wife be ever so great. ⁽¹⁾ He added, that the wife's choses in action were assets, and thereupon decreed an account of what the husband had received since his wife's death as her administrator, and that he should be liable for so much only; but as to any further demand against him, dismissed the bill. ⁽²⁾

2. *In respect to Contracts made by Wife during Coverture.*—⁽³⁾ All the personal estate of which the wife is possessed in her own right, is by the marriage vested absolutely in the husband. ⁽ⁱ⁾ ⁽⁴⁾ [*291] *The marriage is an absolute gift of all chattels personal in possession in her own right, whether the husband survive the wife or not; but if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them unless he and his wife recover them. And of personal goods, *en autre droit* as executrix or administratrix, &c., the marriage is no gift of them to the husband although he survive his wife. ^(k) ⁽⁵⁾ Notwithstanding the law thus di-

^(h) F. N. B. 120, F.

⁽ⁱ⁾ 1 Inst. 851, b., recognized in *Checchi v. Powell*, 6 B. & C. 253.

^(k) 1 Inst. 351, b., cited per *Tenterden*, C. J., delivering judgment in *Richards v. Richards*, 2 B. & Ad. 453.

(1) See *Buckner v. Smith*, 4 Dessaus. 371.

(2) If the wife give a bond before coverture, and, after her death, the husband promise to pay it, he is liable on the express assumpsit. *Beach v. Lea*, 2 Dallas's Rep. 257.

The husband is liable for the debts of his wife, whether arising from contract or misfeasance, or by a devastavit. But his estate is liable for a devastavit committed by her before the marriage only so far as the property he received by her will be an indemnification; and for devastavit after marriage only so far as he actually received money. After that the separate property of the wife becomes liable. *Knox v. Pickett*, 4 Dess. 92; *Morn v. Henderson*, 4 Dess. 459. The husband is not liable for the debts of the wife, contracted *dum sola*, unless judgment be obtained against him during coverture, even though he receives a sufficient estate with her, and has a life estate in her property settled on him. *Buckner v. Smyth*, Ib. 391.

(3) If husband and wife live together, any business in which she is engaged is presumed to be with his consent and approbation, and unless the contrary be shown, he is liable on her contracts and civilly for such torts as she may commit in the course of such business. If she buy goods without his knowledge, and after he learns that she has purchased them he permits her to retain possession, he is liable. In such case possession of the wife is the possession of the husband. And if, when applied to for payment, he disclaims the purchase, the seller may disaffirm the contract and retake the goods or bring trover or replevin. *McKinley v. McGregor*, 3 Whart. 369. But he is not liable for services rendered on account of his wife's separate estate where the credit is given to her. *Stammy v. Macomb*, 2 Wend. 454.

(4) The wearing apparel of a married woman, bought by her out of an income settled in the hands of trustees to her sole and separate use, belongs to her husband and not to the trustees, and is liable to be taken in execution for his debts. *Carne v. Brice*, 7 M. & W. 183, cited by *Tindal*, C. J., in *Tugman v. Hopkins*, 4 M. & Gr. 401, 5 Scott's N. R., 464. In *Newlands v. Paynter*, 4 M. & Cr. 408, Lord Cottenham, C., held that personal chattels bequeathed to a single woman for her separate use, but without the intervention of any trustee, could not be seized in execution by a judgment creditor of an after taken husband; for a person marrying a woman with property so circumstanced, is considered as adopting the property in the state in which he finds it, and bound by equity not to disturb it. *Brightly's Eq. Jur.* § 465, 472.

(5) *Henderson v. Stinger*, 2 Dana's Rep. 292. In all cases where the cause of action

vests the wife of all her personal property, she cannot bind her husband by any contracts, even for necessities suitable to her degree and estate, without the assent of her husband, either express or implied. "A femé covert generally cannot bind or charge her husband by any contract made by her without the authority or assent of her husband, precedent or subsequent, express or implied." (1) Mr. J. Hyde's argu-

by law survives to the wife, the husband and wife must join, and he cannot sue alone. *Clapp v. Sloughton*, 10 Pick. 470. A husband cannot maintain a suit in his own name alone, to recover a demand which accrued to his wife before marriage, under a contract made with her. *Morse v. Earl*, 13 Wend. 271.

(1) A wife may act as agent for her husband, and the authority may be shown by subsequent acknowledgment or ratification. *Hopkins v. Mollineux*, 4 Wend. 465. A sale of personal property by the wife to discharge debts due from her absconding husband, and by his authority, vests a good title in the purchaser, and collusion will not be presumed. *Shoemaker v. Runkle*, 5 Watts, 107. So, in the absence of her husband, she may hire out personal property of his, she being considered as having a general authority to exercise a usual and ordinary control over it, unless it be expressly shown he had another agent. *Church v. Sanders*, 10 Wend. 79. So if authorized to deposit his money in bank for safe keeping, she do it in her own name, and receive a bank book, and afterwards withdraw the money, the bank is not liable to the husband, without notice of the coverture. *Dacy v. The Chemical Bank*, 2 Hall, 550. But she cannot make a valid lease of her husband's land. *Tullis v. Wiley*, 6 Ohio, 297. Nor of her own, though she join with her husband, unless it be acknowledged as the statute requires. *Worthington v. Young*, 6 Ohio, 335. And though she join in the deed according to the statute, she is not bound by the covenants. *Aldridge v. Burlinson*, 3 Blackf. 201. And the bond of a married woman, though she join with her husband, is *absolutely* void, and so is a judgment entered on or accompanying a warrant of attorney as respects her and her estate. *Dorrance v. Scott*, 3 Whart. 309. But it seems she may join in a submission to arbitration about her own lands. *Weston v. Stewart*, 2 Fairf. 326.

The acts of the wife are binding upon the husband, so far as she acts as his agent; and any evidence, tending to prove such agency, is admissible. *Gray v. Otis*, 11 Verm. 628. The wife is not *prima facie* the agent of the husband for the purpose of lending his property; and permission from her alone to take it will be no defence to an action of trover brought by the husband for it, where there are no circumstances tending to show the husband's assent. *Green v. Sperry*, 16 Id. 390. A wife, as such, has no original or inherent power to make any contract which is obligatory on her husband. Hence, it is incumbent on a party, whose claim against the husband is derived from such contract, to show that she had authority from him to make it, or that he subsequently assented to it. *Benjamin v. Benjamin*, 15 Conn. 347. And she may be agent for her husband, though they keep separate stores, and bind him by notes signed in her own name, *Abbott v. McKinley*, 2 Miles, 220. And such appointment may be inferred from his acts and conduct respecting her. Where the agency is to be inferred from his conduct, that conduct furnishes the only evidence of its extent, as well as of its existence; and in solving all questions on this subject between the principal and third persons, the general rule is, that the extent of the agent's authority is to be measured by the extent of his usual employment. *Cox v. Hoffman*, 4 Dev. & Batt. 180. And money paid to a wife is paid to the husband, whether he ever receive it or not. And if a wife receive such money in the lifetime of her husband, but does not pay it over to him, it cannot be recovered of her by his administrator in an action for money had and received. *White v. White*, 2 How. Miss. 931.

"The actual agency which cohabitation implies, will be implied as well in case of one who is apparently the wife of the man, as in case of his legal wife.

It is extinguished by notice: and if a general agency has been vested in the woman by reason of a course of dealing on credit with his assent, this authority may continue after separation until notice be given to the tradesman. *Caney v. Patton*, 2 Ashmead, 140.

If exercised by a wife, its validity is not affected by the guilt of her conduct, and it is not terminated by her adultery.

It authorizes the woman to bind the man, according to the state and style of life held out by him to the world, and not merely according to his real condition.

On the other hand, the liability of the husband, in law, or by virtue of the marital relation, is marked by these differences:

It ceases, or does not arise, where the husband, though they are separated, pays her

ment in *Manby v. Scott*, 1 Mod. 125.(1) Husband and wife, devisees of a copyhold, take by entireties, and the husband cannot dispose of it in his wife's life without her consent;(1) and though the estate be only a mortgage, yet, if it appears that the deviser considered it as irredeemable, it shall not vest in the husband as a chattel interest.(1)

During Cohabitation the law will, from that circumstance, presume the assent of the husband to all contracts made by the wife for necessities suitable to his degree and estate, and the misconduct, or even the adultery of the wife, during that period, will not destroy this presumption. The same law is, where the husband deserts his wife, or turns her away without any reasonable ground,(2) or com-
[*292] pels *her, by ill usage or severity,(m) to leave him; in all

(1) *Doe d. Freestone v. Parratt*, L. P. B. 4, Dampier, MSS. L. I. L.; 5 T. R. 652, S. C.

(m) Per Lord Kenyon, C. J., in *Hodges v. Hodges*, 1 Esp. N. P. C. 441.

an adequate allowance, or supplies her himself, though the tradesman has no notice of the allowance. *Kimball v. Keyes*, 11 Wend. 33; *Mott v. Comstock*, 8 Id. 544; *Baker v. Barney*, 8 Johns. 72; *Caney v. Patton*, 2 Ash. 140.

Where the husband does not supply her himself, he cannot, by giving notice or forbidding tradesmen to supply her, if she be not in fault, prevent their making him liable; see *Rotch v. Miles*, 2 Conn. 638; *Emmery v. Neighlor*, 2 Halst. 142; *Billing v. Pilcher & Hauser*, 7 B. Monr. 458; and his liability exists, though the marriage were secret, and unknown to those who supplied the wife. *Cunningham v. Irwin*, 7 Serg. & Rawle, 247.

It is terminated by the fault of the wife; viz., by adultery, though it were unknown to the tradesman. *Hunter v. Boucher*, 3 Pick. 289. Or by her leaving his house without cause, though not adulterously. *McCutchen v. McGahay*, 11 Johns. 281; *Evans v. Fisher et al.*, 5 Gilman, 569; *Williams v. Prince*, 3 Strobb. 490; *Walker v. Simpson*, 7 Watts & Serg. 83, 88; see also *Billing v. Pilcher & Hauser*, 7 Monr. 458. But this latter fault is purged by an offer to return; such an offer revives the husband's liability. *Reed & Gullis v. McGahay*, 12 Johns. 293; *Cunningham v. Irwin*, 5 Serg. & Rawle, 247; see *Rennick v. Ficklin*, 3 B. Monr. 166. The husband, by receiving her back, does not become liable for necessities supplied her during her unlawful absence. *Williams v. Prince*, 3 Strobb. 490.

This distinction between an actual agency, to be implied in point of fact during cohabitation, and an agency or assent, implied by law under certain circumstances during separation, or legal liability without reference to the husband's assent, is clearly recognized in the able opinion of King, President, in *Cany v. Patton*, 2 Ashmead, 140. He decides that on an amicable separation, and a sufficient sum being allowed the wife and paid to her, the husband was not liable to tradesmen for articles furnished to her, though they had no notice, the reason on which the legal implication of assent is founded, viz., the moral obligation of the husband to furnish necessities for his wife, here fails. By his agreement and his faithful execution, for the one without the other will not avail, he performs the moral duty; and the presumption of law ceases with the reason which gave rise to it. The principles applicable to the whole subject are also stated clearly in *Fredd v. Eves*, 4 Harring. 385." 2d Smith's Lead. Cas. 380, 4th Am. ed., note by Wallace.

(1) The case of *Manby v. Scott*, is better reported in 2 Smith's Lead. Cas. 249, in Mr. Phillimore's translation than elsewhere, to which the reader is referred. See also *Webster v. McGinnis*, 5 Binn. 236.

(2) "If the husband turns his wife out of doors, though he advertises her, and cautions all persons not to trust her, or if he even gave particular notice to individuals not to give her credit, still he would be liable for necessities furnished to her; for the law has said, that where a man turns his wife out of doors, he sends with her credit for her reasonable expenses." Per Lord Kenyon, C. J., in *Harris v. Morris*, 4 Esp. N. P. C. 42. See also *Boulton v. Prentice*, post, 298, where the court said the husband appears to be a wrongdoer, and therefore has not a right to prohibit any person. *Twist v. Willis*, 13 Verm. 202. The husband has a right to supply his family in such reasonable measure as he may think proper, as by designating persons to furnish necessities and it be shown that a notice was published forbidding credit, and that the newspaper in which such a notice appeared was taken by such individual, an action cannot be maintained by him. *Kimball v. Keyes*, 11 Wend. 33.

which cases he gives the wife a general credit.(1) This principle which tends to procure credit to the wife for necessities suitable to the degree and estate of her husband, is anxiously adopted by the law on every possible occasion; and although in conformity with the ancient rule respecting dower, it has been decided, that where the wife elopes with an adulterer, the husband's assent to her contracts during the term of elopement cannot be implied; yet by analogy to the same

(1) If husband and wife separate by consent, and the husband allows her no separate maintenance, he is liable for necessities furnished her, suitable to his condition in life. *Lockwood v. Thomas*, 12 Johns. Rep. 248. In this case a ground of defence was, that the wife had separate property of her own. *Quære*, if the property had been sufficient for her support, would it have been a good defence?

Where a husband deserted his wife and children, and left her keeping a boarding-house, without furnishing the means for her support, it was held that he was liable for her contracts made in the course of such business, including the rent of such house. *Rotch v. Miles*, 2 Conn. Rep. 638. The husband is liable for necessities furnished to his wife, suitable to her condition, though she be living apart by agreement, if she have offered to return and he refuses to receive her, and has furnished no support to her. *Cunningham v. Irwin*, 7 S. & R. 247. He is not excused though she has filed a libel against him for divorce. *Ib.* The husband is bound in such a case to support his wife entirely, or pay those who do. *Ib.* Even where a husband and wife separate without any provision being made for her maintenance, the husband is liable for necessities furnished her, suitable to his condition in life. *Lockwood v. Thomas*, 12 Johns. 248. If, however, husband and wife part by consent, and the husband secures to her a separate maintenance, suitable to his condition in life, and pays it according to agreement, he is not liable for articles furnished to his wife, not even for necessities; and the general reputation of the separation will be sufficient. *Baker v. Barney*, 8 Johns. 72; *Fenner v. Lewis*, 10 Id. 38.

If a husband, living in a state of separation from his wife, suffers his children to reside with the mother, he is liable for necessities furnished them, and she is considered as his agent to contract for this purpose. *Rumney v. Keyes*, 7 N. Hamp. 571. Where a wife, living separate from her husband, had become poor and unable to maintain herself, and was assisted by a town, it was held, that an action would lie at common law in behalf of the town, to recover of the husband the amount of the expenditures incurred on her account. *Ib.*

The husband is liable for necessities furnished the wife on his credit while they live apart as well as when they cohabit, especially if they live apart by his consent. *Frost v. Willis*, 13 Verm. 202. The question as to the necessities of the wife, from which the assent and consequent liability of the husband may be inferred, is a matter of relative fact depending upon the situation of the parties as connected with their treatment of each other. *Shelton v. Hoadly*, 15 Conn. 535. Thus it has been held, that where a husband has caused a separation from his wife, in order to hold him liable for necessities supplied to her, it must be shown that he turned her away without cause. *Walker v. Simpson*, 7 Watts & Serg. 83.

The husband is bound for the contracts of his wife, during cohabitation, for necessities suitable to his degree and station in life, without proof of assent on his part that she should make such purchase. *Hughes v. Chadwick*, 6 Ala. 651. If the wife abandon her husband without just cause, the husband cannot be made liable for necessities furnished her by a third person. *Brown v. Patton*, 3 Humph. 135. Where a wife is driven from the home of her husband, and afterwards becomes chargeable as a pauper, the husband is liable for her support to the town or county making the advances. *Howard v. Whetstone Township*, 10 Ohio, 365.

But where a husband turns away his wife for the cause of her adultery, he is not liable on her contracts made with persons having notice that he has discarded her. *Hunter v. Boucher*, 3 Pick. 289. Whether the want of such notice or a divorce refused on the ground of like criminality on the part of the husband would make any difference, *quære*. *Ib.* If a wife elopes from her husband, though not with an adulterer, the husband is not liable for any of her contracts, though the person who gave her credit for necessities had no notice of the elopment. *McCutchen v. McGahay*, 11 Johns. 281. But if she offers to return and the husband refuses to receive her, his liability upon her contract for necessities is revived from that time, notwithstanding a general notice not to trust her. *Ib.*

rule,(n) as soon as he receives her again, the presumption of law revives, and attaches upon the contracts made by her after the reconciliation.(1) But, 1st, as cohabitation is evidence only of the husband's assent,(o) in a special verdict, the assent ought to be found; and 2dly, as cohabitation is *presumptive* evidence only of such assent, it may be rebutted by contrary evidence. In like manner,(p) evidence that the articles purchased were consumed in the family of the husband, is only presumptive and not conclusive evidence of the husband's assent.

Having thus laid down the general positions respecting contracts made by the wife, I shall proceed to establish them by authorities, premising, that the relation of husband and wife is, in respect of the wife's contracts binding the husband, analogous to the relation of master and servant. Indeed, in contemplation of law, the wife is the servant of the husband. In F. N. B. 120 G. it is thus laid down: A man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority unto his bailiff or servant to buy and sell for him; *and so for the contract of the wife, if he give such authority to his wife, otherwise not.*(2) From this passage it appears, that the husband is not liable to his wife's contracts, unless he has given authority or assent; it is incumbent, therefore, on a creditor who brings an action against a husband upon a contract made by his wife, to show that the husband has given such assent, or to lay before a jury such circumstances as will enable them to presume that such an assent has been given;(q) and, in the latter case, if such presumption is not rebutted by contrary evidence, the jury may find against the husband, but not otherwise: for the wife has not any power originally to charge the husband,(r) but is absolutely under his power and government, and must be content with what the husband provides; and if he does not provide necessaries for her, her only remedy is in the spiritual court. A person who contracts with the ordinary agent, contracts with one capable of contracting in his own name; but he who contracts with a married woman, knows that she is in general incapable of [*293] making any contract *by which she is personally bound.(s)

In an action on the case for goods sold and delivered,(t) the evidence to charge the defendant was, that the defendant's wife bought the goods to make her clothes, and that they cohabited. On the other side it was proved, that she was not in any want of clothes when she purchased these; and that the defendant, the last time he paid the plaintiff, warned the plaintiff's servant not to trust her any more, and to give his master notice of it. *Holt, C. J.*, said, that during cohabi-

(n) Per Lord *Kenyon*, C. J., 4 Esp. N. P. C. 42.

(o) *Manby v. Scott*, 1 Bac. Abr. 296.

(p) 1 Sid. 121, 126, S. C.

(q) 1 Sid. 127.

(r) Per *Holt*, C. J., in *Etherington v. Parrot*, Lord Raym. 1006.

(s) Per *Alderson*, B., delivering judgment of court in *Smout v. Ilbery*, 10 M. & W. 11.

(t) *Etherington v. Parrot*, Salk. 118, and Raym. 1006. This case was agreed, per Cur. to be good law in *Boulton v. Prentice*, M. T. 18 Geo. II., Ford's MSS. post, p. 298.

(1) See *supra*, 292, note 1.

(2) See *supra*, 291, note 1.

tation the husband shall answer all contracts of the wife for necessities, for his assent shall be presumed to all such contracts upon the account of cohabiting, unless the contrary appear. But if the contrary appear, as by warning in this case, there is not any room for such presumption; and he held, that the notice to the servant usually employed by the plaintiff in his trade was sufficient notice to the master. When the wife is not living with her husband, there is no presumption^(u) that she has authority to bind him even for necessities suitable to her degree in life; it is for the plaintiff to show that, under the circumstances of the separation, or from the conduct of the husband, she had such authority.

Where a husband, not separated from his wife, makes an allowance for the supply of herself and family with necessities during his temporary absence, and a tradesman with notice of this, supplies her with goods,^(x) the husband is not liable for the debt.⁽¹⁾ If the wife elope from her husband, and live in adultery, the husband cannot be charged by her contracts. In an action for meat, &c., provided for defendant's wife,^(y) the defendant proved, that she went away from him with an adulterer: *Raymond*, C. J., held, that the husband should not be charged, though the plaintiff had not any notice: and he said, *Holt*, C. J., always ruled it so. And although the husband has been the aggressor, by living in adultery with another woman, and although he turned his wife out of doors at the time when there was not any imputation on her conduct, yet if she afterwards commit adultery, the husband is not bound to receive or support her after that time, nor is he liable for necessities, which may have been provided for her after that time.^(z) So where the husband turns his wife out of doors, on account of her having committed adultery under his roof,^(a) he is not liable for necessities furnished to her after the expulsion.⁽²⁾ So if a woman elopes from her husband, though she does not go away with an *adulterer, or in an adulterous manner, [*294] the tradesman trusts her at his peril, and the husband is

(u) Per *Abbott*, C. J., in *Mainwaring v. Leslie*, M. & Malk. N. P. C. 18. See also *Clifford v. Laton*, Ib. 101.

(x) *Holt v. Brien*, 4 B. & A. 252.

(y) *Morris v. Martin*, Str. 647. See also *Mainwaring v. Sands*, Str. 706, S. P.

(z) *Govier v. Hancock*, 6 T. R. 603.

(a) *Ham v. Toovey*, Middlesex Sittings, June 24, 47 Geo. III. C. B. Sp. J., Sir James Mansfield, C. J., MSS.

(1) See 2 Smith's Lead. Cas. 286, and cases there cited.

(2) S. P. *Hunter v. Boucher*, 3 Pick. 289. Whether the rule would be the same if the husband had been refused a divorce on the ground of recrimination was not determined. If a husband and wife part by consent, and the husband secures to her a separate maintenance suitable to his condition in life, and pays it according to agreement, he is not liable for articles furnished to his wife; not even for necessities. And the general reputation of the separation will be sufficient. But where the agreement on the part of the husband to pay a certain sum to his wife, or a separate maintenance, was not reduced to writing, and no evidence of any payment having been made by him to her, he was held liable for goods furnished to his wife, during the separation. *Baker v. Barney*, 8 Johns. 72. Where a sufficient amount is not provided to supply the wife with necessities, the husband is liable for necessities suitable to his rank and circumstances. *Lockwood v. Thomas*, 12 Johns. 248. See note 1, *supra*, 292.

not bound.(b) A person cannot recover against a husband for the price of goods furnished to his wife, when she is living separate from her husband against his wish and contrary to his intreaties, and when he was willing to have received and provided for her in his own house.(c) If the wife, with the consent of her husband, lives apart from him, and has a separate maintenance, and contracts debts for necessities during the separation, the law will presume that she is trusted on her own credit, although the tradesman had not any notice of the separation at the time of the contract; if it were the general reputation of the place where the husband lived, that he and his wife were living apart.(1) The plaintiff brought an action against the defendant,(d) a clergyman, who resided in the country, for medicines provided for the wife of the defendant during her residence in London. It appeared, that the defendant and his wife, having disagreed, had separated by consent for five years, and that upon the separation, the defendant had signed an agreement with certain trustees, by which he obliged himself to allow his wife twenty pounds a year, which he had done accordingly. The plaintiff did not know at the time when he furnished the wife with the medicines, that she was a married woman. It was ruled by *Holt*, C. J., that the defendant was not liable; for though the plaintiff had not any personal notice of the separation, and though it was not the general reputation in London where the plaintiff lived, that the defendant and his wife were separated, yet, since it was the general reputation in the place where the defendant lived, and that for five years past, it was enough to prevent the wife from charging the husband, even for necessities: plaintiff nonsuited. "If the husband gives express notice to a tradesman not to trust his wife, he shall not be charged; and if a tradesman has notice of a separate maintenance being allowed to his wife, that, according to *Holt*, C. J., shall be notice of dissent on the part of the husband, and he shall not be charged; but where the demand is for necessities, it is incumbent on the husband to show that the tradesman had notice of the separate maintenance." Per Lord *Eldon*, C. J., in *Rawlyns v. Vandyke*, 3 Esp. N. P. C. 250. But see *Mizen v. Pick*, 3 M. & W. 481, in which the accuracy of the report of Lord *Eldon's* ruling, as to the necessity of notice, is doubted by *Alderson*, B.; and it was holden, that where a husband living apart from his wife, allowed and paid her a sufficient maintenance, he is not liable for necessities supplied to her, and that notice to the tradesman of that allowance is immaterial. Assumpsit for the board and lodging of

(b) *Child v. Hardyman*, Str. 875, per Lord *Raymond*, C. J.

(c) *Hindley v. Marquis of Westmeath*, 6 B. & C. 200.

(d) *Todd v. Stokes*, Lord Raym. 444, and Salk. 116.

(1) A husband separated from his wife is bound to supply her with necessities suitable to her condition in life; and his omission to do so, furnishes her with a general credit to that extent. *Kimball v. Keys*, 11 Wend. 33. But one who is forbidden to give credit to her, must show affirmatively and clearly that the husband neglected to supply her, in order to charge him. *Mott v. Comstock*, 8 Id. 544. An advertisement in a newspaper, taken by plaintiff, is evidence of notice. *Kimball v. Keys*, *supra*; *Betzhoover v. Blackstock*, 3 Watts, 20; *Frost v. Willis*, 13 Verm. 202; *Gay v. Ballore*, 4 Wend. 403; *Baker v. Barney*, 8 Johns. 72; *Lockwood v. Thomas*, 12 Johns. 248.

the plaintiff's wife: (e) plea, *non assumpsit*. Lord *Mansfield*, in his charge *to the jury, laid it down as clear law, that [*295] when husband and wife live together, the husband is answerable for all such necessities wherewith the wife may have been furnished; but that what are or are not necessities, must depend on the rank and situation of the husband. That where they live separate, the person who gives credit to the wife is to be considered as standing in her place, inasmuch as the husband is bound to maintain her; and the spiritual court, or a court of equity, will compel him to grant her an adequate alimony; but if she elope from her husband, and live in adultery; or if, upon separation, the husband agrees to make her a sufficient allowance, *and pays it*; in either of those cases the husband is not liable; because in the former case, she forfeits all title to alimony; and, in the latter, has no further demands on her husband. And as, in all cases, the creditor is to be considered as standing in the wife's place, it imports him, when the wife lives apart from her husband, to make strict inquiry as to the terms of separation; for in such cases he must trust her at his peril. In the present case, the defendant and his wife had separated, and he had agreed to make her an allowance, but had never paid it; the jury, therefore, under his lordship's directions, found a verdict for the plaintiff. N. In a similar case of *Turner and Winter*, his lordship nonsuited the plaintiff, because on separation the defendant had agreed to make an allowance to his wife, and had regularly paid it: notwithstanding the plaintiff had no notice of the transaction. But the allowance must be sufficient according to the degree and circumstances of the husband; and the adequacy of the allowance is a question of fact for the jury. (f)

A mere agreement for a separate allowance, without payment, is not sufficient to exempt the husband from this liability: (1) Husband and wife having agreed to separate, (g) a deed of separation was executed (between the husband on the first part, his wife on the second part, and a trustee, the sister of the wife, on the third part,) wherein the husband covenanted with the trustee, to pay the wife, during the separation, a weekly allowance; which she agreed to accept, in full satisfaction of her maintenance, provided that if the husband should pay any debt which his wife, during the separation and payment of the annuity, should contract, it should be lawful for him to withhold payment of the weekly allowance, until he *should be reimbursed: [*296] the wife, upon the separation, went to live with the trustee,

(e) *Ozard v. Darnford*, B. R. Middlesex Sittings after M. T. 20 G. III. MSS.

(f) *Hodgkinson v. Fletcher*, 4 Campb. 70; per Lord *Ellenborough*, C. J., *Liddlow v. Wilmot*, 2 Stark. N. P. C. 86; *Ld. Ellenborough*, C. J., *Wilson v. Smyth*, Middlesex Sittings after M. T. 1 Will. IV. S. P. per *Tenterden*, C. J., and afterwards by court, 1 B. & Ad. 801, where alimony had been regularly paid after termination of suit in Ecclesiastical Court, but pending the period during which the debts had been contracted; and it was proved, that if the husband had omitted to pay, a new decree could, by a short process, have been obtained from the Ecclesiastical Court, but that such application was not usually made, unless payment of the alimony were discontinued.

(g) *Nurse v. Craig*, 2 Bos. & Pul. N. R. 148.

(1) See *Baker v. Barney*, 8 Johns. Rep. 72; *Shelthar v. Gregory*, 2 Wendell, 422.

who supplied her with necessaries; the husband having failed to pay the weekly allowance, the trustees brought an action of *indebitatus assumpsit* against him for the amount of the necessaries: it was holden by *Chambre, Rooke, and Heath, Js.*, that, although the trustee had another remedy, and might have brought an action on the deed, yet *assumpsit* was maintainable, on the ground that there was a common law obligation on the husband to provide necessaries for his wife, although she lived apart from him; that where the law imposed a duty, it raised a promise on the part of the person on whom it was imposed to discharge it; and that the mere covenant, *without payment*, was not sufficient to exempt the husband from this liability. Sir J. *Mansfield, C. J.*, expressed an elaborate opinion to the contrary, observing, that a general provision for the separate maintenance of the wife, whether the husband paid it or not, deprived the wife of the advantage of the common law, and prevented the husband from being sued either in *assumpsit* or debt for necessaries furnished to his wife. But if the separate allowance be paid, it is sufficient, although the separation be not by deed or writing; ^(h) and the husband is not liable, although no part of the separate maintenance be supplied by him, ⁽ⁱ⁾ provided it is sufficient. The husband, however, cannot avail himself of the wife's receipts as evidence of the payment of the allowance. ^(k) A divorce *a mensâ et thoro* for adultery on the part of the husband with a decree for alimony to the wife, will not discharge the husband from his liability to pay for necessaries supplied to the wife, if the alimony be not paid. ^(l)

By deed of three parts, between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, ⁽¹⁾ the husband covenanted to pay an annuity to the wife, during so much of her life as he should live, and the trustee covenanted to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, and thirds. It was holden, ^(m) that this deed was legal and binding, ⁽²⁾ and that a plea by the husband, that the wife sued in the Ecclesiastical Court for restitution of conjugal rights, and that he put in an allegation and exhibits, charging her with adultery, and that a decree of divorce, *a mensâ et thoro*, was in that cause pronounced, was not a sufficient answer to an action, by the trustee, for arrears of the annuity. "There are some deeds of sepa-

(h) *Hodgkinson v. Fletcher*, 4 Campb. 70, per Lord *Ellenborough, C. J.*

(i) Per Lord *Tenterden, C. J.*, *Clifford v. Laton, M. & Malk.* 101.

(k) *S. C.*

(l) *Hunt v. De Blaquiére*, 5 Bing. 550.

(m) *Jee v. Thurlow*, 2 B. & C. 547; *Baynon v. Batley*, 8 Bingh. 256. S. P. See also *Wilson v. Mushett*, 3 B. & Ad. 743.

(1) An agreement to live separate, and a bond by husband to secure the wife's maintenance, are null whenever the wife returns and lives with him, and a subsequent abandonment by the wife does not revive either. *Shelthar v. Gregory*, 2 Wend. 422.

(2) Deed of separation by which husband binds himself to pay a certain sum annually for four years to trustees for the wife's maintenance, reserving a right to deduct such debts as he might be compelled to pay for her, is good in law. *Reed v. Beagely*, 1 Blackford, 97; *Bettle v. Wilson*, 14 Ohio, 257; *Mansfield v. Mansfield*, Wright, 284; *Nichols v. Palmer*, 5 Day, 47. But where there is no third party, no suit lies at law or in equity. *Simpson v. Simpson*, 4 Dana's Rep. 140.

ration which are legal; some of which are illegal; illegality is not to be presumed, and *unless we necessarily see that a [*297] transaction is illegal, we are not to put an unfavorable construction upon it.”(n)

“If a husband improperly compels his wife to leave his house,(1) he thereby gives her power to pledge his credit for necessities; but if she goes away without his consent, and against his will, I am of opinion that a tradesman giving her credit, does so at his peril. If, under such circumstances, a deed is executed by the husband, securing a provision to the wife, I think that he cannot be sued by any person who may supply goods to his wife, but he is only liable to the trustees for the money which he has covenanted to pay the trustees, which was the form of action adopted in *Jee v. Thurlow*.” Per *Bayley, J.*, in *Hindley v. Marquis of Westmeath*, 6 B. & C. 213: There a deed was made between husband and wife, and a trustee, providing a separate maintenance for the wife, and purporting to be made in contemplation of an immediate separation, but, in fact, no separation then took place, nor was intended to take place at that time: it was holden that the deed was void. Where, in pursuance of articles of separation, a wife quits her husband’s house against his wishes, and continues to live apart from him, although he is willing and wishes to receive her back, and provide for her in his own house; *semble*, that he is not liable to be sued by tradesmen for debts contracted by her, even for necessities.(o) If a husband, living separate from his wife, and allowing her a maintenance, uses such violence towards her that she is obliged to exhibit articles of the peace against him, she may employ an attorney for that purpose at his expense.(p) Where the wife, whilst living apart and in adultery, acquired and invested money in trust for herself and her illegitimate issue; she was afterwards convicted of murder, and executed, and the trustees expended a considerable part of the fund in her defence; it was holden, that the husband was entitled to such funds, and that the trustees could not retain out of the funds the sums so expended, and must bear their costs occasioned by the interpleading rule to try the right.(q)

A husband, who allowed his wife a separate maintenance, promised to pay the amount of a debt, which she had contracted during the separation; it was holden,(r) that he was bound by such promise, and that he could not recede from it, on the ground that the plaintiff knew that he allowed his wife a separate maintenance, and that he had made the promise under a misapprehension of law.

(n) Per *Bosanquet, J.*, *Waite v. Jones*, 1 Bing. N. C. 684, 5; 1 Scott, 730, affirmed on error in Exch. Ch., Lords *Denman* and *Abinger* dissenting, 5 Bingh. N. C. 341; 7 Scott, 317, affirmed in House of Lords, 4 M. & Gr. 1104; 5 Scott’s N. R. 951; and see *Clough v. Lambert*, 10 Sim. 174; *Frampton v. Frampton*, 4 Beav. 287. See further on this subject, *post*, tit. “Covenant,” III. 4.

(o) *Hindley v. Marquis of Westmeath*, 6 B. & C. 200.

(p) *Turner v. Rookes*, 10 A. & E. 47.

(q) *Agar v. Blethyn*, 2 Cr. M. & R. 699; 1 Tyrw. & Gr. 160.

(r) *Hornbuckle v. Hornbury*, 2 Stark. 177, Lord *Ellenborough*, C. J.

(1) See *ante*, p. 292, note 1, and cases there cited. A husband who abuses his wife cannot maintain an action against her father who receives and protects her. *Rabe v. Hanna*, 5 Ohio, 531.

[*298] *Where a husband, by bringing another woman under his roof, renders his house unfit for the residence of his wife, who thereupon removes and lives apart from him, the husband is bound to provide the wife with necessaries; *e. g.* medicines in sickness,^(s) during the separation. So where a wife leaves her husband under such apprehension of personal violence, as a jury shall think to have been reasonable, her husband^(t) is liable for necessaries. If the husband causelessly turns^(u) away his wife, or if the wife, having been absent from home, returns, and he shuts his doors against her,^(x) and afterwards she contracts debts for necessaries, the husband will be liable; for he sends with her credit for her reasonable expenses, and if the wife be turned out of doors with violence, she carries along with her credit for whatever her preservation and safety require; *e. g.* the charge of an attorney's bill^(y) for assisting her to exhibit articles of the peace against her husband. But if the husband turns away his wife on account of her having committed adultery, then he will not be liable.^(z)

The following note of *Boulton v. Prentice*, which was extracted by the late Mr. Ford from his father's MSS. at the request of the compiler, may be acceptable to the reader. Assumpsit for goods sold and delivered to defendant's wife.^(a) Verdict for plaintiff. On motion for a new trial, it appeared that defendant and his wife had formerly lodged at plaintiff's house, during which time the defendant had given plaintiff express notice not to trust defendant's wife. Afterwards defendant and his wife went to lodge at another place, where defendant used his wife ill, after which they separated, and defendant refused to receive her again;⁽¹⁾ she desired him to maintain her, and offered to return and cohabit with him, which he refused, and struck her; and declared that if any person trusted her, or gave her credit, he would not pay

[*299] them; she had not any *clothes, and was wholly destitute of necessaries. The goods furnished to her by plaintiff were necessaries, and suitable to the condition of the wife. On the part of the defendant it was proved, that defendant's wife used to pawn her clothes, and was addicted to drinking; that plaintiff had assisted her

^(s) *Aldis v. Chapman*, Middx. Sittings, after Trin. T. 50 Geo. III. Lord *Ellenborough*, C. J.

^(t) *Houlston v. Smyth*, 2 C. & P. 22; 3 Bingham 127.

^(u) *Lungworthy v. Hockmore*, per *Holt*, C. J., Lord Raym. 444; and per *Holt*, C. J., in *Etherington v. Parrott*, Salk. 118.

^(x) *Thompson v. Hervey*, 4 Burr. 2177.

^(y) *Shepherd, Gent., &c., v. Mackoul*, 3 Campb. 326, cited in *Grindell v. Godmond*, 5 A. & E. 755; 1 Nev. & P. 168, S. C.

^(z) *Ham v. Toovey*, *ante*. p. 293.

^(a) *Boulton v. Prentice*, from Mr. Ford's MSS. Note, S. C. shortly reported in Str. 1214.

(1) "My conception of the law is this: that if a man will not receive his wife into his house, he turns her out of doors; and if he does so, he sends with his credit for her reasonable expenses." Per Lord *Eldon*, C. J., in *Rawlins v. Vandyke*, 3 Esp. N. P. C. 251.

"Where a wife's situation in her husband's house is rendered unsafe from his cruelty or ill treatment, I shall rule it to be equivalent to a turning her out of the house, and that the husband shall be liable for necessaries furnished her under those circumstances." Per Lord *Kenyon*, C. J., in *Hodges v. Hodges*, 1 Esp. N. P. C. 441.

in pawning her watch ; and that defendant, a year before they parted, had expressly forbidden plaintiff from trusting defendant's wife. The foundation of moving for a new trial was, that the verdict was contrary to law, as the credit given to the wife is in law grounded on the supposed assent of the husband, which assent cannot be supposed where, as in this case, there is an express prohibition. But it was answered, and so resolved by the court, that, although the prohibition took effect and continued in force during the cohabitation, yet such prohibition could not, after the cohabitation ceased, either extinguish or lessen the credit to which the wife was by law entitled, after the husband had turned her away and refused to maintain her : for the husband, by such conduct, gave his wife such a general credit as amounted to a revocation of the prohibition. If the husband, in a case of this kind, could prohibit one person from trusting his wife, he might *pari ratione* prohibit many ; and this might be extended so far as to deprive the wife from obtaining any credit whatsoever, so that particular prohibitions might amount to a total prohibition. If a wife leaves her husband, he is not in that case answerable for her contracts ; it is the cohabitation which is considered as the evidence of the husband's assent to the contract made by his wife for necessities ; but if the husband during the cohabitation declares his dissent, by forbidding any person to trust his wife, all persons who have notice of such dissent trust the wife at their peril. The husband is only liable on account of the implied assent to the contracts of the wife, of which assent the cohabitation afterwards induces a presumption, and when he declares the contrary, there is not any longer room for such presumption. But if a husband turns away his wife, he gives her credit wherever she goes, and must pay for necessities which have been provided for her. Another leading case on this subject is the case of *Manby v. Scott* : (b) there the wife of the defendant went away from him against his will, and continued absent many years. Afterwards, and before action brought, or the sale of the goods, she desired to cohabit with her husband, which he refused. During the separation, the husband, who did not allow the wife any maintenance, expressly forbade the plaintiff to deliver any goods to his wife, notwithstanding which, the plaintiff sold to the wife silks and velvets, and then brought an action against the husband for the value of the goods. At the trial, the jury found that the goods *were necessary for her, and suitable to the [*300 degree of the husband. After three arguments in the Court of King's Bench, the judges were divided, whereupon the case was adjourned into the Exchequer Chamber, where nine of the judges (among whom was *Hale*, Chief Baron,)(1) were of opinion that the husband was not chargeable.(2)

(b) *Manby v. Scott*, 1 Lev. 4 ; and 1 Sid. 109, S. C. printed from a copy of Sir Orlando Bridgman's MS. forming part of the late Mr. Hargrave's MSS. in the British Museum, and published by S. Bannister, in 8vo. 1823. The judgment, as given by Sir O. Bridgman, will be found in p. 229.

(1) See *Hale's* argument, Bac. Abr. Baron and Feme (H.) *Twisden*, J., having de-

(2) For note (2), see next page.

What is necessary, and what is suitable to the degree of the husband, is to be tried by the jury. The rule as to necessities does not include a counterpart of a deed of separation.(c) It is also a question of fact, whether a tradesman who furnishes goods to a wife gives credit to her or her husband: if the credit is given to her, the husband is not liable, though the wife lives with him, and he sees her in possession of some of the goods.(d) In *Baker v. Baber*, MSS. Gundry, J. F. 4, *Keniston v. Goodall* was cited, where *Holt*, C. J., held husband not liable for costly apparel furnished to his wife and worn by her in a clandestine manner without the privity of her husband. In assumpsit for goods sold, it appeared that the plaintiff, a jeweller, in the course of two months, delivered articles of jewelry to the wife of the defendant, amounting in value to 83*l*. It appeared that the defendant was a certificated special pleader, and living in a ready furnished house, of which the annual rent was 200*l*; that he kept no man servant; that his wife's fortune upon her marriage was less than 4000*l*.; that she had, at the time of her marriage, jewelry suitable to her condition, and that she had never worn in her husband's presence, any articles furnished her by the plaintiff: it appeared also that the plaintiff, when he went to the defendant's house to ask for payment, always inquired for the wife and not for the defendant. It was holden,(e) that the goods so furnished, were not necessities, and that, as there was no evidence to go to the jury of any assent of the husband to the contract made by his wife, the action could not be maintained. See also *Seaton v. Benedict*, 5 Bingh. 28, where the husband was living with his wife and supplied her with necessities suitable to her degree; it was holden, [*301] that the *husband was not liable for debts contracted by the wife for expensive articles of dress without the husband's knowledge.(1)

The defendant treated his wife with great cruelty, and took another woman into the house, with whom he cohabited; he confined his wife in her chamber, under pretence of insanity; she escaped, and the plaintiff brought an action against the defendant for the value of necessities furnished to the wife after her departure; *Lawrence*, J., thought that, as the wife might have had necessities if she had remained, the action

(c) *Ladd v. Lynn*, 2 M. & W. 265.
(e) *Montague v. Benedict*, 3 B. C. 631.

(d) *Bentley v. Griffin*, 5 Taunt. 356.

livered an opinion in the King's Bench in favour of the plaintiff, changed it afterwards, and agreed in opinion with the majority of the judges in the Exchequer Chamber. See 1 Sidf. 119. The argument of Mr. J. *Hyde*, will be found at great length in 1 Mod. 124. It will be remarked, that in this case an express prohibition had been given to the plaintiff not to trust the wife; but it was agreed by all the judges, that if the prohibition had been general, it would have been void. 1 Sidf. 127. In like manner, it is incumbent on persons dissolving a partnership to give *express* notice of such dissolution to all persons with whom they have had dealings in partnership. Peake's N. P. C. 155.

(2) If the wife leave her husband, although voluntarily and without sufficient cause, and afterwards offers to return to him, his liability for necessities furnished to her, is thereby revived. *McGahay v. Williams*, 12 Johns. Rep. 293; *S. P. Cunningham v. Irwin*, 7 S. & R. 247.

(1) See 2 Smith's Lead. Cases, 279, and notes.

could not be supported. And *Mansfield*, C. J., thought that nothing short of actual terror and violence would support the action.(f)(1)

If a man cohabits with a woman,(g) to whom he is not married, and permits her to assume his name, and appear to the world as his wife, and in that character to contract debts for necessities, he will become liable, although the creditor be acquainted with her real situation; for here a like assent will be implied, as in the case of husband and wife.(2) But this rule only holds during cohabitation; for when they have separated,(h) the man is no longer liable. A man who had for some years cohabited with a woman that passed for his wife, went abroad, leaving her and his family at his residence in this country, and died abroad; it was holden(i) by three judges, *absente Tenterden*, C. J., that the executor was not bound to pay for goods which had been supplied to her after the man's death, although before information of his death had been received. Where a man, who had been in the habit of dealing with the plaintiff for meat supplied to his house, went abroad, leaving his wife and family resident in this country, and died abroad;(k) it was holden, that the wife was not liable for goods supplied to her after his death, but before information of his death had been received. *Alderson*, B., delivering judgment of court, observed, that here the agent had full authority to contract, and did contract in the name of the principal: there was no ground for saying that in representing his authority as continuing, she did any wrong—there was not any *mala fides* on her part, or want of due diligence in acquiring knowledge of the revocation—no omission to state any fact within her knowledge relating to it, and the revocation was by the act of God. The continuance of the life of the principal was a fact equally within the knowledge of both contracting parties. It had been, indeed, decided in *Blades v. Free*,(l) that in such a case the executors of the husband were not liable; and consequently no one would be liable. That might be so,—yet it was only, as it was in the ordinary case of a wife, who made a contract, in her husband's lifetime, for which the *husband [*302] was not liable. There, as here, no one was liable. In an action for the use and occupation of apartments by the defendant's wife,(m) it appeared that the apartments had been occupied by a lady, who went by the defendant's name, and who had actually been married

(f) *Horwood v. Heffer*, 3 Taunt. 421. But see *Houlston v. Smyth*, 3 Bingh. 127, *ante*, p. 298.

(g) *Watson v. Threlkeld*, 2 Esp. N. P. C. 637, *Kenyon*, C. J.

(h) *Munroe v. De Chemant*, 4 Campb. 215.

(i) *Blades v. Free, Executor of Clark*, 9 B. & C. 167.

(k) *Smout v. Ilbery*, 10 M. & W. 1.

(l) *Supra*, and 9 B. & C. 167.

(m) *Robinson v. Nahon*, 1 Camp. 245.

(1) In *Houlston v. Smith*, 2 Car. & Payne, 22, and S. C. 3 Bingh. 127, the Court of Common Pleas repudiated with great earnestness the doctrines advanced in the case here quoted; *Best*, C. J., saying that the case was not law, "it being against the first principles of morality:" and *Park*, J., added, "With respect to the decision in *Horwood v. Heffer*, I am surprised at the language of that case. Taken to its full extent, it is abhorrent to every feeling of a man, and every duty of a moralist and a Christian."

(2) See *Bishop on Marr. & Div.* § 651.

to him. The defence attempted to be set up was, that the defendant had a former wife then and still living. But Lord *Ellenborough*, C. J., said, that there was not any evidence to fix the plaintiff with a knowledge of the celebration of the first marriage, and that the defendant was estopped to set up bigamy as a bar to the action. He had given the woman who lodged with the plaintiff, every appearance of being his wife. By his misconduct in marrying a second wife, whilst his first was still alive, he had done what he could to confer the rights of marriage upon both, and had incurred a civil as well as a criminal responsibility.

3. *In respect of Children of the Wife by a former Husband.*—If a man marries a woman having children by a former husband, he is not bound⁽ⁿ⁾ by the act of marriage to maintain such children ;^(o)(1) but if he holds them out to the world as part of his family, he will be considered as standing *in loco parentis*, and liable even on a contract made by his wife during his absence abroad, for the maintenance and education of such children.^(p) Maintenance by the second husband of the children of wife by former husband, is a good consideration for a promise by such children when they come of age, to repay the expense of their maintenance. *Cooper v. Martin*, 4 East, 76. See *Rawlin v. Vandyke*, 3 Esp. N. P. C. 252, Lord *Eldon's* opinion as to how far a father is liable for necessities furnished to his children, living with the mother apart from the father. The father of a bastard child is liable for its nursing and board, if he adopts it as his own, although an order of filiation has not been made on him. *Heskett v. Gowing*, 5 Esp. N. P. C. 131.

II. *In what Cases a Feme Covert may be considered as a Feme Sole.*⁽²⁾

It is now clearly established, notwithstanding former decisions^(q) to

(n) But see stat. 4 & 5 Will. IV. c. 76, s. 57. Poor Law Act.

(o) *Tubb v. Harrison*, 4 T. R. 118, recognized in *Cooper v. Martin*, 4 East, 76.

(p) *Stone v. Carr*, 3 Esp. N. P. C. 1, *Kenyon*, C. J.

(q) *Ringstead v. Lady Lanesborough*, 3 Doug. 197; *Barwell v. Brooks*, 3 Doug. 371; and *Corbett v. Poelnitz*, 1 T. R. 5.

(1) See *S. P. Gay v. Ballou*, 4 Wend. 403.

(2) A wife may become a sole dealer by the privity and acquiescence of her husband, although there be no deed from him. *Mecgrath v. Robertson's Adm.*, 1 Dessaus. 445. A *feme covert* who keeps a shop and carries on trade herself, without her husband intermeddling, is to be considered as a *feme sole* trader, and as such liable. *Newbiggin v. Pillans*, 2 Day, 162. A married woman, acting as a *feme sole* trader, may enter into a bond, provided it be such as relates to or is in some manner connected with her business as a trader. *McDowell v. Wood*, 2 Nott & McC. 242; *Burke v. Winkle*, 2 Serg. & R. 289. No temporary absence of a husband, or separate maintenance or living apart of the wife, will enable the latter to sue or subject her to be sued alone. *Robinson v. Reynolds*, 1 Aik. 174. But where the husband is accounted in law *civiliter mortuus*, as where he is exiled, banished for life, or has abjured the realm, the wife may sue or be sued as a *feme sole*. So, too, where the husband, being an alien, has never resided in the government. *Ib.*; *Wright v. Wright*, 2 Dessaus. 244; *Tronton v. Hill*, 2 Harr. 406. The law seems to be settled, that when the wife is left by the husband, has traded as a *feme sole*,

the contrary, that a feme covert cannot bring an action or be impleaded as a feme sole, while the relation of marriage subsists, and she and her

and has obtained credit as such, she ought to be liable for her debts; and the law is the same whether the husband is banished for his crimes or has voluntarily abandoned the wife. *Rhea and al. v. Rheaner*, 1 Peters, 105; *King v. Paddack*, 18 Johns. 141. Property acquired by her during such desertion, becomes her separate estate, which she may dispose of by will or otherwise. *Starrett v. Wynn*, 17 S. & R. 130. A deed, however, executed by a married woman, of real property, acquired by her while a *feme sole* trader while she was abandoned by her husband, is void. *Rhea v. Rheaner*, *supra*. A *feme covert* whose husband has been absent six or seven years, and who in the meantime has carried on business as a *feme sole*, is still a *feme covert* in legal estimation. *Commonwealth v. Oullins*, 1 Mass. 116.

Where the husband was a foreigner, who had never been in the United States, and had deserted her, and she had been domiciled in Massachusetts for several years, it was held, that she was competent to sue and be sued as a *feme sole*. *Gregory v. Paul*, 15 Mass. 31; *Robinson v. Reynolds*, 1 Aik. 124.

"At common law a wife could not take or enjoy either real or personal estate separate from or independent of her husband. But by the Penn. statute of 1848, it is provided that every species and description of property, real or personal, which may be owned by or belong to any single woman, shall continue to be the property of such woman as fully after her marriage as before; and all such property, of whatever name or kind, which shall accrue to any married woman during coverture, by will, descent, deed of conveyance, or otherwise, shall be owned, used, and enjoyed by such married woman as her own separate property.

"Of property thus acquired by a married woman, possession is no test of title. She cannot have or use her property exclusively unless she live apart from her husband; and it was not the intention of the legislature to compel a separation in order to protect the wife's rights. But it is obvious that the statute would be the means of protecting and covering the grossest frauds, if the mere fact of the legal title being vested in a married woman were sufficient to protect it from her husband's creditors, or to throw on them the burden of proving that it was purchased with his money. Such a construction, however, has not been placed upon the act. To bring the property of a married woman under its protection, it is made necessary by the letter as well as the spirit of the statute, to prove that she owns it. She must identify it as property which was hers before marriage, or show how she came by it afterwards. Evidence that she purchased it amounts to nothing, unless accompanied by clear and full proof that she paid for it with her separate funds. In the absence of such proof the presumption is a violent one, that her husband furnished the means of payment. And this rule applies to purchase of real estate as well as personal. No agreement of the husband and wife about the property of either, whether it be made in writing or by parol, can avail against creditors, without proof which will render the fact indubitable, that it was hers independent of all agreements between themselves.

"In regard to the wife's power of disposition over her separate property, we have seen that the English rule gives her the entire control of it, so far as her power has not been restricted by the terms of the settlement; but that the contrary doctrine has been established in Pennsylvania, where it is held, that she has no power which is not given to her, either expressly or by necessary implication. But the act of 1848 has worked a radical and thorough change in the condition of a married woman. She is now considered as a *feme sole* in regard to her separate estate, and may dispose of it by will or otherwise. The statute does not, however, enable her to convey by deed, to which her husband is not a party; and the salutary rule is still in force which forbids any one from taking title to the wife's property, unless it be conveyed by a deed made not only with her own free consent, but under the protection and by the advice of her husband, and if she dispose of her property by will, the statute requires that it be executed in the presence of two or more witnesses, neither of whom shall be her husband.

"Subject to these restrictions, her power of disposition is unaffected by the coverture, and unless limited by the terms of the settlement, she may dispose of her separate estate in the same manner as a *feme sole*. She may execute a power of appointment for the benefit of her husband; for being considered a *feme sole* to the full extent of her power over the property, she must of course be permitted to judge for herself as to the particular use she shall make of it in order most effectually to promote her own comfort and happiness. If she have no trustee of her separate estate, the Pennsylvania act of 25th of April, 1850, authorizes her to apply by petition to the Court of Common Pleas of the

husband are living in this kingdom, notwithstanding she lives separately from her husband, and has a separate maintenance secured to her by deed. This point was solemnly determined, (after two arguments before the judges in the Exchequer Chamber,) in *Marshall v. Rutton*, 8 T. R. 545. A woman who has even declared herself to be [*303] a feme sole, and as such has executed *deeds and maintained actions, if herself sued as a feme sole, is not thereby estopped from setting up a defence of coverture.^(r) A woman divorced *a mensâ et thoro* for adultery, and living separate from her husband, cannot be sued^(s) as a feme sole.⁽¹⁾ But the rule of law, which has considered a married woman as incapable of suing, or being sued, without her husband, admits of some modification from particular circumstances: 1. By the custom of the city of London, a feme covert being a sole trader, may sue or be sued in the city courts as a feme sole, with reference to her transactions in London: but even there the husband must be made a party to the suit for conformity. By the custom of London, "A feme sole merchant is where the feme trades by herself in one trade, in which her husband does not intermeddle, and buys and sells in that trade; then the feme shall be sued, and the husband named only for conformity; and if judgment be given against them, execution shall be against the feme only." *Langham v. Bewett*, Cro. Car. 68. "This custom is one of those customs called executory customs, the meaning of which expression is, customs united to the courts of the city of London. They are pleadable in London, and not elsewhere, except so far as they may be made use of in the superior courts by way of bar." Per Lord *Eldon*, C. J., delivering the judgment of the court in *Beard v. Webb*, in error, Exchequer Chamber, 2 Bos. & Pul. 98. The judgment here referred to is very elaborate, and contains a fund of useful information on this subject. A feme covert, sole trader in the city of London, cannot sue^(t) or be sued,^(u) in the courts at Westminster, without her husband.

2. A wife may acquire a separate character by the civil death of her husband, by exile,^(x) and formerly by profession and abjuration of the realm. See 1 Inst. 133, a, where Sir Edward Coke says, "that an abjuration, that is, a deportation forever into a foreign land, like to

(r) *Davenport v. Nelson*, 4 Campb. 26.

(s) *Lewis v. Lee*, 3 B. & C. 291.

(t) *Caudell v. Shaw*, 4 T. R. 361.

(u) *Beard v. Webb*, 2 Bos. & Pul. 93.

(x) *Belknap's case*, 2 Hen. IV. 7, a.; it appears by the Year Book, 1 Hen. IV. 1, a, that Belknap was banished to Gascony, there to remain until he attained the king's favour, which Sir E. Coke considered as a banishment forever.

county where she was domiciled at the time of her marriage, for the appointment of a trustee to the same, and the court is thereupon to appoint a trustee of the said estate, not being the husband of the petitioner. The same act enables a married woman to declare a trust in regard to her separate property in favor of any of her children." Brightly's Eq. Jur. §§ 466, 467, 468, 469, and cases therein cited.

(1) *Contra, Dean v. Richmond*, 5 Pick. 461, where it was held under the laws of Massachusetts, that a woman divorced *a mensâ*, might sue or be sued as a *feme sole* in respect to contracts subsequent to the divorce. But as to *choses in action* of the wife previous to the divorce, the husband alone has the right of suing. See also 2 Kent's Comm. 136, and cases cited in the later editions.

profession, is a civil death; and *that is the reason* that the wife may bring an action, or may be impleaded, during the natural life of her husband. And so it is, if by act of parliament the husband be attainted of treason or felony, and saving his life, is *banished forever*, as Belknap, &c., was; *this is a civil death*, and the wife may sue as a feme sole. But if the husband, by act of parliament, have judgment to be *exiled for a time*, which some call a relegation, that is not a civil death. Every person who is attainted of high treason, petit treason, or felony, is disabled to bring any action; for he is *extra legem positus*, and is accounted in law *civiliter mortuus*." 1 Inst. 130, a.

3. Where the husband has been transported for a term of years, before the expiration of which the debt was contracted, and sued *for; *Yates*, J., thought that the transportation sus- [*304] pended the disability of the wife, and that she might be sued as a feme sole.(y)(1) Lord *Eldon*,(z) commenting on this case, having said, that in the cases of abjuration, profession, &c., which amounted to a civil death, he thought he understood the situation in which the wife was placed, for the fiction of law, which considered the husband as civilly dead, put the wife in the same situation as if he were actually dead; then proceeded to observe that, "transportation for a term of years might give rise to many difficulties with respect to the enjoyment of the husband's estate, both real and personal; but, besides the difficulties which might arise during the term of transportation, another difficulty of equal importance occurred, where the wife had contracted debts after the period of her husband's transportation had elapsed, but before his actual return to this country. In the case of *Sparrow v. Carruthers*, Mr. Justice *Yates* seemed to have treated it as a material circumstance in evidence, that the time of transportation was not expired, and he did not give any opinion as to what would have been the situation of the parties if it had been expired. The court could not presume to say how Mr. Justice *Yates* would have decided, had the husband continued to reside abroad, after the period of his transportation had expired, or had only remained there to arrange his affairs, with a view of returning to this country when he had so done." Since the preceding observations were made, the following case was decided at Nisi Prius in 1801: in assumpsit for goods sold and delivered,(a) the defence was, that the plaintiff was a married woman. The plaintiff's counsel answered this case by producing the record of the husband's conviction for felony in March, 1794, and of a sentence of transportation for seven years; whereupon it was insisted, on the part of the defendant, that the sentence being for seven years, from March, 1794, that time was now expired, so that the husband was competent to sue. But Lord *Alvanley*, C. J., said, that by the record of the conviction

(y) *Sparrow v. Carruthers*, cited in *Lean v. Schutz*, 2 Bl. R. 1197, and in *Corbett v. Poelnitz*, 1 T. R. 7.

(z) *Marsh v. Hutchinson*, 2 Bos. & Pul. 231.

(a) *Carrol v. Blencow*, June 3, 1801, Sittings after East. T. C. B.; coram *Alvanley*, C. J., 4 Esp. N. P. C. 27.

(1) *Troughton v. Hill*, 2 Hayw. 406; *Wright v. Wright*, 2 Dessauss. 244.

and sentence, there was conclusive evidence to support the right of action in the plaintiff as a feme sole, and though the term of his transportation had expired, if in fact he had not returned, the right of action remained; but that, if the defendant meant to rely on the circumstance of the husband having returned, the proof of that lay on the defendant. Evidence to this effect not being offered, the plaintiff had a verdict.

4. Where the husband is an alien, who has deserted this kingdom, leaving his wife to act here as a feme sole, the wife may be charged as a feme sole for contracts made after such desertion. In *assumpsit* for goods sold and delivered, (b) the defendant pleaded [*305] *that she was covert of the Duke de Pienne. It appeared in evidence, that the duke, who was an alien, had gone abroad in the year 1793, with an intention to return in four months, but had not returned; during his absence the defendant had kept house, and paid bills on her own account and in her own name. Lord *Kenyon*, C. J., said, this case came within the principle of the common law, where the husband had abjured the realm. If the husband had been absent for some time, and then returned, and paid bills contracted by the wife in his absence, and again left the kingdom, he should hold the defendant not liable; but here was a desertion of the kingdom, and an absence for some years; he was no longer domiciled here, and, in the interval, the wife was supplied with those articles; if she was not to be held liable for debts contracted under such circumstances, she might starve. See also *Francks v. Duchess de Pienne*, 2 Esp. N. P. C. 587, to the same effect. But see *Kay v. De Pienne*, 3 Campb. 123, where Lord *Ellenborough* confines the preceding doctrine to the case, where the husband has never been in this kingdom. In *De Gaillon v. Victoire Harel L'Aigle*, 1 Bos. & Pul. 357, where the replication to a plea of a coverture was, that the husband resided abroad, (not stating him to be an alien,) and that the defendant lived separate from him in this kingdom, that she traded as a feme sole, and plaintiff did not give credit to the husband, but traded with the defendant as a feme sole, and on her credit; the court held the wife chargeable as a feme sole. But it is conceived that, since the case of *Marsh v. Hutchinson*, 2 Bos. & Pul. 226, such a replication could not be supported unless it appeared that the husband was an alien. "There is a great difference between the cases of an Englishman residing abroad, leaving his wife in this country, and of a foreigner so doing. The former may be compelled to return at any time by the king's privy seal. There is not any case in which the wife has been holden liable, the husband being an Englishman." Per *Heath*, J., in *Marsh v. Hutchinson*. See also *Farrer v. Countess of Granard*, 1 Bos. & Pul. N. R. 80, where *Heath*, J., said, the case of *De Gaillon v. L'Aigle*, proceeded much upon the ground of the defendant's husband being a foreigner. But see *Stretton v. Busnach*, 1 Bingh. N. C. 139, and *Barden v. De Keverberg*, 2 M. & W. 61.

The case of *Marsh v. Hutchinson*, was an action for goods sold and

(b) *Walford v. The Duchess de Pienne*, June 7, 1797, Middlesex Sittings, 2 Esp. N. P. C. 554.

delivered; the defence coverture. The defendant's husband was an Englishman, who about ten years before action brought, had purchased the appointment of agent for the English packets, at the Brill, in Holland, and had resided there ever since. During that period, he became possessed of madder-grounds, from the cultivation of which he derived considerable profit. On the irruption of the French into Holland, in 1795, his employment as agent having ceased, he sent the defendant, together with his family, to reside in England, but he remained in Holland to look after his madder-grounds, and with a view to recover his situation, in case *the intercourse between England [*306] and Holland should be re-established. The defendant lived at Aylsham, in Norfolk, and was there considered to be a married woman. The plaintiff had furnished her with coals, for the value of which this action was brought. It was holden, under these circumstances, that the husband's residence in Holland did not enable the wife to bind herself by her own contracts. So where to a plea of coverture(c) the plaintiff replied, that the defendant's husband "lived and *resided* in Ireland, and that the defendant lived in this kingdom separate from her husband as a single woman, and as such single woman, promised, &c.;" the replication was holden bad on general demurrer, because the terms of it were perfectly consistent with a mere temporary absence, and they might be applied to in the case of every man, who went for a short time to live in Ireland or Scotland, and whose wife in the mean time contracted debts here. So where to a plea of coverture the plaintiff replied, that before the cause of action accrued the defendant's husband became bankrupt, absconded without appearing to his commission, and continued to reside in foreign parts; on general demurrer, the replication was holden(d) bad; for, independently of the objection that this replication did not contain any express averment, that the defendant's promise was made during the absence of her husband, nor any equivalent allegation, it did not state such an involuntary absence of the husband, as within the principle of former decisions, could affect her with the liabilities of a feme sole. It alleged no more than a temporary absconding. To trespass for breaking and entering the plaintiff's dwelling-house and shop,(e) on the 8th of April, 1807, and on divers other days, &c., and ejecting her from the possession thereof: defendant pleaded, that the plaintiff at the time of committing the trespass, and thence continually hitherto, hath been, and still is, under the coverture of one Jos. Boggett, then and still her husband, and still alive. Replication, that before the committing the trespasses, the husband deserted and left plaintiff, and departed out of this kingdom to parts beyond the seas, viz. to America, without leaving any means of necessary provision and support to plaintiff; and from the time of his departure hitherto, has not returned to this country, nor corresponded with nor been heard of by plaintiff; and that during all that time, plaintiff has lived apart from her husband, and made contracts, and obtained credit as a single woman; and for her necessary

(c) *Farrar v. Countess of Granard*, 1 Bos. & Pul. N. R. 80.

(d) *Williamson v. Dawes*, 9 Bingh. 292.

(e) *Boggett Friar*, 11 East, 301.

support and maintenance has, during all that time, carried on the business of a merchant, as a single woman and sole trader, and as such was lawfully possessed of both dwelling-house and shop. Rejoinder, that the husband was born within this realm, and from the time of his nativity hitherto, has been and still is a subject of our Lord the King, and that he has not at any time hitherto abjured this realm, [*307] or been exiled or *banished, or relegated therefrom. On demurrer, the court listened reluctantly to the argument in support of the replication, and gave judgment for the defendant on the authority of the preceding cases, observing that the rule had been laid down in *Marshall v. Rutton*; it was capable of having exceptions engrafted on it, as where the absence is tantamount to a civil death, &c.; but that a temporary absence of the husband, not banished or the like, had never been deemed sufficient.(1)

An action cannot be maintained against one as the executor of a feme covert,(f) although the ground of the action be goods furnished to her in the course of trade carried on by her as a feme sole, and though defendant may have possessed himself of goods to the amount of the demand, of which the woman was in possession as a feme sole.

III. Of Actions by Husband and Wife.

1. *Where the Husband and Wife must join*, p. 307.
2. *Where the Husband must sue alone*, p. 309.
3. *Where the Husband and Wife may join, or the Husband may sue alone at his Election*, p. 311.

1. *Where the Husband and Wife must join*.(2)—In real actions for the recovery of land for the wife, the husband and wife must join.(g)

(f) *Clayton v. Adams, Executor*, L. P. B. 107, Dampier, MSS. L. I. L.; 6 T. R. 604, S. C.

(g) 1 Bulst. 21.

(1) Where the wife left England in consequence of ill treatment by her husband, and came to Massachusetts, and both husband and wife were aliens, and he continued to reside in England, it was held, that she might sue as a *feme sole*. *Gregory v. Paul*, 15 Mass. Rep. 31; *Robinson v. Reynolds*, 1 Atk. 174. So where the husband was a citizen and resident of Rhode Island, and had driven his wife away without the means of support, whereupon she came to Massachusetts, and had resided there for twenty years, it was held, that she was entitled to sue as a *feme sole*. *Abbott v. Bayley*, 6 Pick. 89. In *Starrett v. Wynn*, 17 S. & R. 130, it was held, that if a husband deserts his wife, and ceases to perform his marital duties, the acquisitions of property made by his wife during such desertion are her separate estate, and she may dispose of them by will or otherwise.

Where the husband sailed from the United States, and neither he nor the vessel were ever heard of after, and twelve years having elapsed; held, that these circumstances furnished an irresistible presumption, from analogy to the statute of bigamy, and the statute concerning leases determinable upon lives, that he was dead, and that the wife might be sued as a *feme sole*. *King v. Paddock*, 18 Johns. Rep. 141; *ante*, p. 302, note 2.

(2) She must be joined as plaintiff to recover a demand which accrued to her before marriage. *Morse v. Earle*, 13 Wend. 271; *Story v. Baird*, 2 Green, N. J. R. 262; *Croner v. Gans*, 1 Bibb, 257; *Nutts v. Rutter*, 1 Watts, 233; *Johnston v. Posteur*, Cam. & Nor. 464; *Norfeit v. Harris*, Ib. 517; *Armstrong v. Simonton*, 2 Murph. 357. They cannot sue at law for proceeds of real estate, against trustee of the wife. The remedy is in equity. *Duval v. Covenhoven*, 4 Wend. 561.

So in action of waste, for waste committed on the land of the wife.(h) So in detinue of charters of the wife's inheritance.(i) In an action on a bond given to wife *dum sola*, husband and wife must join.(k)(1) But husband may sue alone *on bill payable to [*308] wife *dum sola*, but becoming due after marriage.(l)

Bond was given to wife during coverture; the wife died; and then the husband sued upon the bond, as administrator to his wife; it was holden, on demurrer, that the action was well brought.(m)(2) If an ac-

(h) 7 Hen. IV. 15, a.; 3 Hen. VI. 34.

(i) 1 Rol. Abr. 347, (R.) pl. 1.

(k) Per Lord Hardwicke, C. J., in *Bates v. Dandy*, 2 Atk. 208.

(l) *McNeilage v. Holloway*, 1 B. & Ad. 218. See *Richards v. Richards*, 2 B. & Ad. 453; *Gaters v. Madeley*, 6 M. & W. 423.

(m) *Day v. Padrone*, B. R. Trin. 13 & 14 Geo. II. MSS; 2 M. & S. 396, n., and Serj. Hill's MSS. vol. 27, p. 172.

(1) I am not aware of any solemn adjudication on this point, but the position is supported by the following authorities: 1. In *Fenner v. Plaskett*, Moor, 422,* it is said, that for a debt due to the wife *dum sola*, husband and wife *ought* to join; but it is observable, that in Croke's report of this case (Cro. Eliz. 459), which is more full and accurate than Moor's, this dictum does not appear. 2. In 1 Roll. Abr. 347, (R.) pl. 3, it is laid down that husband and wife *ought* to join in actions due to the wife before coverture; but there is not any authority cited. 3. Lord Hardwicke, C., in *Garforth v. Bradley*, 2 Ves. 676, 677, takes a distinction between *choses in action* vesting in the wife before and after marriage, and confines the power of the husband to sue alone to those which vest during the coverture. 4. In Buller's N. P. 179, it is laid down that a debt to a man, in right of his wife, cannot be a set-off in an action against him on his own bond; cites *Paynter v. Walker*, C. B. E. 4 Geo. III. 5. Lord Kenyon, C. J., delivering the judgment of the court in *Milner v. Milnes*, 3 T. R. 631, said, "it is extremely clear on the one hand, that the marriage gives to the husband all the personal estate which the wife has in possession; it is also clear on the other hand, that where a *chose in action* of the wife is to be reduced into possession, and it is necessary to bring an action for that purpose, it *must* be brought in the names of both husband and wife." It may be observed, on this last case, (which was an action of trespass brought by a *feme covert*, without her husband, for an injury done to the personal chattels of the wife *dum sola*; to which coverture of the plaintiff at the time of exhibiting the bill was pleaded in bar,) that it was not necessary for the determination of this case to decide, that the action must be brought by husband and wife. It was only necessary to decide, in the first place, that the wife could not sue alone, upon which point there could not be any doubt, as the wife cannot in any of these cases sue alone; and, secondly, whether advantage could be taken of the wife suing alone by a plea of abatement, or a plea in bar; the question whether the husband might sue alone was wholly irrelevant. It may be proper to add, that the court were of opinion, that the plea ought to have been in abatement. So in *Bendix v. Wakeman*, 12 M. & W. 97, it was adjudged that the coverture of the plaintiff cannot be pleaded in bar to an action of covenant on a deed made between the defendant and the plaintiff: it is matter for a plea in abatement only. 6. This question was raised, but not decided, in the case of *Carr v. Taylor*, 10 Ves. 578, before Sir W. Grant, M. R., who said that there had been some doubt upon it at law. I cannot conclude this note without observing, that until the doubts which hang over this question are removed by a solemn adjudication, the best way of proceeding for the recovery of a *chose in action* of wife *dum sola*, is to bring the action in the names of husband and wife; on the propriety of which method a question cannot be raised.

(2) If the husband survive the wife, he is entitled to all her *choses in action*, chattels real, trusts, and every other species of personal property, whether actually vested in her and reduced into possession, or contingent and recoverable only by action or suit; and the representative of the husband is entitled as much to that species of the wife's property which lies in action or suit, and is not reduced into possession, as to any other; the right of administration is in the husband's next of kin, and if obtained by another, he is trustee to the husband's representative. *Whiteaker v. Whiteaker*, 6 Johns. Rep.

*Cited by the court in *Weller v. Baker*, 2 Wils. 422.

tion is brought in respect of a personal wrong to the wife, as for the battery of the wife, the husband and wife must join;(1) [*309] *so in action for slander of the wife, she must join because she is the party slandered, and the husband must join for conformity;(n) and the declaration ought to conclude, "to their damage,"(o) and not "to the damage of the husband,"(p) for the damages will survive to the wife, if the husband die before they are received. So where an action is brought for *words* in themselves actionable [spoken of the wife,] and no special damage laid, then such conclusion(q)(2) is right; for the action survives:(3) but in a case where

(n) *Dengate v. Gardiner*, 4 M. & W. 5.

(o) *Horton v. Byles*, 1 Sid. 387.

(p) Judgment arrested for this conclusion, in *Newton and Uz. v. Hatter*, Lord Raym. 1208.

(q) *Grove and Uz. v. Hart*, Tr. 25 Geo. II. Bull. N. P. 7.

112, and cases there cited. See *Hartman v. Dondel*, 1 Rawle, 279. See p. 289, note 2, ante.

But where a husband abandoned his wife, and married another woman, with whom he continued to live for twenty years, he was holden to have forfeited all just claim to his wife's distributive share to personal estate inherited by her. And equity ordered the principal of the wife's share to be brought into court, and placed at interest, and after her death the principal to go to her children or their representatives. *Dumond v. Mager*, 4 Johns. Chanc. Rep. 318.

(1) But in these cases the husband may sue alone for the injury sustained by himself from the loss of the society, comfort, and assistance of his wife, in consequence of the battery; *Hyde v. Scissor*, Cro. Jac. 538. And if the husband adopts this method, he may in the same declaration complain of a battery to himself. *Guy v. Liressey*, Cro. Jac. 501. Although the wife ought not to be joined in an action with the husband for the battery of the husband, (*Newton v. Hatter*, Lord Raym. 1208,) yet, where husband and wife join in an action, for a personal wrong to the wife, the husband may declare also for an injury arising solely to himself *by way of aggravation of damages*; as where, in trespass by husband and wife, for false imprisonment of wife, *per quod negotia domestica* of the husband *remanserunt infecta ad grave damnum ipsorum*; on motion in arrest of judgment, the declaration was holden good; for, although the husband and wife could not have declared jointly for the special damage resulting to the husband alone, if such damage had been the gist of the action, yet in this case, it having been laid for *aggravation of damages only*, the action was well brought. See *Barnes v. Hurd*, 11 Mass. 59. For trespass will lie for a matter jointly with other matters, for which singly an action could not have been maintained; as trespass will lie for entering the plaintiff's house, and *beating his servant*, without adding, "*per quod servitium amisit*;" for then it is considered as a continuation of the first trespass. *Russell v. Corne*, Ld. Raym. 1031; Salk. 119, 6 Mod. 127, S. C. So where in an action of assault and battery by husband and wife, it was stated in the declaration that the defendant assaulted the wife, and driving a coach over her, bruised her, and "*by reason thereof*," the husband laid out divers sums of money in the cure, &c.; after verdict for plaintiff, with entire damages, it was holden, on motion in arrest of judgment, that the gist of the action was the beating of the wife, and the expenses incurred by the husband were only in aggravation of damages; and *Powell, J.*, observed, that if these had been omitted in the declaration, yet the surgeon's bill might have been given in evidence in aggravation of damages. *Todd v. Redford*, 11 Mod. 264. See also *Dix v. Brookes*, 1 Str. 61; but in *Dengate v. Gardiner*, 4 M. & W. 7, Lord Abinger, C. B., said, that "in trespass by husband and wife for assault on the wife, the surgeon's bill cannot be recovered." But in *Lewis v. Babcock*, 18 Johns. Rep. 443, in assault and battery committed on the wife, where the husband's damages for the loss of comfort, &c., of his wife, and expenses incurred by her illness, were joined in aggravation; it was holden, that, although the objection was in arrest of judgment, it would have been good on demurrer. Vide cases there cited.

(2) S. P. *Throgmorton v. Davis*, 3 Blackf. 383.

(3) If a *feme sole* plaintiff marries, after a report of referees in her favor, the husband

special damage was laid for the loss of wages of the wife, it was holden, (r) that the husband and wife could not recover for such damage; for as the profit of her wages is entirely his, he alone can sue for the loss of them.

2. *Where the Husband must sue alone.*—Where the wife cannot maintain an action for the same cause, if she survive her husband, the action must be brought by the husband alone: as in the case of an action of *indebitatus assumpsit* for the labour, &c., of the wife, *during the coverture; (s) for, in contemplation [*310] of law, the wife is considered as the servant of the husband, and he is entitled to her earnings, and such earnings shall not survive to the wife, but go to the personal representative of the husband. (1) So in an action on the case for words, (t) not actionable in themselves, spoken of the wife, whereby the husband sustains special damage, the husband must sue alone. So, in actions for injuries committed during coverture to personal chattels, (u) which by law are vested in the husband; as in trespass for cutting down and carrying away corn, although it grew upon the wife's land: for it grows by the industry of man, and consequently the property thereof is in the husband alone. (2) In all cases where the wife shall not have the thing, (x) when it is recovered, either solely to herself, or jointly with her husband, but the husband only shall have it, there the husband shall sue alone. An action on the case was brought by A. and B. his wife (y) for the use and occupation of a messuage and lands, and for money had and received to the use of the husband and wife, stating the promises to husband and wife; after judgment by default, writ of inquiry

(r) *Dengate v. Gardiner*, 4 M. & W. 5.

(s) *Buckley v. Collier*, Salk. 114, and Carth. 251.

(t) *Coleman and wife v. Harcourt*, 1 Lev. 140, cited in *Saville and wife v. Sweeny*, 4 B. & Ad. 514.

(u) *Arundel v. Short*, Cro. Eliz. 133.

(x) 1 Rol. Abr. 347, (Q.) pl. 5.

(y) *Bidgood v. Way and wife*, on error in Ex. Chamb. 2 Bl. R. 1236, cited in *Morris v. Norfolk*, 1 Taunt. 214.

must be made a party, by *scire facias*, to the judgment. *Johnson v. Parmely*, 17 Johns. Rep. 271.

The husband of a *feme covert*, guardian in socage, must join in actions by her. *Byrne v. Van Hoesen*, 5 Johns. Rep. 66.

(1) It may here be observed, that, although the law will not imply a promise to the wife, yet where the wife is the meritorious cause of the action, that is, where the defendant has derived profit or advantage from her labor or skill, and an *express* promise of remuneration is made by the defendant *to the wife*, if, in such case, an action is brought by the husband and wife jointly, and it is expressly stated in the declaration, that the promise was made to the wife, an objection cannot be raised to such declaration, merely on the ground of the wife having been joined; because contracts made by the wife, with the assent of the husband, are valid, and the bringing the action in their joint names is a declaration of such assent; and in this case the action would survive the wife. *Brashford v. Buckingham*, in error, Cro. Jac. 77, 205. Care, however, must be taken, that the declaration does not embrace any other cause of action accruing to the husband alone; for, if it does, it will be bad. *Holmes and wife v. Wood*, cited by the court in *Weller v. Baker*, 2 Wils. 424.

(2) Husband and wife being seised of land in right of wife may join in trespass *quare clausum fregit, et herbam ibidem crescentem consumpsit et asportavit*, because the grass is the natural produce of the earth, and shall continually go with the land. *Willy v. Hanks-worth*, B. R. M. 3 Geo. II. MSS., and cited by the court in *Weller v. Baker*, 2 Wils. 424.

executed, and final judgment in B. R., a writ of error was brought in the Exchequer Chamber, assigning for error, that judgment was given for the husband and wife to recover their damages, whereas [*311] it appeared on the record, that B. *was the wife of A. and could not sustain any damage by reason of any thing contained in the declaration; the court were of opinion, that the judgment was erroneous, because a contract could not be made with a married woman; that a promise, either express or implied, did not give any interest to her; the whole resulted to the husband, and the action ought to have been brought in his name.(1) The counsel for the defendants in error having urged, that, if an impossible assumpsit was stated in the declaration, it might quoad her be surplusage, as much as if she had been a stranger; the court said the insertion of the wife could not be surplusage, for it created an interest in her, and entitled her to damages by survivorship. Where a debtor to the wife as executrix promises to pay the husband in consideration of his giving time for payment, the husband ought to sue alone, because the wife is not a party to the agreement between her husband and the defendant;(2) but in this case the life of the wife must be averred:(a) N. the recovery by the husband will amount to a *devastavit pro tanto*. Per *Holt*, C. J., *Carth.* 463; but per *Rokeby*, J., assets at law.

3. *Where the Husband and Wife may join, or the Husband may sue alone at his Election.*—In personal actions for the recovery of damages only, (other than actions in respect of personal wrongs to the wife,) where the action will survive to the wife,(2) the husband and wife may join;(b) or the husband may sue alone, for he alone may release such action.(3)

Assumpsit.—In an action for a breach of promise made to husband and wife after coverture, to pay a sum of money to the wife, husband and wife may join.(c)(4) So where a promise is made to the wife only.(d)

(z) *Yard v. Eland*, Lord Raym. 368; Salk. 117; Carth. 462, S. C.

(a) *Lea v. Minns*, Yelv. 84; Cro. Jac. 110.

(b) Per Cur. 2 Mod. 270.

(c) *Hilliard v. Hambridge*, Aleyn, 36.

(d) *Prat v. Taylor*, Cro. Eliz. 61; 1 Rol. Abr. 32, pl. 12.

(1) Lord *Ellenborough*, C. J., speaking of this report in *Ord v. Fenwick*, 3 East, 106. said that the declaration was not stated sufficiently explicit; that it did not appear whose lands had been used and occupied, whether the husband's or wife's.

(2) In *Frosdike v. Sterling*, 1 Freem. 236, *North*, C. J., said, "that he always took it for an unquestionable rule, that, wheresoever, in case the husband should die, the action would survive to the wife, there the wife *might* join, but on the other side, the husband may join the wife in many cases where he is not bound to join her, but may have the action alone." See also *Ayling v. Whicher*, 6 A. & E. 259; 1 Nev. & P. 416. Where husband *may* sue in his own name, he cannot defeat the right of set-off by joining his wife as a co-plaintiff. *Ferguson v. Lathrop*, 15 Wend. 625.

(3) "What the husband alone may discharge, and of which he may make disposition to his own use, he may recover alone without joining his wife in the action." Per *Doddridge*, J., to which *Cook*, C. J., assented, and said it was a true and good ground. 3 Bulst. 164. "For any species of injury done to the wife, the husband may release the damages." *Southwark v. Packard*, 7 Mass. Rep. 95.

(4) Husband and wife may join in *assumpsit* for the purchase money of the land of the wife sold during coverture. *Higdon v. Thomas*, 1 Har. & Gill, 139.

Covenant.—Where a lease is granted to *husband and wife [*312] for a term of years, and the lessor ousts them, husband and wife may join in action of covenant.(e) Queen Elizabeth, by letters patent, demised a house to A. for years, who covenanted to repair,(f) and afterwards, during the term, the queen granted the reversion to husband and wife, and to the heirs of the husband in fee; the house being out of repair, the husband alone brought covenant, and it was holden well, although the interest of the feme appeared on the face of the declaration.(1) Covenant will lie by husband and wife for non-payment of rent, due by virtue of a lease granted by husband and wife of lands, the inheritance of wife.(g) Husband alone may bring an action on a covenant made to himself and his wife, for, although the covenant be made to both, yet he may refuse quoad her.(h) In this case, *North*, C. J., said, that he remembered an authority in an old book, that, if a bond be given to baron and feme, the husband shall bring the action alone, which shall be looked upon to be his refusal as to her.(i)

Debt.—So if a bond be given to husband and wife administratrix,(k) husband may sue alone, declaring on it as a bond to himself. In debt on bond made to husband and wife,(l) both may join; or the husband may disagree to the wife's right to the bond,(m) and bring the action in his own name only; but, until such disagreement, the right to the bond is in both the husband and wife, and shall survive;(2) hence, if the husband dies, the wife shall have the bond, and not the personal representative of the husband.(n)(3) So in debt on bond made to the wife during coverture,(o) or in assumpsit on a promissory note given to the wife during coverture,(p) husband and wife may join: or husband may sue alone;(4) but if the husband does not reduce his interest into pos-

(e) Bro. Baron and Feme, pl. 23.

(f) *Bret v. Cumberland*, Cro. Jac. 399; Buls. 163, S. C.

(g) *Aleberry v. Walby*, Str. 230.

(h) *Beaver v. Lane*, 2 Mod. 217.

(i) Cited by *Buller*, J., 4 T. R. 617.

(k) *Ankerstein v. Clarke*, 4 T. R. 616.

(l) 32 Ed. III. 5; 43 Ed. III. 10; Bro. Baron and Feme, pl. 14, 55.

(m) *Coppin v. —*, 2 P. Wms. 497.

(n) Bro. Baron and Feme, pl. 60.

(o) *Howell v. Maine*, [in the record, *Powell v. Mason*,] 3 Lev. 403, S. P. per Lord Hardwicke, 2 Atk. 208. See also *Nurse and Ux. v. Wills*, 4 B. & Ad. 739, judgment affirmed on error, 1 A. & E. 65.

(p) *Philliskirk and wife v. Pluckwell*, 2 M. & S. 393.

(1) But see *Middlemore v. Goodall*, Cro. Car. 505.

(2) A joint obligation to husband and wife for a debt due to himself alone, is a gift to the wife, which survives to her in case of his death, unless there be a deficiency of assets for creditors, or perhaps legatees. *Gibson v. Todd*, 1 Rawle, 455. Vide *Low v. Porter*, 2 Green, 516; *Condit v. Neighbour*, 1 Green, 92. A gift of plate to a *feme covert*, unexplained as to intention, vests immediately in the husband. *Carroll v. Lee*, 3 Gill & Johnson, 504. So also does a promissory note, given to her for her separate use, in consideration of her share of an intestate estate. *Com. v. Manley*, 12 Pick. 173.

(3) See *Gibson v. Todd*, 1 Rawle, 452. If after judgment in favor of husband and wife on such bond, the husband die, and afterwards the wife die, the executors of the wife may bring a *scire facias*, on the judgment. *Executors of Schoonmaker v. Elmendorf*, 10 Johns. Rep. 49.

(4) It appears by a MS. note, in the possession of a friend of the compiler, that the roll in *Howell v. Maine* was searched, and it was found that the bond was given to the wife during the coverture; for *devant*, therefore, in some editions of Levinz's Reports, read

session during his lifetime, it will survive to the wife; (q) but [*313] after the death of wife, husband *must sue as administrator to his wife; (r) for the rule of law is, that choses in action can only be put in suit by the party to whom they are given; or, after their deaths, by persons claiming *jure representationis*. Hence, if the husband, surviving his wife, does not, in his lifetime, reduce her choses in action into possession, although in equity those claiming under him are entitled to them, they must be recovered, not by his representatives, (s) but the wife's; and they will take the property as trustees for the representatives of the husband. A married woman, being administratrix, received a sum of money in that character, and lent it to her husband, taking in return for it the joint and several promissory note of her husband, and two other persons, payable to her with interest; it was holden, (t) that although she could not have maintained any action upon the note during the lifetime of her husband, yet that, he having died, and the note having been given for a good consideration, it was a chose in action surviving to the wife, and that she might sue either of the other makers at any time within six years after the death of her husband, and recover interest from the date of the note. The assignees of a bankrupt may maintain an action in their own names only, for a chose in action belonging to the wife before marriage, *e. g.* a promissory note given to her *dum sola*; and in such action, the defendant cannot set off a debt due to him from the bankrupt. (u)

Where husband and wife have recovered judgment on a bond made to wife, *dum sola*, husband and wife may join in an action (x) on such judgment; or husband may sue alone; for that which was before a chose in action, *transit in rem judicatam*, and is of another nature from what it was before the coverture. If it be referred to a master in Chancery to take an account of what is due to husband and wife, (y) who reports the sum due, and appoints it to be paid to the husband, and the defendant is committed for non-payment, and escapes, the husband and wife may join in action against the warden for the escape.

Quare impedit.—So where a right of presentation is in the husband *jure uxoris*, a *quare impedit* may be brought by the husband and wife jointly. (z) Or the husband may sue alone, (a) for the presentation only is recoverable and not the advowson, and the release of the husband would bar the action.

(q) *Gaters v. Madeley*, 6 M. & W. 423.

(r) *Day v. Padrone*, B. R. Trin. 13 & 14 Geo. II. 2 M. & S. 396, n., and Serjt. Hill's MSS. vol. 19, p. 290, and vol. 27, p. 172.

(s) *Betts v. Kimpton*, 2 B. & Ad. 273.

(t) *Richards v. Richards*, 2 B. & Ad. 447, recognized in *Rose v. Poulton*, 2 B. & Ad. 812.

(u) *Yates v. Sherrington*, 11 M. & W. 42, recognizing *Miles v. Williams*, 1 P. Wms. 249, post, p. 316.

(x) *Woolverston v. Fynnimore*, T. 18 & 19 Geo. II. C. B. MSS.

(y) *Huggins v. Durham*, Str. 726.

(z) Bro. Baron and Feme, pl. 41.

(a) *Ib.* pl. 28.

durant. Comyns has stated the case accurately in his Digest, tit. "Baron and Feme" (w.) See *Templeton v. Gram*, 5 Greenl. 417. And this, although the note were given to the wife by her maiden name through mistake. *Ib.*

Replevin.—Baron and feme may be joined in the same declaration in replevin for goods distrained from the feme *dum sola*.(b) If the *goods of a feme sole be taken, and she marries, the [*314] husband alone may sue the replevin.(c) In the replevin of goods which the wife has as executrix, husband and wife shall join, *ut videtur*.(d) Avowry for rent arrear *jure uxoris* may be by husband and wife, or husband only, averring the life of feme.(e)

Tort.—In an action upon the case for stopping a way to the land of the wife, husband and wife may join.(f) So an action upon the case for cutting down trees,(g) the lops of which were reserved to the wife for her life, may be brought by husband and wife jointly. In *Weller and Wife and others v. Baker*, 2 Wils. 414, an action was brought by the dippers at Tunbridge Wells, together with their husbands, against the defendant for exercising the business of a dipper, not being duly appointed and approved according to a private statute: it was holden, that the action was well brought in the names of the husbands and wives. But where lands were demised to husband and wife for years, and the husband had granted an underlease, it was holden,(h) that the husband might sue alone for damage done to the reversion.

Trespass.—Trespass was brought by the husband alone for hunting in a free warren,(i) which he had in right of his wife, and it was adjudged good, for damages only are recoverable. It is immaterial as to the point in question, whether the interest of the husband is a joint interest with the wife, or an interest only in right of the wife. In the first and second cases in covenant before abridged, the husband had a joint interest with the wife. In the fourth case in covenant, two first cases in tort, and the case to which this remark is annexed, the husband had an interest only in right of his wife.

Trover.—Where the inception of the cause of action is in the wife before marriage,(k) and consummated afterwards, husband and wife may join, as in trover for a personal chattel of wife before, and conversion thereof after marriage.(1) It must be observed, that, in all the preceding cases, where the wife is made a party, her interest ought to appear on the face of the declaration, for the court will not intend it upon demurrer,(l) or even after verdict, according to the case of *Abbott v. Blofield*, Cro. Jac. 644. Sed quæ. whether this case be law to its full extent; for in *Bourn and Wife v. Mattaire*, Bull. N. P. 53, and MSS., where husband and wife joined in replevin, and defendant avowed

(b) Bro. Baron and Feme, pl. 85.

(c) F. N. B. 159, K. cited in Bull. N. P. 53.

(d) Bro. Baron and Feme, pl. 85.

(e) *Wise v. Bellent*, Cro. Jac. 442; *Osborne v. Walleeden*, 1 Mod. 273.

(f) Agreed in *Baker and wife v. Brereman*, Cro. Car. 418.

(g) *Tregmiell and wife v. Reeve*, Cro. Car. 437.

(h) *Wallis v. Harrison*, 5 M. & W. 142.

(i) Bro. Baron and Feme, pl. 16.

(k) *Blackborn v. Greaves*, 2 Lev. 107.

(l) *Serres v. Dodd*, 2 N. R. 405.

(1) In North Carolina it is held that in *detinue* to recover slaves of the wife detained before and at the time of the marriage, the wife must be joined. *Johnston v. Pasteur*, Cameron & Norwood, 484. So in Kentucky, *Crozier v. Gano*, 1 Bibb, 257. See *Spiers v. Alexander*, 1 Ruff. 67; *Crozier v. Bryant*, 4 Bibb, 174; *Walker v. Mebane*, 1 Murphy, 41.

for rent arrear, after verdict, it was objected, that the husband and wife could not have a joint property in personal chattels after [*315] the marriage, and consequently, *the replevin ought to have been brought by the husband alone. Lord *Hardwicke*, C. J., delivering the judgment of the court, said that, although the ground of the objection was generally true, yet, notwithstanding, as a man and woman might have a joint property before marriage, or the wife might have the goods in question as executrix, and the taking might in both cases be before marriage, the court were of opinion, that they might declare jointly in an action for such taking. That if the law would admit of such joint action, the fact was admitted by the pleading. The defendant had not disputed with the plaintiff to whom the property belonged at the time of the taking, and therefore, if there could be a case in which husband might join with the wife in an action for a personal chattel, the court thought that, *after verdict*, this ought to be intended to be the case: Bro. Bar. and Feme, pl. 85, abridges a book case in 33 Edw. III. (but which is not to be found in the "Year Book," and was probably taken from some manuscript) wherein it is held, that husband and wife may join for such things as the wife has as executrix, or where goods are taken from her whilst sole. A declaration in replevin by husband and wife, where nothing appears on the face of the record whence the court can infer that the wife had an interest in the goods taken, is bad, on special demurrer. *Serres and Wife v. Dodd*, 2 N. R. 405.(1)

IV. Of Actions against Husband and Wife.

In actions against the husband for the debts of the wife contracted before marriage, (m) if the wife is not joined, (2) advantage may be taken of the omission in arrest of judgment; and this rule holds, although an account has been stated with the husband, (n) for that does not alter the nature of the debt. A woman occupied a house from Lady-day until the 8th of June, and then intermarried with the defendant and quitted the house, having on the Lady-day preceding given notice that she should quit at Michaelmas; an action for use and occupation from

(m) *Mitchinson v. Hewson*, 7 T. R. 348 [*Angel v. Fellon*, 8 Johns. 149; *Gage v. Reed*, 15 Id. 403.]

(n) *Drue v. Thorne*, Aleyn, 72.

(1) Husband and wife cannot sue jointly in replevin for goods, the property of the wife before marriage, unlawfully taken afterwards. He must sue alone. *Seibert v. M'Henry*, 6 Watts, 301.

(2) Vide *Carl v. Wonder*, 5 Watts, 97; *Neutz v. Reutter*, 1 Watts, 229. The wife cannot be joined upon a mere personal contract arising during the coverture. *Jackson v. Vanderheyden*, 17 Johns. 271. If in assumpsit by husband and wife it be not shown why the wife is joined, it will be fatal on error. *Staley v. Barkile*, 2 Caines', 221. Replevin cannot be maintained in the name of a husband and wife to recover chattels the property of the wife before marriage, unlawfully taken afterwards. The action must lie in the name of the husband alone. *Seibert v. M'Henry*, 6 Watts, 301; *Spiers v. Alexander*, 1 Ruff. 67. See *Crozier v. Gano*, 1 Bibb, 217.

Lady-day to Michaelmas was afterwards brought against the husband; and it was holden,^(o) that it would not lie; for there was no occupation by the husband for the former part of the half-year either in fact or in law. Assumpsit against husband and wife for goods sold and delivered to wife *dum sola*; promise by the wife: pleas, non assumpsit; non assumpsit by wife, *dum sola*, within six years: evidence for plaintiff, sale of goods by plaintiff to wife, *dum sola*, and payments by her within six years; for defendants: that they were married more than six years before action brought: nonsuit: per *Tenterden*, C. J.; *Burt v. Stobart and Wife*, Middlesex Sittings, after M. T. 1 Will.

IV. *ex relatione* *Cresswell, counsel for defendant. To a de- [*316]
claration against husband and wife for debt due from the wife, before coverture, the husband's discharge under the Insolvent Act is a good plea;^(p) so also to a similar declaration is a plea, that the wife was discharged under the same act before coverture.^(q)(1)

As a husband *de facto* is liable to the debts of his wife,^(r) a plea of *ne unques accouple en loyal matrimonie* to an action brought against husband and wife, for the recovery of a debt due from wife before coverture, is bad. Husband cannot be charged at law for money lent to his wife, even for the purpose of buying necessaries; because it may be misapplied. If the money be laid out in necessaries, equity will consider the lender as standing in the place of the person providing the necessaries, and decree relief. *Harris v. Lee*, 1 P. Wms. 482. Preced. in Chan. 502, *S. C.*, and *Hutchinson v. Standly*, Lord Bathurst, C., H. T. 1776. MSS. But a count for money lent to the wife at the request of the husband is good,^(s) because a loan to the wife at the request of the husband is considered in law as a loan to the husband. The count, however, must state the money to have been lent to the wife at the request of the husband; for where the money was alleged to have been lent to the wife at the wife's request, it was holden bad.^(t) "It is true that a complete or perfect contract cannot be made by a feme covert by her own authority; yet, by the assent of her husband, she may contract as his substitute, as in case either of sale or loan. This assent may be either express or implied; it may be prior or subsequent to the contract. If prior and communicated to the defendant, the contract made is an actual contract, and not merely *virtual* with the husband; if subsequent, then the wife's contract is *inchoate* and *imperfect*, until affirmed by the husband; and such affirmation, if given, transfers the contract to him." Per *Blackstone*, J., in *Stevenson v. Hardie*, 2 Bl. R. 873. So where the plaintiff declared, that the defendant was indebted for meat,^(u) &c., found by the plaintiff at the defendant's request, and on evidence it appeared to be found for the

(o) *Richardson v. Hall*, 1 Brod. & Bingh. 50.

(p) *Lockwood v. Salter*, 5 B. & Ad. 303.

(q) *Storr v. Lee*, 9 A. & E. 868; 1 P. & D. 633.

(r) *Norwood v. Stevenson*, Andr. 227.

(s) *Stevenson v. Hardy*, 3 Wils. 388; 2 Bl. R. 872, *S. C.*

(t) *Stone v. Macnair*, in error, 7 Taunt. 432.

(u) *Ross v. Noel*, Bull. N. P. 136.

(1) A plea of infancy by husband is no defence. *Roach v. Quick*, 9 Wend. 238.

defendant's wife, at his request, in his absence; upon a case reserved, it was holden, that a delivery to the wife, at the husband's request, was in law a delivery to the husband.(1) If a declaration against husband and wife, for a debt of the wife contracted before marriage, allege a promise of the wife, made after the marriage, to pay the debt, it is bad.(x)(2) If an action is brought against husband and wife [*817] on a bond given by the wife *dum sola*,(y) *the defendant may plead the bankruptcy of the husband after the intermarriage, &c. as a discharge of the debt. This plea upon the statute must conclude to the country. Husband and wife cannot maintain an action of trover, and suppose the possession in them both; for the law will transfer the whole interest to the husband: but trover may be maintained *against* husband and wife;(z) for the gist of the action is the conversion, which is a tort, with which a feme covert may be charged, as well as with trespass.(3) Where the injury is not of such a nature as must necessarily have been done by the husband alone, the wife may properly be joined.(a) Hence husband and wife may be jointly sued in trespass for their joint act in assaulting and taking the plaintiff into custody on a false charge.(b) Trespass against J. G., widow,(c) and pending the suit she took husband; after judgment a writ was directed to the sheriff *quod caperet* J. G. *ad satisfaciendum*, upon which the sheriff took J. G., whose husband, together with her, thereupon brought an action for false imprisonment against the sheriff, who justified under the *ca. sa.* On demurrer, the court gave judgment for the defendant, observing, that if an action be brought against a feme, who before judgment takes husband, yet if she be found guilty, the *ca. sa.* shall be awarded against her, and not against her husband.(4) In like manner, after interlocutory judgment in assumpsit against a feme,(d) who after-

(x) *Morris and wife v. Norfolk and another*, 1 Taunt. 212.

(y) *Miles v. Williams*, 1 P. Wms. 249; said by Lord *Hardwicke*, in 2 Vesey, 181, to be truly reported, and recognized in *Yates v. Sherrington*, 11 M. & W. 42, ante, p. 262, 303.

(z) *Draper v. Fulkes*, Yelv. 165; *Anon.* 1 Vent. 24.

(a) Per *Tindal*, C. J., in *Vine v. Saunders and Uz.*, 4 Bingh. N. C. 101; 5 Sc. 359, recognizing *Bayley, J.*, in *Keyworth v. Hill*, 3 B. & A. 685.

(b) *Ib.* on demurrer to declaration.

(c) *Doyley v. White*, Cro. Jac. 323.

(d) *Cooper v. Hunchin*, 4 East, 521. See 3 M. & S. 537.

(1) The husband is answerable for a forfeiture under a penal statute, incurred by the wife during coverture. *Hasbrouck v. Weaver*, 10 Johns. Rep. 247.

(2) A promise by a husband and wife, during coverture, to pay a debt of hers *dum sola* barred by statute of limitations does not revive it against her after death of husband. *Kline v. Guthart*, 2 Penn. R. 490.

(3) A declaration against husband and wife, on the wife's promise *dum sola*, with the addition of a count on husband and wife's promise during coverture, is bad. *Edwards v. Davis*, 16 Johns. Rep. 281. *Grassen v. Eckart*, 1 Binn. 175. But in an action against husband and wife on a bond executed by them jointly, the plaintiff was allowed before the plea to enter a *nolle prosequi* as to the wife, and amend his declaration as if the suit were against the husband alone. *Pell v. Pell*, 20 Johns. 126. An action will lie against husband and wife for slanderous words spoken by the wife *dum sola*. *Hawk v. Harman*, 5 Binn. 43. It seems that judgment cannot be entered against husband and wife on a warrant given by the wife *dum sola*. *Anon.* 2 Penning. Rep. 973. See also *Ivins v. French*, 2 Halsted, 27; *Sheble v. Cummins*, 1 Browne, 253. Vide *Dorrance v. Scott*, 3 Whart. 309, as to its effect when given after marriage.

(4) See *Haines v. Corliss*, 4 Mass. 659; *Com. v. Philipsburgh*, 10 Id. 78.

wards marries, the plaintiff, even after notice of the marriage, may proceed to final judgment, without joining the husband, and sue out execution thereon against the feme only;(1) and such execution cannot be set aside for irregularity. So where an action is brought by a feme sole, who marries after the commencement of the suit but before trial, it is not necessary to sue out a *scire facias* to make the husband a party to the suit.(e) Judgment was obtained against a feme sole,(f) who afterwards married, and then the plaintiff brought a *sci. fa.* against husband and wife, and had judgment thereon:(2) then the wife died, and the plaintiff afterwards brought another *sci. fa.* against the husband alone: it was holden, on writ of error, that the second *sci. fa.* was well brought, on the ground that the judgment on the first *sci. fa.* had made the husband liable. If wife be joined in an action for words spoken by husband only, it will be error.(g) Hence, if slander be spoken by husband *and* wife, there must be separate actions, one against the husband only, for the slander spoken by him, and the other against the husband and wife, for slander spoken by the wife; and the court will not order the actions to be consolidated. So for *words spoken of husband and wife there must be two actions, [*318] one by the husband for words spoken by the husband, and another by husband and wife for the words spoken of the wife.(h)(3) The policy of the common law will not permit husband and wife to give evidence *for* each other,(i) because their interests are the same; nor *against* each other, on account of the implacable dissension which might be occasioned thereby. The declarations of a married woman, during coverture, of the non-payment of money lent to her before marriage, are admissible(k) in evidence for the plaintiffs, in an action brought against her husband as her administrator: for the wife, like any other person, may bind her representative.(4) Feme covert, sued as feme sole, cannot(l) bring error without her husband joining.

(e) *Walker v. Golling*, 11 M. & W. 78.

(f) *Obrian v. Ramm*, Carth. 30. See the record, 3 Mod. 170.

(g) *Swithin v. Vincent*, 2 Wils. 227; Dyer, 19, a, pl. 112, in the margin.

(h) *Errington v. Gardiner*, B. R. M. 22 Geo. III. MS. See *Smith v. Warner*, Golds. 76; *Dalby v. Dorthall*, Cro. Car. 553, *Anon. W. Jones*, 440; *Smith v. Cooker*, W. Jones, 409.

(i) *Davis v. Dinwoody*, 4 T. R. 678; Bull. N. P. 286.

(k) Per Lord Tenterden, C. J., *Humphreys v. Boyce*, 1 M. & Rob. 140.

(l) *Fisher v. M'Namara*, B. R., April 19, 1799, L. P. B. 279; Dampier, MSS. L. I. L.

(1) A husband cannot be sued *alone* in *trover* for goods converted by the wife before the marriage. *Overholt v. Ellswell*, 1 Ashmead, 200. But he may if the conversion were by the wife alone *after* marriage. If the conversion were in fact, *as it may be*, the joint act of both, he may be sued alone, or both may be sued, and the declaration should charge the conversion to the use of the husband, and not of both. *Estill v. Fort*, 2 Dana, 238.

(2) See *Haines v. Corliss*, 4 Mass. 659.

(3) See *Ebersoll v. Krug*, 3 Binn. 555.

(4) But where the policy of this rule ceases, it should seem that the rule does not apply; as where husband and wife live separate under articles of agreement. And when the husband permits the wife to act for him in any particular business he adopts, and is bound by her acts and admissions, and they may be given in evidence against him. *Fenner v. Lewis*, 10 Johns. Rep. 38.

*CHAPTER IX.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

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[*320] *I. *Of the Nature of a Bill of Exchange.*

A Bill of Exchange is a written order from A. to B., directing B. (who has, or is supposed to have, in his hands, sufficient effects belonging to A.) to pay a sum of money to C. or order, or to C. or bearer,

either at sight or a certain number of days after sight, or after date, or at single, double, or treble usance, or on demand. The peculiar properties of a bill of exchange are these:—First,—It is assignable to a third person not named in the bill, or party to the contract, so as to vest in the assignee a right of action *in his own name*: contrary to the general rule of law, that choses in action are not so assignable.(1) Secondly,—Although a bill of exchange be merely a simple contract, and not a specialty, yet it will be presumed that it has been originally given for a good and valuable consideration.(2) Bills of exchange are either foreign or inland: foreign bills of exchange have long been considered as the most convenient paper security among merchants,(a) in conformity to the universal usages and customs established among traders, by unanimous concurrence, for facilitating a general commerce throughout the world.(3) The person making the bill is called the *drawer*, the person to whom it is directed, the *drawee*, and the person in whose favour it is made, the *payee*. When the drawee has undertaken to pay the bill, he is styled the *acceptor*, and his undertaking to pay the bill is called an *acceptance*. No one can be liable as acceptor but the person to whom the bill is addressed,(b) unless he be an acceptor for honour. Bills of exchange payable to order are assignable by

(a) Postleth. Dict.

(b) Per Lord Tenterden, C. J., delivering judgment in *Polhill v. Walter*, 3 B. & Ad. 122. See stat. 6 & 7 Will. IV. c. 58, *post*, 381.

(1) But courts of equity would always give effect to and protect the assignment of choses in action; and courts of law now take notice of such assignments, and apply to them, as far as consistent with legal principles and rules of practice, the doctrines established in courts of equity. Thus, where a *choss in action* is assigned by the owner, he cannot interfere to defeat the rights of the assignee in the prosecution of a suit brought to enforce those rights. *Welch v. Mandeville*, 1 Wheat. Rep. 235; *Mandeville v. Welch*, 5 Id. 277, 283. So a release procured by the original debtor, after notice of the assignment, is considered as a nullity. *Johnson v. Bloodgood*, 1 Johns. Cas. 51; *Wardell v. Eden*, 2 Id. 121; *Van Vechten v. Graves*, 4 Johns. Rep. 403; *Littlefield v. Storey*, 3 Id. 425; *Andrews v. Beecker*, 1 Johns. Cas. 411. And where the assignor of a judgment enter satisfaction on the record, after notice to the defendant of the assignment, the court will order the entry of satisfaction to be vacated. *Wardell v. Eden*, 2 Johns. Cas. 121, 258; *S. C.* 1 Johns. Rep. 531, note; *S. C.* Coleman's Cas. 137. Nor can the suit be discontinued or withdrawn by the nominal plaintiff without the consent of the assignee for whose benefit the suit is brought. *Welch v. Mandeville*, 1 Wheat. Rep. 235; *McCullum v. Coxe*, 1 Dall. Rep. 136. But these doctrines apply only to the case of a *total*, and not to a *partial* assignment of the choses in action. *Mandeville v. Welch*, 5 Wheat. Rep. 277, 283.

(2) Bills of exchange and promissory notes are distinguishable from all other choses in action by being *prima facie* evidence of a valuable consideration between all the parties to the same, and all other persons against whom they may be used as evidence. *Mandeville v. Welch*, 5 Wheat. Rep. 277; *Goshen Turnpike Co.*, 9 Johns. Rep. 217; *Ten Eyck v. Vanderpool*, 8 Id. 120; *Riddle v. Mandeville*, 5 Cranch, 322; *Moore v. Mitchell*, Walker, 231; *Dugan v. Campbell*, 1 Ohio, 50. And if given by an executor or administrator it is so of assets, and it is unnecessary to show it in pleading or prove it in the first instance on trial. *Bank of Troy v. Topping*, 13 Wend. 557.

(3) A bill drawn in the United States, on any part of the United States, was held, by the Supreme Court of the state of New York, to be an inland bill. *Miller v. Hackley*, 5 Johns. Rep. 375. But the contrary doctrine has been maintained in the Circuit Court of Pennsylvania, by Mr. Justice Washington, in *Lonsdale v. Brown*, 4 Wash. C. C. R. 148; and the Supreme Court of the United States have sanctioned this doctrine. *Buckner v. Finley*, 2 Peters's Rep. 586; *Wells v. Whitehead*, 15 Wend. 527; *Phoenix Bank v. Hussey*, 12 Pick. 483; *Brown v. Ferguson*, 4 Leigh, 37; Story on Bills, § 23, and cases cited.

indorsement. The person making an indorsement is called the *indorser*; the person in whose favour it is made, the *indorsee*; the party in possession of the bill, and entitled to receive its contents, the *holder*. Bills payable to bearer are transferable by delivery without indorsement.^(c)(1) Where the drawee refuses to accept, a stranger, after protest for non-acceptance, may accept for the honour of the drawer, and thereby such stranger acquires certain rights, and subjects himself to the same obligations as if the bill had been directed to him. So a stranger may become a party to a bill, *paying* it after protest for non-payment, either for the honour of the drawer or indorsers.⁽²⁾ Although regularly there ought to be three persons concerned in a bill of exchange, *viz.*, drawer, drawee, and payee, yet there may be only two; that is, the characters of drawer and payee may be, and frequently are, united in the same person,^(d) as if A. draw a bill in this manner: "Pay to me or my order £ Value received *by myself." A bill of exchange is a simple contract,^(e) and consequently is within the statute of limitations; and must be sued for within six years after it becomes payable.⁽³⁾ In an action by an administrator, upon a bill of exchange payable to the testator, but accepted after his death, it was holden,^(f) that the statute of limitations begins to run from the time of granting the letters of administration, and not from the time the bill becomes due, there being no cause of action until there is a party capable of suing. An agent having money in his hands belonging to his principal, purchases with it a bill of exchange, which he indorses specially to his principal; the latter, at the time of the indorsement, was dead, but that fact was not known to the agent; it was holden,^(g) that the property in the bill passed to the administrator of the principal, and that he might, therefore, sue upon the bill in that character; it was holden, also, that the administrator was only entitled to recover interest upon bills accepted after the death

(c) *Grant v. Vaughan*, 3 Burr. 1516.

(d) Per Holt, C. J., in *Buller v. Crips*, 6 Mod. 30.

(e) *Renew v. Axton*, Carth. 3.

(f) *Murray v. East India Company*, 5 B. & A. 204.

(g) *Ib.*

(1) And the holder may sue in his own name. *Rankin v. Woodworth*, 2 Watts, 134; *Hutchings v. Low*, 1 Green, 246. And may recover on a note payable to bearer, though the consideration is illegal, if it be not void and there is no proof of notice. *Gould v. Armstrong*, 2 Hall, 266.

(2) An acceptor *supra protest* for the honor of the drawer, cannot recover of the drawee who accepted without funds for drawer's accommodation. *Gazzam v. Armstrong*, 3 Dana, 556. A person who pays a bill of exchange *supra protest* for the honor of the indorser, must give him reasonable notice of the fact, or he is not liable. *Wood v. Pugh*, 7 Ohio, 164. Where plaintiff was authorized to draw a bill in payment of goods sold, and the drawee fails after acceptance, and it is paid by a third person *supra protest* by mistake and no notice of the dishonor is given to plaintiff, who afterwards suffers judgment by default in a suit on the bill by the person who paid it: Held, in an action for the price of the goods, that plaintiff was entitled to notice of the dishonor of the bill—that he could not waive it to the prejudice of defendant, the vendee, and that the suit would not lie. *Grosvenor v. Stone*, 8 Pick. 79.

(3) A note on demand, but not to draw interest till the maker's death, may be sued at once, and the statute of limitation runs therefore from date. *Newman v. Kettelle*, 13 Pick. 418.

of the testator, from the time of demand of payment made by the administrator, and not from the time the bills became due. Where the declaration stated the drawing of certain bills of exchange, and their acceptance after the death of the intestate, the granting of the letters of administration to the plaintiff, the defendant's liability, &c.; and the defendants pleaded that the cause of action did not accrue within six years; to which the plaintiff replied generally, that it did accrue within six years: it was holden, *(h)* that the replication was good. Bills of exchange for value received, *(i)* are not such matters of account as are intended by the exception in the statute of limitations concerning merchants' accounts.

A bill of exchange is to be considered as a simple contract debt in a course of administration, which an executor or administrator cannot discharge before debts by bond, without being guilty of a devastavit. If a merchant in London draws a bill of exchange on his correspondent in Newcastle, *(k)* in favour of J. S., and the bill is refused, and J. S. dies intestate, his administrator, on letters of administration taken out at Durham, cannot bring an action on the custom of merchants against the drawer, and lay the same in London, because a bill of exchange is not equal to a bond or specialty, which are the deceased's goods where they happen to be at his death, but is a simple contract which follows the person of the debtor, and makes *bona notabilia* where the debtor resides, and therefore administration ought to be taken out in London.

***II. Of the Capacity of the contracting Parties to a Bill of [*322]**
Exchange:—Corporations. p. 322. Infant. p. 324.
Feme Covert. p. 324. Agent. p. 325. Partners. p. 327.
Spiritual Person. p. 328.

All persons, whether merchants or not, if they have capacity to contract, may be parties to a bill of exchange. *(1)* This appears from the case of *Sarsfield v. Witherby*, Carth. 82, in which it was decided, that the act of drawing a bill of exchange constituted the drawer a merchant, within the custom of merchants, so as to make him responsible to the holder upon non-payment.

Corporations.—The general rule is, that as a corporation is a body politic and invisible, it can only speak and act by its common seal, *(l)* but on this general rule many exceptions have been grafted, *(m)* and it

(h) *Murray v. East India Company*, 5 B. & A. 204.

(i) *Chevely v. Bond*, Carth. 226.

(k) *Yeomans v. Bradshaw*, Carth. 373.

(l) See *Gibson v. East India Company*, 5 Bingh. N. C. 259.

(m) See *ante*, p. 70.

(1) No person is party to a bill unless his name appears on some part of it. *Fluck v. Green*, 3 Gill & J. 474. The incapacity of one party to a bill does not affect the responsibility of the others; as that the drawee was postmaster-general. *Knox v. Reeside*, 1 Miles, 294.

has been holden, (n) that assumpsit will lie on a bill of exchange against a trading corporation, whose power of drawing and accepting bills is recognized by statute. (1)

The stat. 7 & 8 Vict. c. 32, s. 27, continues to the Bank of England the privileges given or recognized by the stat. 3 & 4 Will. IV. c. 98,

(n) *Murray v. East India Company*, 5 B. & A. 204. See *Broughton v. Manchester Water Works Company*, 3 B. & A. 1.

(1) Anciently, it seems to have been held, that corporations could not do any act without deed. But this rule was afterwards relaxed, and corporations, were, for the sake of convenience, permitted to act in ordinary matters without deed; as to retain a servant, &c.; and this relaxation was gradually widened to embrace other subjects. At length it was established, that though they could not contract directly, except under their corporate seal, yet they might, by mere vote or other corporate act, not under their corporate seal, appoint an agent, whose contracts and other acts within the scope of his authority, would be binding on the corporation. A note given to an incorporated company for stock, is valid in the hands of an indorsee, without notice, notwithstanding the statute forbids such note to be taken by the company, in payment of any instalment called in and required to be paid, if it is not affirmatively shown to have been so given. *Wilmorth v. Crawford*, 10 Wend. 341. A bill of exchange on which there are no damages or dishonor, is a "company note," within the meaning of a note of a corporation, authorizing an agent to draw such. *Tripp v. Swansea Co.*, 13 Pick. 291. And it is now settled that, wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts, (and all contracts not under seal are technically deemed parol contracts,) made by its authorized agents, are *express* promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise *implied* promises, for the enforcement of which an action will lie. Hence, an incorporated bank or insurance company, although it has no express power to make a promise not under seal, is yet liable for the notes issued by it, for the funds deposited in it, for the repayment of a premium, the consideration of which has failed, or for any other express or implied assumpsit in the ordinary course of its business, in the same manner as a natural person. *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch, 299, 305.

After the expiration of the charter of the late Bank of the United States, no action could be maintained at law by the bank, upon promissory notes indorsed to, and the property of the bank; and all its property having been assigned by a general assignment in trust to certain assignees, for the purpose of liquidating its affairs, *query*, whether any action at law could be maintained by the assignees, the notes not having been specially assigned or indorsed to the assignees? However this might be, it was clearly held, that a suit in equity might be maintained by the assignees, against the parties to the notes. *Lenox v. Roberts*, 2 Wheat. Rep. 273.

The old doctrine that a corporation can contract only under its corporate seal, is now repudiated. *Chestnut Hill Turnpike Co. v. Rutter*, 4 Serg. & Rawle, 16; *U. S. Bank v. Dandridge*, 12 Wheat. 64; *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Heckner v. U. S. Bank*, 8 Wheat. 338; *Hamilton v. Lycoming Ins. Co.*, 5 Penn. Rep. 339.

An insurance company may make a valid promissory note. *Barker v. Mechanic Ins. Co.*, Wend. 94. A note in the form, "I, G. C. L., treasurer" of a corporation, "promise, &c.," is the note of the corporation. *Mann v. Chandler*, 9 Mass. 335. But see *Tucker v. Bass*, 5 Id. 164.

A factor, employed by the general agent of a corporation to sell the goods manufactured and to purchase stock, has power to buy on credit, but not to give the note of the corporation. *Emerson v. Providence Manufacturing Co.*, 12 Mass. 237. The general agent of a corporation can give their note for purchases necessary to carry on their business. *Odwine v. Maxcy*, 13 Id. 178; *White v. Westport Manufacturing Co.*, 1 Pick. 215; *Butts v. Cuthbertson*, 6 Geo. 166.

A bill of exchange directed to John A. Wells, cashier Farmers' and Mechanics' Bank of Michigan, and accepted by writing across the face thereof, "Accepted, John A. Wells, cashier," is drawn upon and accepted by the bank, and not by Wells, in his individual capacity. *Farmers' and Mechanics' Bank v. Troy City Bank*, 1 Doug. 457. Story on Bills, § 79; Story on Agency, § 52; Ang. & Ames on Corp., §§ 223-226; Hodge on Railw. 59-62, 3d ed., where the later English cases will be found collected.

and by sect. 10 enacts, that from and after the passing of this act no person other than a banker, who on the 6th day of May, 1844, was lawfully issuing his own bank notes, shall make or issue bank notes in any part of the United Kingdom. And by sect. 11, from and after the passing of this act it shall not be lawful for any banker to draw, accept, make, or issue in England or Wales, any bill of exchange or promissory note, or engagement for the payment of money payable to bearer on demand; or to borrow, owe, or take up in England or Wales any sums or sum of money on bills or notes of such banker payable to bearer on demand, save and except that it shall be lawful for any banker who was, on the 6th day of May, 1844, carrying on the business of a banker in England or Wales, and was then lawfully issuing in England or Wales his own bank notes, under the authority of a license to that effect, to continue to issue such notes to the extent and under the conditions in the act mentioned, but not further or otherwise; and the right of any company or partnership to continue to issue such notes shall not be in any manner prejudiced or affected by any change which may hereafter take place in the personal composition of such company, or partnership, either by the transfer of any shares or share therein, or by the admission of any new partner or member thereto, or by the retirement of any present partner or member therefrom: provided always, that it shall not be lawful for any company or partnership, now consisting of only six or less than six persons, to issue bank notes at any *time after the number of partners therein shall [*323] exceed six in the whole. And by sect. 12, if any banker after the passing of the act becomes bankrupt, or ceases to act as a banker, or discontinues the issue of bank notes, he is disqualified from resuming such issue. And by sect. 26, from and after the passing of this act, it shall be lawful for any society or company, or any persons in partnership, though exceeding six in number, carrying on business of banking in London, or within sixty-five miles thereof, (o) to draw, accept, or indorse bills of exchange, not being payable to bearer on demand, notwithstanding the statute 3 & 4 Will. IV. c. 98, or any other statute.

The right of one director of a joint-stock company to draw a bill upon the rest, and still further the power of one director to accept a bill for himself and the other so as to make those others liable, is not a right or power implied by law, like that which belongs to one member of an ordinary partnership in trade, with respect to bills drawn and accepted for the purposes of the trade; it must depend upon the powers given by the charter or deed or agreement under which the company is established and constituted, or some other agreement between the parties, whether a bill so drawn or accepted shall or shall not have that legal effect. (p)

By the act for the regulation of joint stock-companies (stat. 7 & 8

(o) Joint Stock Banks are regulated by stat. 7 Geo. IV. c. 46, stat. 3 & 4 Vict. c. 111, and stat. 7 & 8 Vict. c. 113.

(p) Per *Tindal*, C. J., delivering judgment of court in *Bramah v. Roberts*, 3 Bingham. N. C. 972, recognized in *Dickinson v. Valpy*, 10 B. & C. 128. See *Bull v. Morrell*, 12 A. & E. 745.

Vict. c. 110, s. 45) it is enacted, with regard to bills of exchange and promissory notes made, accepted, or indorsed on the behalf or account of any company within the provisions of that act, so far as relates to the mode of making, accepting, or indorsing the same, and to the liability of any such company thereon, that if the directors of the company be authorized by deed of settlement or bye-law to issue or accept bills of exchange or promissory notes, then every such bill of exchange or promissory note shall be made or accepted, as the case may be, by and in the names of two of the directors of the company on whose behalf or account the same may be so made or accepted, and shall be by such directors expressed to be made or accepted by them on behalf of such company; and that every such bill of exchange and promissory note so made or accepted as aforesaid shall be countersigned by the secretary or other appointed officer of the company in whose behalf the same is expressed to be made or accepted; and that every bill of exchange so made as aforesaid, or received by or on behalf of the company, may be indorsed in the name of the company by any officer authorized by deed of settlement or bye-law in that behalf; and that every such bill of exchange or promissory note so made, accepted, or indorsed as aforesaid shall, immediately after the making, accepting, or indorsing of the same, be reported to the proper officer of the company [*324] *on whose behalf the same shall have been made, accepted, or indorsed, and such last-mentioned officer shall enter the same in proper books to be kept for that purpose; and that if any such bill of exchange or promissory note be not so reported and entered, then the officer, by whose default such bill or note shall not be so reported or entered, shall be liable to repay to the company the amount which the company shall pay, or be liable to pay, in respect of such bill or note: provided always, that nothing herein contained shall be deemed to make any such secretary or officer personally liable upon any such bill of exchange or promissory note, nor be deemed to make any such directors personally liable thereon, except as shareholders of the company; and that every such company on whose behalf or account any bill of exchange or promissory note shall be made, accepted, or indorsed, in manner and form aforesaid, shall and may sue and be sued thereon, as fully and effectually, and in the same manner, as in the case of any contract made and entered into under their common seal.

Infant.—An infant cannot bind himself by a bill drawn in the course of trade, (q) or even for necessities. (r) But infancy is a personal privilege, of which the infant alone can avail himself. Hence it has been holden, that the drawer of a bill of exchange cannot set up the infancy of the payee and indorser as a defence to the action. (s) In like manner the *acceptor* of a bill of exchange cannot set up the infancy, (t) or the bankruptcy, (u) of the drawer as a defence to an action brought at the

(q) *Williams v. W. Harrison and R. Harrison*, Carth. 180.

(r) *Williamson v. Watts*, 1 Campb. 552, Sir J. Mansfield, C. J.

(s) *Grey v. Cooper*, B. R. E. 22 Geo. III. M. S.; S. C., more fully reported 3 Doug. 65.

(t) *Taylor v. Croker*, 4 Esp. N. P. C. 187; and per Lord Hardwicke, in *Haly v. Lam*, 2 Atk. 181, 2, S. P.

(u) *Pitt v. Chappelow*, 8 M. & W. 616.

suit of the indorsee. So, though a note given by a wife to a husband is void, yet if it is indorsed over by the husband, as between him and the indorsee, it is certainly good.^(t) And if a bill be accepted by a party after he is of full age, he will be liable, although the bill was drawn on him while an infant.^(x)(1)

(t) *Taylor v. Croker*, 4 Esp. N. P. C. 187; and per Lord *Hardwicke*, in *Italy v. Lane*, 2 Atk. 181, 2, S. P.

(x) *Stevens v. Jackson*, 4 Campb. 164.

(1) A negotiable note made by an infant, is voidable, and not void; and if he, after coming of age, promise the payee that it shall be paid, the payee may negotiate it, and the holder may maintain an action in his own name against the maker. *Reed v. Batchelder*, 1 Metc. 559; *Everson v. Carpenter*, 17 Wend. 419; *Best v. Givens*, 3 B. Monroe, 72; *Goodsell v. Myers*, 3 Wend. 479.

A promissory negotiable note executed by an infant, is not void so as to be incapable of ratification after the infant becomes of age; and a repromise by him is valid, though not made until after the commencement of the suit against him. After the infant became of age he wrote a letter to the plaintiff containing these words: "All that is justly your due shall be paid." Held, that this was a sufficient repromise, and that the legal presumption that claims are just and also due, after the usual evidence in support of them, is sufficient, till rebutted by other evidence of injustice or of payment. *Wright v. Steel*, 2 N. Hamp. 51; *Font v. Cathcart*, 8 Ala. 725. An infant made a note, and after age, on payment being demanded, said, "I will pay it as soon as I can make it, but I cannot do it this year. I understand the holder is about to sue it, but she had better not." This was held to be an affirmation of the contract, and that an action would presently lie. *Babo v. Hansell*, 2 Bailey, 114. When an infant on being applied to for the payment of a note made by him during infancy, acknowledged that the money was due, and promised that, on his return to his home he would endeavor to procure it and send it to his creditor: it was held to be a sufficient ratification of the original promise. *Whitney v. Dutch*, 14 Mass. 457. The declaration of an infant, after he arrives of age, of his intention to pay a note, accompanied with his authorizing an agent to pay it, are a sufficient confirmation of the contract to bind him, although the agent has not done anything. *Orris v. Kimball*, 3 N. Hamp. 314. An infant purchased a kettle and other articles, and gave his promissory note for them, it being agreed by the parties that he might try the kettle and return it if it did not answer. The vendor, after the infant became of age, requested him to return it if he did not intend to keep it, but he retained and used it with the other property a month or two afterwards. Held, that this was a sufficient ratification of the contract, and that an action might be sustained on the note. *Aldrich v. Grimes*, 10 N. Hamp. 194. In an action on a note of an infant, the evidence of ratification was that the defendant said that he knew but little about the matter, as the transaction had been mostly managed by another person; that he thought the note had been paid, or partly paid, and that his uncle would be there next month, and then it should be settled. It was held sufficient to be submitted to a jury. *Bay v. Gunn*, 1 Denio, 108. An infant purchased land and gave his note for the price. After he came of age he continued in possession of the land, and promised to pay the note. Held, that this was a confirmation of the contract, binding on him and his representatives. *Armfield v. Tate*, 7 Iredell, 258.

The retention of the consideration for which the note of an infant was given, after his coming of age, is not a ratification of the note, neither is a submission to arbitration of the question whether he is liable on the note after he comes of age, a ratification. *Benhem v. Bishop*, 9 Conn. 330. Where a defendant, in conversation concerning a note made by him during infancy, said that he owed the plaintiff but was unable to pay him, and that he would endeavor to procure his brother to be bound with him; it was held not to be a renewal of the promise. *Ford v. Phillips*, 1 Pick. 202. A person who gave a note during his infancy, after he became of age made declarations of an intention of payment to persons having no interest in or agency as to the note. Held, that this was no evidence of a promise of payment or ratification of the contract. *Hart v. Underhill*, 9 N. Hamp. 436. A new promise made by an infant after he comes of age, that he will pay his promissory note, will not bind him, if made to one who is attorney for the plaintiff in another suit, but had not then been employed in the present suit against the infant. *Bigelow v. Grannis*, 2 Hill, 120.

A plea of infancy by one member of a firm to an action on a note in the name of the

Feme Covert.—A feme covert cannot bind herself by drawing a bill of exchange. This proposition falls within the general rule of law, which permits married women to avoid all contracts made by them during their coverture. To this rule there are some exceptions, which are stated under title "Baron and Feme," sect. II. *ante*, p. 302. The interest in a bill of exchange or note given to a feme covert, vests in her husband, and he must indorse it. An action was brought by the indorsee against the maker of a promissory note: (y) the first count of the declaration was upon the note, to which were added the money counts;

it appeared that the note had been given by the defendant to [*325] a married woman, with knowledge of her coverture, *to the

intent that she should indorse it to the plaintiff, which was done accordingly, in payment of a debt which she owed him (in the course of carrying on trade in her own name with the consent of her husband.) The plaintiff had dealt with her as a feme sole. It was holden, that the property in the note vested in the husband by the delivery to the wife, and that her indorsement did not transfer any interest to the plaintiff; consequently he was not entitled to recover on the special count: nor on the money counts, because no money had passed between the plaintiff and defendant. Where a promissory note is given to a married woman, the husband may sue on it, in his own name only, (z) and then a debt due to the maker from the wife *dum sola* cannot be set off. A promissory note made payable to a woman who is married at the time of the making, passes by the indorsement of the husband alone, during the coverture. (a)

But if a promissory note is made payable to a married woman, and she indorses it for value in her own name, (b) and the maker afterwards promises to pay it, in an action against him by the indorsee, it will be presumed, that the nominal payee had authority from her husband to indorse the note in that form, and the indorsement will be considered as vesting a legal title to the note in the plaintiff. So where the husband called on the defendant for payment of a debt due to the wife, and drew a bill, which was signed by his wife in his presence, at the request of, and accepted by, the defendant, and afterwards indorsed by the wife: the husband having obtained value from the plaintiffs, to whom he delivered the bill; it was holden, (c) that they might recover

(y) *Barlow v. Bishop*, 1 East's R. 432.

(z) *Burrough v. Moss*, 10 B. & C. 558.

(a) *Mason v. Morgan*, 2 A. & E. 30.

(b) *Cotes v. Davis*, 1 Campb. 485.

(c) *Prestwick and another v. Marshall*, 7 Bingh. 565.

firm, is not avoided by a replication that the defendant had continued a partner of the firm for upwards of a year after his arrival at full age, and had not in that time, nor for years afterwards, indicated a disposition to disaffirm any note executed in the name and in the business of the firm, without an averment that he had knowledge of the note declared on, and was looked to for payment. *Crabtree v. May*, 1 B. Monroe, 289.

A confirmation must be distinct, and with the knowledge that he is not liable on the contract. A mere acknowledgment of a debt, or a payment of part of it, will not support an action on such contract. *Hinely v. Margarity*, 3 Barr, 428; *Norris v. Vance*, 3 Richardson, 164. See *supra*, "Assumpsit," and Story on Bills, § 85.

against the defendant, the acceptor, inasmuch as the indorsement was by the authority of the husband, and consequently the property passed to the plaintiffs.(1)

Bill of exchange payable to a woman *dum sola*—she afterwards marries, and then the bill becomes due and is dishonoured: the husband may sue in his own name without joining the wife, for the property in the bill and the right of transfer is vested by the marriage in the husband, and as he might have indorsed it in his own name, so he may sue in his own name without a formal indorsement; for a bill of exchange differs in this respect from other choses in action, that the right of action is vested in the indorsee, who may sue in his own name.(d)

Agent.—Bills of exchange may be drawn, accepted, or indorsed, by means of the agent or attorney of the party.(2) An agent or attorney for this purpose may be constituted by parol. In such case

(d) *McNeillage v. Holloway*, 1 B. & A. 218. See *Gaters v. Madeley*, 6 M. & W. 423, *ante*, p. 312.

(1) A *feme covert* may indorse a note given to her before marriage in a name different from her husband's, if circumstances warranted the presumption of his assent; and such indorsement is valid, even though the note by an ante-nuptial settlement had been transferred to a trustee, if with his knowledge and assent. *Miller v. Delameter*, 12 Wend. 433. See Story on Bills, §§ 90-92; Story on Agency, § 7; 1 Parsons on Cont. 211.

(2) Deeds by an agent or attorney must be executed in the name of the principal, to bind him, but it is otherwise in case of simple contracts. *New England Marine Ins. Co. v. De Wolf*, 8 Pick. 56. In contracts not under seal, if the agent intend to bind his principal and not himself, it will be sufficient if it appear in such contract that he acts as agent. *Andrews v. Estes et al.*, 2 Fairf. 267; *Shotwell v. McKoun*, 2 Southard, 828. It is not sufficient to charge the principal, or protect the agent, if the language of the instrument imports a personal contract on his part. But when the name of the principal appears on the face of the instrument or contract, and it is evident that the agent did not intend to bind himself personally, but acted merely on behalf of the principal, if he acted by competent authority, the principal, and not the agent, will be bound. *Pentz v. Stanton*, 10 Wend. 271. It will, of course, be remembered, that the above case respects the liability of the principal on the bill as such, for a principal is liable on his agent's contracts for him, whether his name was disclosed or not, unless the principal being known, credit was exclusively given to the agent, in an action founded on the original consideration. *Ib.*

A promissory note was subscribed thus: "Pro. W. G., J. S. C.;" it was holden to be the note of W. G., if J. S. C. had authority. *Long v. Colburn*, 11 Mass. 97. And see *Emerson v. Providence Man. Co.*, 12 Mass. 237; *Rice v. Gove*, 22 Pick. 158; *Robertson v. Pope*, 1 Richardson, 501; *Orfelt v. Ayres*, 7 Monroe, 356; *McBean v. Morrison*, 1 A. K. Marshall, 545. When one gives a promissory note as guardian for a minor, although it is so stated in the body of the note, he is personally liable. *Foster v. Fuller*, 6 Mass. 58. As an administrator cannot by his promise bind the estate of the intestate, so neither can the guardian by his contract, bind the person or estate of his ward. *Ib.*

When individuals subscribe their proper names to a promissory note, *prima facie* they are personally liable, though they add a description of the character in which the note is given, but such presumption of liability may be rebutted, as between the original parties, by proof that the note was in fact given by the makers as agents, with the payee's knowledge. *Brockway v. Allen*, 17 Wend. 40; *Webb v. Burke*, 5 B. Monroe, 51; *Hovey v. McGill*, 2 Conn. 680; *Hides v. Banister*, 8 Cowen, 31; *Fogg v. Virgin*, 19 Maine, 352; *Pomeroy v. Slade*, 16 Vermont, 220; *Packard v. Nye*, 2 Metc. 47; *Fitch v. Lawton*, 6 Howard, (Miss.) 371.

If one draws a bill in his own name, without stating that he acts as agent, unless when acting for the government, he is personally liable, although he directs it to be paid out of a particular fund, and although the person in whose favor it is drawn knows the

the principal is said to draw, accept, or indorse, by procura-
 [*326] tion. *Agents should be cautious how they accept bills di-
 rected to them personally, and not to their principals, although
 such directions describe them in their official characters; for in such
 case, if they accept in their own name, they will become personally re-
 sponsible; as appears from the following case:—The plaintiff was
 indorsee of a bill of exchange, drawn from Scotland upon the defendant
 in these words,^(e) “At thirty days’ sight pay to J. S., or order, 200l.,
 value received of him, and place the same to account of the York
 Buildings’ Company, as per advice from Charles Mildmay. To Mr.
 Humphrey Bishop, cashier of the York Buildings’ Company, at their
 house in Winchester street, London. Accepted, per H. Bishop.” The
 bill not having been paid, an action was brought against defendant upon
 his acceptance: at the trial he proved, that the letter of advice was
 addressed to the company; and that, the bill having been brought to
 their house, defendant was ordered to accept it, which he did in the
 same manner as he had accepted other bills. *Page, J.*, directed the
 jury to find for the plaintiff; which they did accordingly. On motion
 for a new trial, the court held the direction right; “for the bill on the
 face of it imported to be drawn on the defendant, and it was accepted
 by him *generally*, and not as servant to the company, to whose account
 he had no right to charge it until actual payment by himself. And
 this being an action by an indorsee, it would be of dangerous conse-
 quence to trade, to admit evidence arising from extrinsic circumstances
 —as the letter of advice. *And this differed widely from the case*
of a bill addressed to the master, and underwritten by the servant:
where undoubtedly the servant would not be liable, but his acceptance
would be considered as the act of the master. A bill of exchange is a
 contract by the custom of merchants, and the whole of that contract
 must appear in writing. In this case there was nothing in writing
 to bind the company, nor could any action be maintained against them
 upon the bill: for the addition of cashier to defendant’s name was only
 to denote the person with certainty; the direction to whose account to
 place it was for the use of the drawee only.” Judgment for the
 plaintiff. One who covenants for *himself, his heirs, &c.*, under *his own*
hand and seal, for the act of another, shall be personally bound by his
 covenant, though he describe himself in the deed as covenanting *for*
and on the part and behalf of such other person.^(f) Where the de-
 fendant, in the absence of his brother, who was liable to give the plain-
 tiff a bill for goods supplied, signed it in his own name; it was holden,
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 cient consideration for which a party may bind himself by bill, and the
 consideration need not be such as would enable the plaintiff to sue on a

(e) *Thomas v. Bishop*, Str. 955; Ca. Temp. Hardw. 1, S. C.

(f) *Appleton v. Binks*, 5 East, 148.

special contract.(g) But where A. entered into and signed an agreement as *agent of B., and B. shortly afterwards [*327] signed it with the words "I hereby sanction this agreement, and approve of A.'s having signed it on my behalf;" it was holden that A. was not personally liable.(h) An agent to a country bank, to whom the plaintiff sent a sum of money in order to procure a bill upon London, drew in his own name, for the amount upon the firm in London, the two firms being the same: it was holden,(i) that the agent was liable as drawer, although plaintiff knew that he was agent, and supposed that the bill was drawn by him as such, and on account of the country bank, to which the agent paid over the money. A power of attorney,(k) authorizing an agent to demand, sue for, recover, and receive, by all lawful ways and means whatsoever, all moneys, debts, dues, whatsoever, and to give sufficient discharges, does not authorize him to indorse bills for his principal.(1)

(g) *Sowerby v. Butcher*, 2 Cr. & M. 368.

(h) *Spittle v. Lavender*, 2 Brod. & Bingh. 452.

(i) *Leadbitter v. Farrow*, 5 M. & S. 345.

(k) *Murray v. The East India Company*, 5 B. & A. 204; recognized in *Goldstone v. Tovey*, 6 Bingh. N. C. 101; and in *Davidson v. Stanley*, 3 Scott's N. R. 49; 2 M. & Gr. 721. See *Attwood v. Munnings*, 7 B. & C. 278; 1 M. & Ry. 66.

(1) An authority to sign a note may be by parol, or by letter, or by verbal directions, or may even be implied from certain relations proved to exist between the actual maker of the note and the party for whom he undertakes to act. *Long v. Colburn*, 1 Mass. Rep. 97. But a person acting as a clerk to a merchant, does not authorize him to sign notes in the name of his master. *Terry v. Fargo*, 10 Johns. Rep. 114. But the clerk of a partnership firm may sign notes, accept bills, &c., in consequence of a special authority given by one partner, for each has full power to this effect. *Tillier v. Whitehead*, 1 Dall. Rep. 269. And a bill drawn by a general agent is binding upon the principal, although the agent misapply the money. *Hoe v. Oxley*, 1 Wash. Rep. 23.

A special authority must be strictly pursued: and if an agent be authorized to sign a note payable at six months, and he sign a note payable at a shorter time, the principal is not bound. *Batty v. Carsvell*, 2 Johns. Rep. 48. And if an agent act beyond his authority, he will be responsible personally to third persons. Therefore, if he sign a note for his principal without authority, he will be personally bound. *Dusenberry v. Ellis*, 3 Johns. Cas. 70.

In the drawing and negotiating of bills and notes, as in other cases, if an agent acts without authority, and the principal ratify his acts, or acquiesce in them, he is bound in the same manner as if the agent had an original authority. Where a note is indorsed in the handwriting of the maker, and not of the indorser himself, the maker's authority may be shown by proof of the indorser's silence and acquiescence after notice and suit, and by his suffering judgment by default, and taking no measure to defend the suit till the maker had absconded, and his assuming payment of other notes similarly situated. *Weed v. Carpenter*, 10 Wend. 403. The indorsee of a note, payable to bearer, *over due*, cannot sue the maker if the payee were an agent, and the person beneficially interested forbid the payment. *Comstock v. Hogg*, 5 Wend. 600. *Van Reimsdyke v. Kane*, 1 Gallis. Rep. 630; *S. C.* 9 Cranch, Rep. 153; *Towle v. Stevenson*, 1 Johns. Cas. 110; *Conn. v. Penn.*, 1 Peters's Rep. 496; *Schimmelpennich v. Bayard*, 1 Peters's Rep. 264. And the acts of agents do not derive their validity from professing on the face of them to have been performed in the exercise of their agency; but the liability of the principal depends upon the facts, 1st, That the act was done in the exercise, and, 2dly, within the limits of the power delegated: and in ascertaining these facts, as connected with the execution of written instruments, (except deeds,) parol testimony is admissible. Therefore, where a check was drawn by a cashier of an incorporated bank, and it appeared doubtful upon the face of the paper, whether it was an official or private act, parol evidence was admitted to show that it was a private act. *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. Rep. 326, 336.

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Where an agent and partner in a joint concern was authorized to take up money or a credit on the whole concern, and to draw bills on a house in Amsterdam for payment, and he took money and drew a bill, directing the amount to be *charged to the account of all the parties*, but signed the bill *in his own name only*; held, that the payee was entitled, at least *in equity*, to recover, on nonpayment, from all the parties. *Van Reimsdyke v. Kane*, 1 Gall. Rep. 630; *S. C.* 9 Cranch's Rep. 153.

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Where an agent and partner in a joint concern was authorized to take up money or a credit on the whole concern, and to draw bills on a house in Amsterdam for payment, and he took money and drew a bill, directing the amount to be *charged to the account of all the parties*, but signed the bill *in his own name only*; held, that the payee was entitled, at least in equity, to recover, on nonpayment, from all the parties. *Van Reimsdyke v. Kane*, 1 Gall. Rep. 630; *S. C.* 9 Cranch's Rep. 153.

As to public agents, a distinction has long been recognized in their favor; and, therefore, if an agent of the government contract for its benefit, and on its behalf, and describe himself as such in the contract, he is held not to be personally responsible, although the terms of the contract might, in cases of a mere private nature, involve him in a personal responsibility. *Macbeath v. Haldimond*, 1 T. R. 172; *Union v. Wolseley*, T. R. 641; *Myrtle v. Beaver*, 1 East's Rep. 135; *Rice v. Shute*, 1 Id. 579; *Hodgdon v. Dexter*, 1 Cranch's Rep. 363; *Jones v. Le Tombe*, 3 Dall. Rep. 384; *Brown v. Austin*, 1 Mass. Rep. 208; *Freeman v. Otis*, 9 Id. 272; *Sheffield v. Watson*, 3 Caines' Rep. 69.

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partner, such acceptance binds all the partners, if it concerns the trade; otherwise, if it concerns the acceptor only, in a separate and distinct interest.(1) The implied authority of one partner to bind another by bills of exchange is by the custom and law of merchants, and is confined to partnerships, for the purpose of trade; but there is no custom or usage that attorneys shall be parties to negotiable instruments, nor is it necessary for the purposes of their business; hence, one of two attorneys in partnership has no implied authority to bind his partner by a note in the name of the firm, though given for their debt.(m) The authority implied by law, is an authority to bind the firm in the name of the partnership, and in that only: hence, where a firm consisted of J. B. and C. H., the partnership name being "J. B." only, and C. H. accepted a bill in the name of "J. B. & Co.," it was holden that J. B. was not bound thereby.(n) If a bill of exchange is drawn upon a firm, and one of the partners accept it in his own name, this acceptance binds the partnership.(o) So if A., B., and C., are in partnership, and A. draws a promissory note, by which he promises *individually* to pay the money, and which he signs with his own name only, but prefixing to his signature "*for A., B., and C.,*" this binds the whole partnership.(p) Where there are several partners, it is competent to either of them, by his indorsement, in the name of the firm, to pass their interest in the bill;(q) and such indorsement made by one partner for the *satisfaction of his separate [*828] debt, cannot be questioned in an action by the indorsee against the acceptor, without showing that the indorsement was at the time unknown to or unauthorized by the other partner.(r) But if a creditor of one of the partners collude with him to take security for his individual

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(2) A note drawn by one of two partners in the name of the firm, may be given in evidence in an action against both partners, under the count for money lent, without averment of partnership. *Mack v. Spencer*, 4 Wend. 411. In a suit against three persons, two of whom are partners, a note signed by one in his proper name, and by one of the partners in the name of the firm, supports a count alleging that they *subscribed their own proper names*. *Porter v. Cumings*, 7 Id. 172. Where a bill was drawn on a firm by one who had been a partner, in favor of another partner; held, this did not excuse indorsee from presentment and notice, notice of the drawer's retirement having been given publicly several days before the date of the bill. *Taylor v. Young*, 3 Watts, 339. The indorser of a note, in a suit against him by the surviving partner of a firm, cannot call on plaintiff to prove the consideration he paid for it, nor the manner it came into his possession, on an allegation that it belonged to the deceased partner individually, when the administrator does not deny his right to sue. *Smyth v. Hawthorn*, 3 Rawle, 355.

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Partners.(1)—By the custom of England,(1) where there are joint traders, and one of them accepts a bill drawn on them *for himself and*

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debt, out of the partnership funds, knowing at the time that it is without the consent of the other partners, it is fraudulent and void;(1) but if it be taken *bond fide* without such knowledge at the time, no subsequently acquired knowledge of the misconduct of the partner, in giving such security, can disaffirm the act.(2) If a bill is sent into circulation after the dissolution of a partnership,(s) all the partners must join in the indorsement, and one by putting the partnership name thereon cannot bind the rest; for the moment the partnership ceases, the partners become distinct persons; from that time they are tenants in common of the partnership property undisposed of.(3) In like manner, after a secret act of bankruptcy committed by one of two partners,(t) the other cannot, by an indorsement in the name of the firm, transfer the property in a bill which belonged to the firm before bankruptcy; for the partnership having ceased to exist, the solvent partner is to be considered as tenant in common with the assignees of the bankrupt partner, and the property in the bill can only be transferred by their respective indorsements. *Indorsee v. Defendant* as one of the drawers of a bill of exchange, the other drawers having become bankrupts; the bill was drawn in the firm of "James King & Co.," under which firm the defendant and his partners had traded; it appeared that there were other partnerships carried on under the same firm, in which the other drawers were concerned, but in which the defendant had no share; the defendant offered to show that this bill was not drawn on account of the partnership in which he was concerned, but on account of one of the others, and that he knew nothing of it: Lord *Kenyon*, C. J., was of opinion that the defendant was nevertheless liable: he had traded with the other persons under that firm; any person taking bills under it, though without his knowledge, had a right to look to him for payment.(u)(4)

(s) *Abel v. Sutton*, 3 Esp. N. P. C. 108, *Kenyon*, C. J.

(t) *Ramsbottom v. Lewis*, 1 Campb. 279.

(u) *Baker v. Charlton*, Peake's N. P. C. 80. See *Ashby v. Vere*, 10 B. & C. 296; *South Carolina Bank v. Case*, 8 B. & C. 427.

(1) The vendor of goods who takes from vendee a draft accepted by a firm procured for the express purpose of the purchase, must show the knowledge or assent of all the members. *Soyer v. Williams*, 14 Wend. 141.

(2) See *Baird v. Cochran*, 4 S. & R. 397.

(3) See *Le Roy v. Johnson*, 2 Pet. 197.

(4) If after a dissolution of the partnership, one partner issue notes in the partnership name, and the notes are ante-dated so as to appear as if they were dated within the term of the partnership, the other partners are not bound. *Lansing v. Gaine*, 2 Johns. Rep. 300. Nor can one of the partners, after the dissolution, indorse notes or bills given before to the firm, even though he is authorized to settle the partnership concerns. *Sandford v. Mickles*, 4 Johns. Rep. 224. The holder of a note drawn by one of two partners after dissolution, payable to A. or bearer, and transferred to plaintiff for an antecedent debt by payee, cannot recover against the firm. *Bristol v. Speague*, 8 Wend. 423. But this rule only applies in cases where the dissolution of the partnership has been duly notified, or is known to the party taking the bills or notes. *Ketcham v. Clark*, 6 Johns. Rep. 144. And notice of the dissolution of the partnership in the gazette is sufficient as to all persons who had no previous dealings with the partnership. *Lansing v. Gaine*, 2 Johns. Rep. 300. But it seems that as to persons who have previously dealt with the firm, mere notice in the newspapers is not sufficient; but actual knowledge of

Spiritual Person.—To assumpsit by the indorsee against the indorser of a bill of exchange, the defendant pleaded, that the bill was made and indorsed after the passing of the stat. 57 Geo. III. c. 99, (x) which restrained spiritual persons from being occupied in any trade or dealing; that the plaintiffs were a banking company, (the Northern and Central Bank of England,) of which certain spiritual persons, holding benefices, were partners; that the trade of a banker was carried on by the said partnership for the profit of those *spiritual per- [*329] sons, as well as others, contrary to the form of the statute; it was holden, (y) on demurrer, that the trade of a banker was within the meaning of the statute, and consequently that the plea was good. The inconvenience likely to arise from this decision induced the legislature to interpose; and by stat. 1 & 2 Vict. c. 10, [20th Feb. 1837] certain contracts, by banking firms, were made valid, in cases of associations or corporations then formed, or which might be formed before the end of the next session of parliament, although any spiritual person might be partner. And now, by stat. 4 & 5 Vict. c. 14, after reciting that “divers associations and copartnerships, consisting of more than six members or shareholders, have been formed for the purpose of carrying on the business of banking and other trades and dealings for gain and profit, and were then engaged in carrying on the same, by means of boards of directors or managers, committees, or other officers, acting on behalf of all the members or shareholders of or persons otherwise inter-

(x) This act was repealed by stat. 1 & 2 Vict. c. 106; ss. 29 and 30 of this latter act contain the prohibitions now in force against spiritual persons trading.

(y) *Hall v. Franklin*, 3 M. & W. 259.

the fact of the dissolution must be brought home to the party. *Ketcham v. Clark*, 6 Johns. Rep. 144.

Where after the dissolution of the partnership, one of the partners signed a note in the name of the firm, if such transaction be ratified subsequently by the other partners, it binds the partnership. And a part payment of the note by the other partner has been held a sufficient ratification of the act. *Eaton v. Taylor*, 10 Mass. Rep. 54.

Where there is a limited and special partnership, and persons deal with it knowingly as such, they are bound by the terms of it, and cannot make the partners liable beyond them. *Ensign v. Wands*, 1 Johns. Cas. 171. Therefore, where one of the partners in such a firm gives a note for a debt not due from the firm, it does not bind the firm, although executed in its name, unless the other partners assent. *Lansing v. Gaine*, 2 Johns. Rep. 300. Nor can a person receiving a note drawn by one partner in the name of the firm, but for his private debt, and without the knowledge or assent of the other partners, and having notice of these circumstances, recover against an indorser, who indorsed it merely as a surety of the firm, believing it to be good against all the partners, and unacquainted with the circumstances under which it was issued. *Livingston v. Hastie*, 2 Caines' Rep. 246. But such a note will bind all parties in the hands of a *bona fide* holder without notice. *Livingston v. Roosevelt*, 4 Johns. Rep. 251; *Livingston v. Hastie*, 2 Caines' Rep. 246; *Boardman v. Gore*, 15 Mass. Rep. 331. See *Smith v. Lusher*, 5 Cowen, 688, how far a note given in the partnership name to one partner, and by him indorsed over, can be recovered upon by the holder.

The acknowledgment of a debt by one partner, after a dissolution of the partnership, will not bind the other partners. *Hackley v. Patrick*, 3 Johns. Rep. 536. But an acknowledgment of a partnership debt, by one of the partners, after the dissolution, will take it out of the statute of limitations. *Smith v. Ludlow*, 6 Id. 267. Where a surviving partner purchases of the executor his deceased partner's interest, and gives his note therefor at a fair valuation, with which the executor charges himself in his probate account, it is no defence that the sum is too large, and more than was due from errors in the partnership account. *Grew v. Burdett*, 9 Pick. 265.

ested in such associations or co-partnerships; and that several spiritual persons, holding dignities, canonries, benefices, stipendiary curacies, or lectureships, have been members or shareholders of or otherwise interested in divers of such associations or co-partnerships, and that it was expedient to render legal contracts entered into by such associations or co-partnerships, although the same may now be void, by reason of such spiritual persons being or having been such members or shareholders; it was enacted, that no such association or co-partnership already formed, nor any contract, either as between the members, partners, or shareholders, composing such association or co-partnership for the purpose thereof, or as between such association or co-partnership and other persons heretofore entered into, or which shall be entered into by any such association or co-partnership already formed or hereafter to be formed, shall be deemed to be illegal or void, or to occasion any forfeiture whatsoever, by reason only of any such spiritual persons as aforesaid being or having been a member, partner, or shareholder of or otherwise interested in the same; but all such associations and co-partnerships shall have the same validity, and all such contracts shall be enforced in the same manner to all intents and purposes as if no such spiritual person had been or was a member, partner, or shareholder of or interested in such association or co-partnership: provided always, that it shall not be lawful for any spiritual person holding any cathedral preferment, benefice, curacy or lectureship, or who shall be licensed or allowed to perform the duties of any ecclesiastical office, to act as a director or managing partner, or to carry on such trade or dealing as aforesaid in person."

[*330] *III. *Of the Requisites in a Bill of Exchange, and herein of the Stamp. p. 332; Date. p. 336; Alteration of Bill. p. 337; Of the Person to whom the Bill is made Payable. p. 339; Word, "or Order." p. 340; Consideration. p. 340; Gaming. p. 341; Usury. p. 342.*

In order to prevent any mistake in the manner of penning this instrument, (although to constitute a bill of exchange there is not any precise form required,)(z) a foreign and inland bill of exchange are subjoined in the proper form:—

Foreign Bill.

London, 1st January, 1841.

Stamp.

Exchange for 10,000 Livres Tournoises.

At two usances (or "at sight," or "—after date") pay this my first bill of exchange (second and third of the same tenor and date not paid,)(1) to Messrs. or order, ("or

(z) Per Cur. Lord Raym. 1397.

(1) When the second of a set of three bills is protested for non-acceptance, and suit

bearer,") ten thousand Livres Tournises, value received of them, and place the same to account as per advice from

JAMES OATLAND.

To Mr. in Paris, }
payable at }

Inland Bill.

£100



London, 1st January, 1841.

At sight (or "on demand," "at sight," "at after date," pay to Mr. days after or order, ("or bearer") one hundred pounds, for value received.

SAMUEL SKINNER.

To Mr. merchant in }
Bristol, payable at }

*An instrument which appears on common observation to [*331] be a bill of exchange may be treated as such, (a) although words be introduced into it for the purpose of deception, which might make it a promissory note. With respect to these bills of exchange, the following rules must be observed:—A bill of exchange must *not* purport to be payable out of a particular fund, which may or may not be productive, (b) or upon an event which may not happen; for it would perplex the commercial transactions of mankind, if paper securities were issued into the world incumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to inquire at what time these uncertain events would probably be reduced to a certainty. The following cases will illustrate this position:—An action was brought by payee against drawer of a written instrument in these words: (c) (1)

(a) *Allan v. Mawson*, 4 Campb. 115, *Gibbs*, C. J.

(b) *Jenney v. Herle*, Lord Raym. 1361; *Stevens v. Hill*, 5 Esp. N. P. C. 247.

(c) *Dawkes and another v. Lord de Loraine*, 3 Wils. 207; 2 Bl. R. 782, *S. C.*

brought against indorser, and plaintiff declares on the first of the set, he must produce the second of the set which was protested, or account for the non-production to guard against liability for acceptance *supra* protest. *Wells v. Whitehead*, 15 Wend. 527.

(1) An order drawn on an administrator, "Please settle eighty dollars out of my part of the estate," is not a bill of exchange, as it is payable out of a particular fund. *Mills v. Kuy Kendall*, 2 Blackf. 47. An order, by a contractor, on the postmaster-general, to pay on the 1st of January, to his order, five thousand dollars, for value received, and charge the same to his account for transporting the United States mail, is not negotiable. *Reeside v. Knox*, 2 Whart. 233. A bill absolute on its face cannot be shown by parol to be payable on a contingency. *Cunningham v. Wadwell*, 3 Fairf. 466. An indorsement making the payment contingent does not affect its negotiability. Its only effect is to give notice of the consideration to subsequent holders, and enable the maker to set up such defence as he has against the payee. *Tappan v. Ely*, 15 Wend. 362. A mere order drawn by one person on another to pay to order of a third, when in funds, the net amount of sales, and accepted, if without consideration, is revocable; if with consideration, is an appropriation; but in neither case is negotiable. *Jackson v. Tilghman*, 1 Miles, 31.

"Seven weeks after the date pay A. B. £ out of W. Steward's money as soon as you receive it."

It was objected, "that it was payable out of a supposed fund at a future time, which was uncertain, and might or might not happen." The court gave judgment for the defendant; and *de Grey*, C. J., said, that the instrument or writing which constituted a good bill of exchange, according to the law and custom of merchants, was not confined to any certain form of words, yet it must have some essential qualities, without which it was not a bill of exchange; it must carry with it a personal and certain credit given to the drawer, not confined to credit upon any thing or fund; that the payee or indorsee took it upon no particular event or contingency, except the failure of the general credit of the person drawing or negotiating the same. So where the instrument declared on was, "Pay A. B. one month after date £ on account of the freight of the *Veale Galley*." It was objected, that it was an order upon a particular fund, and on this ground, *Lee*, C. J., ruled it not to be a bill of exchange. *Banbury v. Lisset*, Str. 1212. So where a bill was drawn by an officer upon his agent, requesting him to pay out of his growing subsistence, it was holden(d) not to be good because the fund was uncertain. So a request to J. S. to pay £ out of the moneys in J. S.'s hands,(e) belonging to the proprietors of the Devonshire mines, was holden not to be a bill of exchange, because it was uncertain whether the fund would be sufficient to pay it. So

[*332] an order to pay money out of the fifth payment, when *it should become due, and it should be allowed by the drawer.(f)

The same principle was recognized in the following case, although the instrument was holden to be a good bill of exchange: J. S., on the 25th of May, 1724, drew a bill on(g) J. N., and directed him, one month after date to pay A. B. or order £ as his quarter's half-pay, from 24th June, 1724, to 25th September following. The court were of opinion that this was a good bill of exchange, for it was not payable on a contingency nor out of a particular fund, and was made payable at all events; and was drawn upon the general credit of the drawer, not out of the half-pay; for it was payable as soon as the quarter began for the half-pay mentioned in the bill, which was not to be due till three months after: the mention of the half-pay was only by way of direction to the drawee, how he should reimburse himself.(1)

Of the Stamp.—A bill of exchange cannot be given in evidence,(h) nor is it in any manner available, unless it be duly stamped, that is, not only with a stamp of the proper value, but also with a stamp of a proper denomination, or the peculiar stamp appropriated to this species

(d) *Josselyn v. Lacier*, 10 Mod. 294, 316; Fort. 281, S. C.; MS. Serjt. Hill, vol. 32, p. 1.

(e) *Jenney v. Herle*, B. R. on error from C. B. Str. 591, and more fully reported in 8 Mod. 265; Lord Raym. 1361, and 11 Mod. 384, Leach's ed.

(f) *Haydock v. Lynch*, on demurrer to declaration, Lord Raym. 1563.

(g) *Mackleod v. Snee*, Lord Raym. 1481; Str. 762, and 11 Mod. 400, Leach's ed.

(h) 1 Bos. & Pul. N. R. 30.

(1) Inserting in a bill that drawer will credit drawee's note with the amount does not make it payable out of a particular fund. *Early v. M'Cart*, 2 Dana, 415.

of instrument by the legislature. The enactment of stat. 31 Geo. III. c. 25, s. 19, that no bill, draft, or order, &c., shall be given in evidence, or available in law, unless the paper is lawfully stamped, is incorporated in stat. 55 Geo. III. c. 184, s. 8.(i) The 19th section of this act prohibits the re-issuing a bill of exchange which has been paid, and a bill issued contrary to such prohibition is void.(k)

Notice of dishonour of a bill not drawn on a proper stamp is not necessary,(l) for it is worth nothing.

The amount of the stamp duties on bills of exchange is at this time (1845) regulated by stat. 55 Geo. III. c. 184.(1)

Exemptions from Stamp Duties.

All bills of exchange, or bank post bills, issued by the governor and company of the Bank of England. All bills, orders, remittance bills, and remittance certificates, drawn by commissioned officers, masters and surgeons in the navy, or by any commissioner of the *navy, under the act of the thirty-fifth year of his late [*333] Majesty's reign, for the more expeditious payment of the wages and pay of certain officers belonging to the navy. All bills drawn pursuant to any former act of parliament by the commissioners of the navy, or by the commissioners for victualling the navy, or by the commissioners for managing the transport service, and for taking care of sick and wounded seamen, upon, and payable by, the treasurer of the navy.(m) All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker, or any person acting as a banker, who shall reside, or transact the business of a banker, within fifteen miles of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders; and provided the same shall bear date on or before the day on which the same shall be issued; and provided the same do not direct the payment to be made by bills or promissory notes.(n) By stat. 7 & 8 Vict. c. 32, s. 7, the promissory notes of the Bank of England, payable to bearer on demand are exempted from all stamp duties.

The stamp duty is imposed upon the sum actually due at the time of taking the security, and not upon what may become due in future for the use of the money. Hence, a promissory note for the payment of 30*l.* at three months after date, with interest from the date, requires(o) a stamp applicable to a note not exceeding 30*l.* So where a note

(i) *Field v. Woods*, 7 A. & E. 114.

(k) *Lazarus v. Cowie*, 3 Q. B. 459; 2 G. & D. 487.

(l) *Cundy v. Marriott*, 1 B. & Ad. 696.

(m) 55 Geo. III. c. 184.

(n) See stat. 9 Geo. IV. c. 49, s. 15.

(o) *Pruessing v. Ing*, 4 B. & A. 204.

(1) A bill payable to A. B. or order on demand is not a bill payable to bearer on demand, and therefore is within the second class of the schedule requiring the lower stamp. *Exp. Robinson*, 1 D. & Ch. 275, questioning the authority of *Keates v. Whieldon*, 8 B. & C. 7.

reserves interest from a day prior to the date, a stamp applicable to the principal(*p*) sum is sufficient. The legislature having in contemplation the mistakes which might arise in the use of stamps of an improper denomination, has, by stat. 37 Geo. III. c. 136, made provision for those mistakes; for, by the fifth section of that statute, it is enacted, that bills and notes made after the passing this act, and liable to a stamp duty by stat. 31 Geo. III. c. 25, if stamped with a stamp of a different denomination than is required by the last-mentioned act, may, if the same be of *equal* or *superior* value to the stamp required, be stamped by the commissioners on payment of the duty and penalty; that is, by sect. 6th of the 37 Geo. III. c. 136, the penalty of forty shillings, if the bill or note is produced to the commissioners, *before* it is payable, and ten pounds, if so produced *after* it is payable. Since this statute of 37 Geo. III. it has been determined(*q*) that a promissory note, drawn before the 37 Geo. III. c. 136, upon a receipt stamp of equal value with that required for a promissory note, is not available in law. The act of 37 Geo. III. c. 136, is a clear legislative declaration, that it is not sufficient, that a certain sum of money be paid on [*334] the instruments which are the subjects of taxation, *but the stamp used must be of the proper denomination.(*r*) By stat. 31 Geo. III. c. 25, s. 19, bills and notes were forbidden to be stamped after they were made. This provision is still in force. Stat. 35 Geo. III. c. 63, s. 14, contains a similar provision as to marine assurances.(*s*)

By stat. 43 Geo. III. c. 127, s. 6, it is enacted that every instrument,(*t*) matter, or thing, although stamped or impressed with any stamp of greater value than the stamp required by law, shall be valid and effectual, provided such stamp shall be of the denomination required by law for such instrument, &c.

An unstamped bill, or one improperly stamped, cannot be *read to the jury*(*u*) as evidence of the contract, or any part of it, in respect of which the plaintiff sues.

Where partners resident in Ireland signed and indorsed a copper-plate impression of a bill of exchange, leaving blanks for the date, sum, time when payable, and name of the drawee, and transmitted it to B., in England for his use, who filled up the blanks and negotiated it; held, that this was to be considered a bill of exchange by relation from the time of the signing and indorsing in Ireland, and consequently that an English stamp was not necessary.(*x*) But where a blank acceptance was written on a stamped paper, which afterwards was filled up and became a bill of exchange, it was holden that the bill could not be

(*p*) *Wills v. Noott*, 4 Tyrw. 726.

(*q*) *Chamberlain v. Porter*, 1 Bos. & Pul. N. R. 30.

(*r*) Per Sir J. Mansfield, C. J., delivering the opinion of the court in *Chamberlain v. Porter*, 1 Bos. & Pul. N. R. 33.

(*s*) The stamp duties on marine assurances are now regulated by stat. 7 & 8 Vict. c. 31.

(*t*) See *Furr v. Price*, 1 East's R. 55, and *Taylor v. Hague*, 2 Id. 414.

(*u*) *Jardine v. Payne*, 1 B. & Ad. 663, in effect overruling *Bishop v. Chambre*, 1 Danson & Lloyd. 83.

(*x*) *Snaith v. Mingay*, 1 M. & S. 87, recognized by *Parke, J.*, *Holdsworth v. Hunter*, 10 B. & C. 456.

considered as existing by relation from the time of acceptance.(y) A bill of exchange(z) drawn in England upon a person abroad, but accepted by him, payable in England, is an inland bill, and requires a stamp as such. Indorsee of a bill of exchange, against the acceptor;(a) it appeared at the trial, that the bill, which was drawn on a proper stamp, was originally dated on the 2nd of September, 1793, payable *twenty-one* days after date; and, while it continued in the hands of the drawer, it was altered with the consent of the acceptor, to be made payable *fifty-one* days after date, and afterwards with the like consent was again restored to *twenty-one* days after date, and the date brought forward from the 2nd to the 14th of September. This last alteration was made on the 30th of September, the bill being then over due according to the original tenor of it; after these alterations, it was negotiated, and came into the hands of plaintiff. Lord *Kenyon*, C. J., nonsuited the plaintiff; and, on a motion to set aside the nonsuit, *the court were clearly of opinion, that the nonsuit [*335] was proper; for that, at the time when the last alteration was made, the operation of the bill, as it originally stood, was quite spent; that it was a new and distinct transaction between the parties; *and that therefore there ought to have been a new stamp.* The plaintiff declared as indorsee of a bill of exchange against the acceptor,(b) and it appeared that the bill in question, which was drawn by *Giles and Co.*, on the 3rd of June, 1807, payable to their own order, and accepted by the defendant at three month's date, was exchanged by him with *Giles and Co.*, for their acceptance of a bill drawn by the defendant for the same sum at eighty-five days, payable to his order, the object being that *Giles and Co.* should put the defendant in cash before his acceptance became due. On the 23rd of June, before *Giles and Co.*, or the defendant had passed the respective securities to any other person, it was agreed to procrastinate the payment of the bills by post-dating them the 23rd of June, instead of the 3rd. The court were of opinion, that the alteration rendered a new stamp necessary; observing that the delivery of the bill by the drawer to the acceptor, and the re-delivery of it for a valuable consideration, such as the exchange of acceptances, has been held to be, since *Cowley v. Dunlop*, 7 T. R. 565, a negotiation of the bill; that the several drawers were mutual purchasers of each others acceptances; and, as the alteration was made while the bill was in this course of negotiation, and after it had continued so twenty days, (during which time it was in the power of the drawer and payee to have passed it to any third person,) it was in effect drawing a new bill. So where a promissory note, payable by the defendant to the plaintiff or order,(c) was originally expressed to be *for value received*, but the day after it had been signed and delivered by defendant to plaintiff, it was by consent of the parties altered, by the addition of the words *for the goodwill of the lease and trade of Mr.*

(y) *Abrahams v. Skinner*, 12 A. & E. 763; 4 P. & D. 358.

(z) *Amner v. Clark*, 2 Cr. M. & R. 468; 1 Gale, 191.

(a) *Bowman v. Nichol*, 5 T. R. 537.

(b) *Cardwell v. Martin*, 9 East, 190. See also *Bathe v. Taylor*, 15 East, 412, S. P.

(c) *Knill v. Williams*, 10 East, 431.

F. K., deceased; it was holden, that as the alteration was material, as well because it was evidence of a fact which, if necessary to be inquired into, must otherwise have been proved by different evidence, as also because it pointed out the particular consideration for the note, and put the holder upon inquiring, whether that consideration had passed, and as such alteration was made after the note had issued, a new stamp was necessary. An alteration, made with the assent of the defendant, the acceptor, and before the bill was negotiated, has been holden(*d*) not to be a re-issuing, so as to require a fresh stamp. So where, after issuing of a joint and several note, the name of a third party was added, with consent of all parties, as an additional surety.(*e*) An objection, on the ground of *the insufficiency of the stamp, cannot be taken after payment of money into court.(*f*)(1)

Omission of Date.—Regularly, every bill of exchange ought to be dated: but in the following cases, where the day of the date was omitted in the declaration, the court said they would intend the bill to bear date on the day when it was made. A date is not of the substance of a deed, for if it want a date, or have a false or impossible date, as the 30th of February, yet the deed is good.(*g*) Case on a foreign bill of exchange payable at double usance from the date,(*h*) and it was alleged that the party beyond the sea drew the bill on a certain day, and that the same was presented to and accepted by the defendant. Exception, that the date of the bill was not set forth. The court said, that they would intend the bill dated at the time of drawing it. Judgment for plaintiff. So where, in the first count of the declaration, it was stated,(*i*) that the defendant heretofore, to wit, on the 15th day of September, 1800, drew a bill of exchange, bearing date the day and year aforesaid, payable two months after date. The second count stated, that the defendant afterwards, to wit, on the same day and year aforesaid, drew a certain bill of exchange, payable two months after date. On writ of error, after judgment by default, it was objected, that the second count

(*d*) *Leykariff v. Ashford*, 12 Moore, 281.

(*e*) *Catton v. Simpson*, 3 Nev. & P. 248; 8 A. & E. 136.

(*f*) *Israel v. Benjamin*, 3 Campb. 40.

(*g*) *Goddard's case*, 2 Co. 5, a.

(*h*) *De la Courtier v. Bellamy*, 2 Show. 422.

(*i*) *Hague v. French*, Exchequer Chamber, in error, 3 Bos. & Pul. 173; *Giles v. Bourne*, 6 M. & S. 73, S. P. on demurrer.

(1) The courts of one country do not take notice of the revenue laws of another independent country. Therefore, where a note was executed in France, by a person resident there, payable at New York, to another person resident in that city, as agent of a third person resident in France, and by the then existing laws of France all notes for the payment of money were required to be stamped, it was held, that a suit could be maintained in the courts of the state of New York, notwithstanding the note was not stamped. Besides, a contract made in a foreign country, but to be performed here, and invalid in the place where made, by reason of some formal defect, is not, in consequence, to be deemed invalid here: and it might be said, in this case, that the parties never contemplated exacting payment of the note in France. *Ludlow v. Van Rensselaer*, 1 Johns. Rep. 94.

But if the two countries be under the same united empire or government, and a bill is drawn in any part of its dominions, where by the local law a stamp is necessary, it will not be available in any other part of the same empire, without such stamp. *Roach v. Edie*, 6 T. R. 45.

could not be sustained, because the date of the bill was not stated: that although, in *De la Courtier v. Bellamy*, the court held, that it might be intended that the date of the bill was the day of the drawing, yet there the day of drawing was expressly stated; whereas in this case it was to be collected only from words of reference to the first count, in which the day of drawing was laid under a "to wit." But the court were of opinion, that this case was not distinguishable from *De la Courtier v. Bellamy*, and that they might well intend the date to have been the day of drawing stated in the first count. The defendant, on the 4th May, 1810, drew a bill of exchange, which he dated on the 11th May, 1810, payable sixty-five days after date, and delivered it to the payee, who, after indorsing it for a valuable consideration to the plaintiff *on the fifth day of May*, died *on the same day*. It was holden, that the plaintiff was entitled through this indorsement to recover against the drawer. (k) In an action by the payee against the maker of a promissory note, dated the 28th of June, 1837, the plaintiff in his particulars gave credit for the payment of three years' interest on account. It appeared that the note was made in 1839; it was holden that the bill of particulars had reference to the date of the note, and therefore that the interest became payable from the year 1837, and not from the year *1839, when the note was ac- [*337] tually made. (l) In the case of a bill dated on Sunday, (m) the court, in the absence of evidence, would not presume the acceptance to have been written on that day; and even if it had, such an act would not be an act of ordinary calling within stat. 29 Car. II. c. 7.

Alteration of Bill. (1)—A bill of exchange was drawn on defendant

(k) *Pasmere v. North*, 13 East, 517.

(l) *Chestham v. Sturtevant*, 12 M. & W. 515.

(m) *Begbie v. Levi*, 1 Cr. & J. 180.

(1) "Where an alteration appears on the face of the bill, it lies on the plaintiff to show that it was made under such circumstances as not to vitiate the instrument. And this rule is most reasonable; for if it lay on the defendant, on an acceptor, for example, sued by an indorsee, to show that the alteration was improperly made, it might be a great hardship; for he may have no means of proving that the bill went unaltered from his hands, or of showing the circumstances of a subsequent alteration. But the burthen of explaining an alteration imposes no hardship on the plaintiff, for if the bill was altered while in his hands, he may, and ought to account for it; if before, then he took it with a mark of suspicion on its face, which ought to have induced him either to refuse it, or to require evidence of the circumstances under which the alteration was made.

"The American cases on this subject are not harmonious. The weight of authority, however, sustains the above position. There are several cases which leave the question as a presumption of fact, to be determined by the jury. In some instances it has been held, that the law presumes an erasure or interlineation to have been made before the instrument was signed. In other cases, however, it has been decided, that if an erasure or interlineation appears on the face of a negotiable instrument, some explanation must be given in evidence before it can be allowed to go to the jury. It is then a question of fact for the jury, when, by whom, and with whose consent it was altered; but the materiality of the alteration is, in all cases, a pure question of law for the court. See *Jackson v. Osbourne*, 2 Wend. 555; *Cumberland Bank v. Hall*, 1 Halst. 215; *Bayley v. Taylor*, 11 Conn. 531; *Heffelfinger v. Shute*, 16 Serg. & Rawle, 44; *Chesley v. Frost*, 1 N. Hamp. 145; *Jackson v. Jacoby*, 9 Cow. 125; *Prevost v. Gratz*, Peters's C. C. 369; *Stephens v. Graham*, 7 Serg. & Rawle, 508; *Bowers v. Jewell*, 2 N. Hamp. 543; *Steele v. Spencer*, 1 Pet. 552; *Rankin v. Blackwell*, 2 Johns. Cas. 198; *Hills v. Barnes*, 11 N. Hamp. 395; *Gooch v. Bryant*, 1 Shepl. 386; *Crabtree v. Clark*, 7 Id. 337; *Davis v. Carlisle*, 6

on the 26th of March, 1788, payable three months after date to J. S. and accepted by defendant.⁽ⁿ⁾ After acceptance, and while the bill remained in the hands of J. S. the payee, the date of the bill was altered by some person unknown, from the 26th March, 1788, to the 20th March, 1788, without the authority or privity of the defendant: J. S. the payee, afterwards indorsed the bill so altered to the plaintiffs for a valuable consideration. It did not appear that the plaintiffs knew of the alteration at the time when the bill was indorsed to them. Payment having been refused, plaintiffs sued the defendant as acceptor. The declaration contained two special counts, one on a bill dated the 20th March, 1788, the other on a bill dated the 26th March, 1788, and the money counts. Special verdict. The case was argued twice in B. R., after which the court (*Buller, J.*, dissentient,) gave judgment for defendant, on the ground that the alteration of the instrument had avoided it. So if the word "date" be inserted, instead of the word "sight."^(o) So where a bill^(p) having been accepted generally, the

(n) *Master and others v. Miller*, 4 T. R. 320, affirmed on error in Exchequer Chamber, 2 H. Bl. 141; recognized in *Powell v. Divett*, 15 East, 32, where *Le Blanc, J.*, says, "that the decision in *Master v. Miller* was not confined to negotiable instruments;" and the case of *Powell v. Divett*, has been since acted on in *Davidson v. Cooper*, 11 M. & W. 778, 803.

(o) *Long v. Moore, Kenyon, C. J.*, 3 Esp. N. P. C. 155.

(p) *Cowie and another v. Halsall*, 4 B. & A. 197. See also *Desbrow v. Weatherley*, 6 C. & P. 758.

Ala. 707; *Warren v. Layton*, 3 Harr. 404; *Bank v. Lum*, 7 How. Miss. 414; *Wilson v. Henderson*, 9 Smedes & Marsh. 375; *Matthews v. Coalter*, 9 Missouri, 705; *Beamer v. Russell*, 20 Verm. 205; *Tillou v. Clinton and Essex Ins. Co.*, 7 Barb. S. C. 564.

"The question of the burthen of proof in such cases, arose in the Supreme Court of Pennsylvania, in *Simpson v. Stackhouse*, 9 Barr, 186, and it was held, that the onus of showing that an alteration in a material part of a negotiable instrument was lawfully made, is on the holder; and that where the place of payment is in a different handwriting from the body of the instrument, there is a presumption of alteration. Chief Justice *Gibson*, after stating, that as a general rule the law presumes in favor of innocence, that an alteration in an instrument is a legitimate part of it till the contrary appears; but that it is not, according to the English cases, extended to negotiable instruments, remarks, that the decisions in the United States are discrepant, but their preponderance is in favor of restraining the general rule to deeds and writings not negotiable. He then observes: 'But how stands the question on principle? The English decisions are founded in reason, and not in considerations growing out of the stamp acts. He who takes a blemished bill or note, takes it with its imperfections on its head. He becomes sponsor for them; and though he may act honestly, he acts negligently. But the law presumes against negligence, as a degree of culpability; and it presumes that he had not only satisfied himself of the innocence of the transaction, but that he had provided himself with the proof of it to meet a scrutiny he had reason to expect. It is of no little weight, too, that the altered instrument is found in his hands, and that no person else can be called on to speak of it; for without a presumption to sustain him, the maker would in every case be defenceless. It may be said that the holder, with such a presumption against him, would also be defenceless. But it was his fault to take such a note. As bills and notes are intended for circulation, and as payees do not usually receive them when clogged with impediments to their circulation, there is a presumption that such an instrument starts fair and untarnished, which stands till it is repelled; and a holder ought, therefore, to explain why he took it, branded with marks of suspicion which would probably render it unfit for his purposes. The very fact that he received it, is presumptive evidence that it was unaltered at the time; and, to say the least, his folly or his knavery raised a suspicion which he ought to remove. The maker of a note cannot be expected to account for what may have happened to it after it left his hands; but a payee or indorsee who takes it, condemned and discredited on the face of it, ought to be prepared to show what it was when he received it.'" *Byles on Bills*, 259, 3d ed. text, and notes by Sharswood.

drawer, without the consent of the acceptor, added the words "payable at Mr. B.'s, Chiswell street." But a mere correction of a mistake, as by inserting the words "or order," in furtherance of the intention of the parties, will not vitiate the bill.(q) So where two persons being jointly indebted to another, agreed to give him a bill of exchange, to be drawn by one of the debtors, and accepted by the other, instead of which they sent him a promissory note, made by the one and indorsed by the other, which he immediately returned to be altered into a bill of exchange, which was done accordingly: it was holden, that such alteration, only fulfilling the terms of the agreement, might be considered as the correction of a mistake, and did not render a new stamp necessary, the instrument never having been negotiated as a promissory note.(r) So if the alteration be not in the time of payment, sum, &c. or other material part, the bill will not be affected by it.

Hence, writing *on the bill the place where it was to be paid, [*338] before the bill was negotiated, at the request of the payee, has been holden not to destroy the validity of the bill.(s) Where the acceptor had made the bill payable at his own house, and some time after delivery to payee, at the request of payee, altered the place of payment to a banker's; it was holden(t) to be immaterial. But an alteration of a general acceptance, by the addition of a place of payment, discharges(u) the acceptor, if made without his privity. Thus, in an action by indorsee against acceptor of a bill, (not stated to be payable at any particular place,) it is a good defence, under a plea that the defendant did not accept the bill declared on, that after he had accepted it generally, it was altered without his knowledge, by the addition of a memorandum making it payable at a banker's.(x) Three persons joined as drawer, acceptor, and first indorser, in making an accomodation

(q) *Kershaw v. Cox*, *Le Blanc*, J., 3 Esp. N. P. C. 246; *Brutt v. Picard*, 1 Ry. & Moo. 37; *Byrom v. Thompson*, 11 A. & E. 31; 3 P. & D. 71, S. P.

(r) *Webber v. Maddocks*, 3 Campb. 1. See *Cole v. Parkin*, 12 East, 471.

(s) *Trapp v. Spearman*, *Kenyon*, C. J., 3 Esp. N. P. C. 57; *Jacobs v. Hart*, 2 Stark. N. P. C. 45; *Lord Ellenborough*, C. J., 6 M. & S. 142, S. P.; *Stevens v. Lloyd*, 1 M. & Malk. 292.

(t) *Walter v. Cubley*, 2 Cr. & M. 151; 4 Tyrw. 87.

(u) *Desbrowe v. Wetherby*, 1 M. & Rob. 438, *Tindal*, C. J.; *Taylor v. Moseley*, *Lyndhurst*, C. B., 1 M. & Rob. 439, n., S. P., recognizing *Macintosh v. Haydon*, Ry. & Moo. N. P. C. 362, *Abbott*, C. J.

(x) *Calvert v. Baker*, 4 M. & W. 417.(1) See *Crotty v. Hodges*, 4 M. & Gr. 561; 5 Scott's N. R. 221.

(1) The authority of this case has been much weakened by the judgment of *Parke*, B., in *Mason v. Bradley*, 11 M. & W. 594, where he says: "I do not think that case (*Calvert v. Baker*) can be supported, where the alteration is not such as to cause a variance between the statement in the declaration and the instrument when produced, or to raise an objection to the stamp on the document: it is only applicable where the alteration is such as to put an end to existing liabilities. The court do not appear, in deciding that case, to have adverted to the circumstance, that the alteration in the bill sued on was not such as to require a new stamp." In the subsequent case of *Davidson v. Cooper*, 11 M. & W. 786, *Parke*, B., said, "that all that the court must be considered as having decided in *Calvert v. Baker* is, that an alteration in an instrument may be objected to on non assumpsit, when its effect is to make it a different instrument, so as to render a new stamp necessary." See also *Hemming v. Trenery*, 9 A. & E. 926; 1 P. & D. 661, ante, 123.

bill; and it was afterwards issued for value to J. S. Previously to its being issued, its date had been altered; it was holden, that the acceptor, having assented to the alteration when he was informed of it, it was no answer to an action on the bill against him, that the bill had been so altered without the consent of the drawer and first indorser, and that a fresh stamp was not necessary in consequence of such alteration, the bill having been altered before it was issued in point of law. An accommodation bill is not issued until it is in the hands of some person who is entitled to treat it as a security available in [*339] law.(y) *But in all these cases it lies on the plaintiff to show that the alteration was made previous to the note being issued;(z)(1) and where an alteration appears upon the face of a bill, the party producing it must show that the alteration was made with consent of parties, or before issuing the bill.(a) Where the words "or order" had been substituted for "or other," and the attesting witness, who had prepared the note, stated that he could not say whether the alteration was in his handwriting or not, but that he ought to have drawn the note originally with the words "or order," and it appeared that the defendant had paid two years' interest on the note; this was holden to be reasonable evidence, from which it might be inferred that the alteration had taken place with the defendant's consent.(b) If, upon a bill being presented for acceptance, the drawee alters it as to the time of payment, and accepts it so altered; although the drawer and indorser are thereby discharged; yet if the holder acquiesces in such alteration and acceptance, the bill will be good as between the holder and acceptor.(c) But if, after a bill has been drawn and indorsed, and before it is accepted, the drawee alter it by postponing the

(y) *Downes v. Richardson*, 5 B. & A. 674.

(z) *Johnson v. Duke of Marlborough*, 2 Stark. 313.

(a) Per Best, C. J., in *Henman v. Dickinson*, 5 Bingh. 184; see also *Bishop v. Chambre*, 1 M. & Malk. 116; *Knight v. Clements*, 8 A. & E. 215; 3 Nev. & P. 375; *Clifford v. Parker*, 2 M. & Gr. 909; 3 Scott's N. R. 233.

(b) *Carris v. Tattersall*, 2 M. & Gr. 890; 3 Scott's N. R. 257.

(c) *Paton v. Winter*, 1 Taunt. 420.

(1) Material alteration in a written agreement not under seal by party claiming under it, vitiates the instrument and prevents his resorting to original consideration. *Newell v. Mayberry*, 3 Leigh, 250. Cutting off a memorandum regulating the payment of a note, is a material alteration that avoids it, and no suit lies for original consideration. *Whetlock v. Freeman*, 13 Pick. 165. The alteration of a note not before witnessed by a person not present at the signing, is a material alteration, and avoids it. *Brackett v. Morestfort*, 2 Fairf. 115. Where A. & B. made a note payable to H. for twenty dollars, and B., who received it to pass to H., alters it before delivery to one hundred and twenty dollars, A. is not liable. *Goodman v. Eastman*, 4 N. H. R. 455. But where a note is intended to be made for eight hundred dollars, and is indorsed by payee for accommodation of maker, and delivered to him, and by mistake is written eight —, omitting the words hundred dollars, and the maker inserts the same, the indorser is liable to a holder to whom it was delivered, as a security for his debt. *Boyd v. Brotherson*, 10 Wend. 93. The adding of a date to an indorsement of a partial payment on the back, is not such material alteration. *Howe v. Thompson*, 2 Fairf. 152. A bill indorsed in blank by payee and left with drawer, was transferred, without indorser's knowledge, to plaintiff with these words written by drawer under his name, "left with B. as collateral," held, no alteration. *Bachelor v. Priest*, 12 Pick. 399. An alteration by consent of two of three joint contractors by adding seals and the words jointly and severally, binds the two. *Waning v. Williams*, 8 Pick, 322. See *infra*, 565, n. 1.

time of payment, it renders the bill void.(d) So where a bill was delivered by the drawee to the payee, and afterwards its date was altered by an agreement between the payee and drawee before acceptance, in an action by payee against acceptor, it was holden void(e) under the stamp laws, for it was negotiated when delivered by the drawee to payee. But where drawer sued acceptor upon a bill and failed, in consequence of having altered the bill in a material part, he may still recover on the counts on the original consideration.(f) A cancellation by a third person, through mistake, of an acceptance, will not avoid the bill.(g)

Of the Person to whom the Bill is made Payable.—Regularly a bill of exchange ought to be made payable to a real person; but if it be drawn payable to a fictitious payee or order, and indorsed in his name, *by concert between the drawer and acceptor*, it will be considered as a bill payable to bearer, and may be declared on as such in an action by an innocent indorsee for a valuable consideration against the drawer; *Collis and others v. Emmett*, 1 H. Bl. 313: or against the acceptor; *Gibson and another v. Minet and another*, 1 H. Bl. 569. But see contr. the opinions of *Eyre*, C. J., and *Heath*, J., 1 H. Bl. p. 598, 625, with whom Lord *Thurlow*, Ch., concurred. But if the circumstance of the payee being a fictitious *person is unknown [*340] to the acceptor,(h) he cannot be declared against on the bill, either as a bill payable to bearer, or to the order of the drawer. Where the drawer subscribed himself as Thomas Wilson, when his name was Thomas Wilson Richardson; it was holden,(i) that he was not to be esteemed to have committed a forgery, unless it were proved that the omission of his surname was for purposes of fraud.

Words, "or Order."—The negotiability of a bill of exchange depends on its being made payable to A. or order, or to A.'s order, or to A. or bearer.(1) See *post*, on the transfer of bills of exchange. A bill payable to A.'s order is the same as if it were made payable to A. or order,(k) and may be declared on, without alleging that A. did not make any order for the payment of the bill to any other person.(l)(2) In *Hill v. Lewis*, Salk. 133, exception was taken that a bill was payable to defendant only, without the words, "or his order," and therefore not assignable by the indorsement; and *Holt*, C. J., agreed that the indorsement of this bill did not make *him that drew* the bill chargeable to the indorsee; for the words "or his order," give authority to the *plaintiff*(m) to assign it by indorsement; and it is an agreement by the first drawer that he would answer it to the assignee; but the indorse-

(d) *Outhwaite v. Luntley*, 4 Campb. 179.

(e) *Walton v. Hastings*, 4 Campb. 223.

(f) *Atkinson v. Hawdon*, 2 A. & E. 628.

(g) *Raper v. Birkbeck*, 15 East, 17. See *Novelli v. Rossi*, 2 B. & Ad. 757.

(h) *Bennett v. Farnell*, 1 Campb. 130.

(i) *Schultz v. Astley*, 2 Bing. N. C. 544.

(k) Per *Holt*, C. J., 12 Mod. 310.

(l) *Smith v. M'Clure*, 5 East, 476.

(m) Q. Payee.

(1) See *Gerard v. La Coste*, 1 Dall. 194; *Barrow v. Nairoc*, 2 Id. 249.

(2) See *Hay v. Soulding*, 10 Pick. 122.

ment of a bill which has not the words, "or his order," is good, or of the same effect between the indorser and the indorsee, to make the indorser chargeable to the indorsee.

"*Value Received.*"(1)—The essence of a bill of exchange is, that it is negotiable or payable to order, and that it is payable generally, not out of a particular fund. It is not *essentially* necessary to insert the words "value received."(n)

A bill of exchange is *presumed* to be made upon a good and valuable consideration; and in actions not between immediate parties some suspicion must be cast upon the plaintiff's title before he can be compelled to prove what consideration he has given for it. A mere notice given by the defendant to the plaintiff, that he will be required at the trial to prove the consideration, is not sufficient to cast this burden on the plaintiff.(o) When suspicion is cast on the plaintiff's title by showing that some previous holder has been defrauded out of it, the plaintiff must prove what consideration he gave for it.(p)(2) In actions be-

(n) *White v. Ledwick*, 4 Doug. 247, on demurrer to the declaration. Per Lord Ellenborough, C. J., in *Grant v. Da Costa*, 3 M. & S. 352.

(o) *Reynolds v. Chettle*, 2 Campb. 596; *Clarke v. Elliott*, B. R. London Sittings, after M. T. 52 Geo. III. S. P.

(p) *Reese v. M. J. Headfort*, 2 Campb. 574.

(1) If a promissory note purports on its face to be "for value received," setting forth the note according to its terms is a sufficient statement of consideration to entitle plaintiff to recover as on a contract. *Walrad v. Petrie*, 4 Wend. 575. See Story on Bills, § 63.

(2) The courts of this country will not enforce an agreement entered into in fraud of the laws of the United States. *Hannay v. Eve*, 3 Cranch's Rep. 247.

One citizen of the United States has no right to purchase of, or sell to, another citizen, a license or pass from a public enemy, to be used on board an American vessel. *Patton v. Nicholson*, 3 Wheat. Rep. 207. But though in time of war, commercial intercourse with the enemy is unlawful, yet it may be legalized by the license of the government. Thus, where a bill was drawn in the United States upon a person in Great Britain during the late war with that country, for supplies furnished by the payee to a British packet ship, authorized by an act of Congress to sail from hence to an enemy's port, which was sold by the payee to the plaintiff, who remitted it to G. B. for collection; *held*, that the drawing and remittance of the bill was within the protection afforded by the license, and was not illegal. *Suckley v. Furse*, 15 Johns. Rep. 338. And a bill of exchange expressed to be collateral to a ransom bill, is valid, and an action may be maintained upon it, the plaintiff and payee being an alien friend. *Maisonnaire v. Keating*, 2 Gallis. Rep. 325.

A note given by an insolvent to his creditor to induce him to sign his certificate under the insolvent law, with a blank in it for the date to be filled up after his discharge, is void, as against the general policy of the law. Nor can it be revived by a subsequent promise to pay it. *Payne v. Eden*, 3 Gaines' Rep. 213. And a note given to a creditor to induce him to withdraw his opposition to the debtor's discharge under the insolvent law is void. *Wiggins v. Bush*, 12 Johns. Rep. 306. See also *Yeomans v. Chatterton*, 9 Id., 292. If a sheriff, on arresting a defendant, take from him the note of A., indorsed by the defendant in blank, as security, the assignment or transfer is illegal and void, as being contrary to the statute of New York concerning sheriffs; and, in an action by the sheriff, as indorsee, against the maker, the latter may avail himself of the fact to defeat the action. *Strong v. Thompson*, 8 Id. 98.

Where a note is given for the purchase of real property, and the title fails, it is not a good defence against the note unless the failure be total. *Greenleaf v. Cook*, 3 Wheat. Rep. 13. And where the note is given with a full knowledge of the extent of the incumbrance on the title, and the party consents to take the title, the defect is no bar to an action on the note. *Ib.* And see *Lloyd v. Jewell*, 1 Greenl. 656; *Howard v. Wiham*, 2 Id. 390; *Knapp v. Lee*, 3 Pick. 452; *Steinhaur v. Witman*, 1 S. & R. 488; *Hart v. Porter*, 5 Id. 201; *Share v. Anderson*, 7 Id. 43.

tween parties, the illegality or want of consideration^(q) may be insisted on by way of defence *to an action on the bill.⁽¹⁾ [*341] "As between the drawer and payee, the consideration may be gone into, yet it cannot between the drawer and indorsee; and the reason is, because it would be enabling either of the original parties to assist in a fraud;" per *Ashhurst, J.*, in *Lickbarrow v. Mason*, 2 T. R. 71. See an anonymous case in chancery, Comyns, 43, where *Sommers*, Lord Keeper, held, that the drawer of a bill of exchange, though given without consideration, was not entitled to relief against a third person, to whom it was assigned for a just debt. See also *Snelling v. Briggs*, Bull, N. P. 274, where it is said, that it seems a reasonable distinction which has been taken between an action between the parties themselves, in which evidence may be given to impeach the promise, and an action by or against a third person, viz. an indorsee or an acceptor. See also *Puget de Bras v. Forbes and another*, coram *Loughborough*, C. J., 1 Esp. N. P. C. 117.⁽²⁾ Circumstances amounting to proof only of a partial failure of consideration, will afford no answer to action brought

(q) *Puget de Bras v. Forbes*, 1 Esp. N. P. C. 117.

In an action by the holder of a note against the indorser, it is competent for the defendant to prove that the note was put into circulation by the drawer fraudulently, and without his knowledge. *Holme v. Karsper*, 5 Binn. 469. And in such case, he may call upon the plaintiff to show how he came by it. *Ib.* See *Harrisburg Bank v. Meyer*, 6 S. & R. 537; *Lights v. Brenner*, 14 Id. 127; *Evans v. Smith*, 4 Binn. 366; *Miles v. O'Hara*, 1 S. & R. 32; *Perry v. Cramond*, 1 W. C. C. R. 100; *M'Murtrie v. Jones*, 3 W. C. C. R. 206.

(1) A note imports consideration, and possession is presumptive evidence of property rightfully acquired; but where the maker shows it was put in circulation by force or fraud, the onus is thrown on holder. *Rogers v. Morton*, 12 Wend. 484; *Vallett v. Parker*, *Ib.* 615; *Payne v. Cutler*, 13 Id. 605; *Hart v. Palmer*, 12 Id. 523; *Rosa v. Brotherton*, 10 Id. 86. The word "renewal," written on the margin of a note indorsed for accommodation of maker, is enough to put holder on his guard, unless erased so as to escape the attention of ordinary prudence. *Hall v. Hale*, 8 Conn. 336. But a transfer by delivery merely a few days before it was due by the payee, who told indorser he must take it at his own risk, is not evidence of notice. *Ib.* It is not incumbent on defendant to show full and certain knowledge of the want or failure of consideration if the facts were such as to put the holder on his guard. *Cone v. Baldwin*, 12 Pick. 545. An advertisement in a newspaper by drawer of a note, cautioning the public against taking it, and stating he had a just and legal defence, is no evidence of notice to indorser, although it appears he was a subscriber to the paper, that it was duly sent to him, and no complaint was made of its not being received. *Beltzhoover v. Blackstock*, 3 Watts, 20. Express notice is necessary to put plaintiff on proof of consideration given by him. And where notice is given merely of want of consideration between the original parties, it is not sufficient. *Ib.* Where a party indorsed a note at sixty days for the accommodation of maker, with a view to its discount in bank, and after the refusal of the bank the maker passed it off when it had but eighteen days to run, with the bank marks on it, to a lottery broker for tickets at retail price, and the latter knew the maker was not a dealer in lottery tickets, and was informed that it had been in bank; held, that he was chargeable with notice of the fraud. *Brown v. Taber*, 5 Wend. 566. An indorser of a note payable at a bank is not liable on a new note indorsed in blank to enable the drawer to renew the first, which at its maturity was neither renewed nor protested, but lay over for twenty-two months, if there was any improper means used to get the new note from the drawer contrary to the original desire of the indorser. *Lancaster Bank v. Irvine*, 3 Penn. R. 250. See *Morton v. Rogers*, 14 Wend. 575.

(2) If the holder received the bill without consideration, the maker is not precluded from setting up an original want of consideration between him and the payee. *Lawrence v. Stonington Bank*, 6 Conn. Rep. 521.

by an indorsee against acceptor.(r) See *ante*, 174, n., and *Obbard v. Betham*, 1 M. & Malk. 488, as to the distinction between a contract and security in this respect. The want of consideration between drawer and acceptor is no defence to an action at the suit of indorsees for value, unless they take the bill with notice of the want of consideration.(s)

By stat. 9th Ann. c. 14, s. 1, "All notes, *bills*, &c., where the whole or any part of the consideration was for money or other valuable thing, won by gaming, &c., were made void, as by stat. 16 Car. II. c. 7, certain gaming contracts were; and the consequence of these enactments was, that even an innocent indorsee could not maintain an action(t) in any of those cases which fell within their provisions.(1) Although there is not any substantive clause in the stat. 9 Ann. c. 14, which avoids the contract, yet the 2nd sect. of that stat. gives the loser a power to recover back money or goods to the value of 10*l.* lost at any unlawful game, by action brought within three months, but after the expiration of three months the loser cannot recover such goods or money from the winner,

although the winner can show no title to them except what arises [*342] *from having won them.(u) And money fairly lost at play must be recovered in an action founded on the statute; it is not sufficient to sue in debt at common law for money had and received.(x)

The 12th Ann. stat. 2, c. 16, s. 1, enacted that all bonds, contracts, and assurances, made for the payment of any principal or money lent, upon usury, should be utterly void; and the principle of *Bowyer v. Bampton* was applied to bills originally given upon usurious(y) considerations.(2) But now by 58 Geo. III. c. 98, [10th June, 1818,] reciting that by the laws now in force, all contracts and assurances for payment of money made for an usurious consideration are utterly void, and that in the course of mercantile transactions negotiable securities often pass into the hands of persons who have discounted the same without any knowledge of the original considerations for which the same were given, and the avoidance of such securities, in the hands of such *bonâ fide* indorsees without notice is attended with great hardship and injustice; it is enacted, that no bill of exchange or promissory note, drawn or made after the passing of this act, shall, though it may have been given for an usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had at the

(r) *Mann v. Lent*, 10 B. & C. 877.

(s) *Robinson v. Reynolds*, 2 Q. B. 196; 1 G. & D. 526.

(t) *Boyer v. Bampton*, Str. 1155; *Shillito v. Theed*, 7 Bingh. 405.

(u) *Vaughan v. Whitcomb*, 2 N. R. 413.

(x) *Thistlewood v. Cracroft*, 1 M. & S. 500.

(y) *Lowe v. Waller*, 2 Doug. 740.

(1) The stat. 9 Ann. c. 14, only avoids securities for money won or lost at play, and does not extend to cases of mere loans without any security taken; see stat. 16 Car. II. c. 7, s. 3; 12 Geo. II. c. 28; 18 Geo. II. c. 34. With respect to actions to recover money lent for the purpose of gaming, see *M'Kinnell v. Robinson*, 3 M. & W. 434, questioning the cases of *Barjeau v. Walmsley*, 2 Str. 1249; *Wettenhall v. Wood*, 1 Esp. N. P. C. 18, and *Alcinbrook v. Hall*, 2 Wils. 309. See also *Robinson v. Bland*, 2 Burr, 1077, *Quarrier v. Colston*, 1 Phil. 147; and *Applegarth v. Colley*, 10 M. & W. 731; and as to the subject of illegal contracts, *ante*, p. 91, 2, and *post*, tit. "Debt," "Gaming."

(2) See *Sancrasin v. Brunner*, 1 Har. & Gill, 477.

time of discounting or paying such consideration, actual notice that such bill or note had been originally given for an usurious consideration, or upon an usurious contract. And by stat. 5 & 6 Will. IV. c. 41, intituled "An Act to amend the Law relating to Securities given for Considerations arising out of Gaming, usurious and certain other illegal Transactions," after reciting clauses in the foregoing and other statutes against gaming, usury, &c., it is enacted, that so much of the recited acts as enact, that any *note, bill, or mortgage* shall be absolutely void, shall be repealed; and that such *note, bill, or mortgage*, which under those acts would have been absolutely void, shall be deemed and taken to have been made for an *illegal consideration*;(z) and the said several acts shall have the same effect which they would respectively have had, if, instead of enacting that such *note, bill or mortgage*, should be absolutely void, they had provided respectively that every such *note, bill, or mortgage*, should be deemed to have been made for an *illegal consideration*, with a proviso that this statute shall not affect any *note, bill, or mortgage*, which would have been good, if this act had not passed: and by sect. 2, in case any person shall, after the passing of this act, make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by any of the recited acts declared to be void, and such person shall actually pay to any indorsee, *holder, or assignee of such note, bill, or mortgage, [*348] the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed to have been paid on account of the person, to whom such note, bill, or mortgage, was originally given upon such illegal consideration, and shall be deemed to be a debt due from such last-named person to the person who shall have so paid such money, and shall be recoverable by action in any of his Majesty's courts of record. This statute does not mention judgments.(a)

By stat. 3 & 4 Will. IV. c. 98, s. 7, it is enacted, that no bills or notes made payable at or within three months after date, or not having more than three months to run, shall by reason of any interest taken thereon, or secured thereby, or any agreement to pay or receive, or allow interest in discounting or negotiating the same, be void; nor shall the liability of any party to any(b) bill of exchange or promissory note be affected, by reason of any statute in force for the prevention of usury: and persons drawing, accepting, indorsing, or assigning such bills or notes, or lending or advancing money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively, for the loan of money thereon, are exempted from the penalties. Warrants(c) of attorney to secure payment of such bills are within the protection of the statute. A note payable on demand(d) is a note payable

(z) See *Edmunds v. Groves*, 2 M. & W. 642; *Applegarth v. Colley*, 10 M. & W. 731; *Bingham v. Stanley*, 2 Q. B. 117; 1 G. & D. 237; and *Carter v. James*, Exch. T. T. 1844, where *Alderson, B.* said he was the only survivor of the judges who decided *Edmunds v. Groves*, and that it could not be supported.

(a) See *Lane v. Chapman*, 3 P. & D. 668; 11 A. & E. 966, affirmed on error, 11 A. & E. 980; 1 G. & D. 523.

(b) Sic. See *Vallance v. Siddel*, 2 Nev. & P. 81; 6 A. & E. 932.

(c) *Connop v. Meaks*, 2 A. & E. 326; 4 Nev. & M. 302.

(d) *Vallance v. Siddel*, 2 Nev. & P. 78; 6 A. & E. 932.

within three months within this act. Where there was an usurious agreement for a loan on the following terms, viz. the borrower was to give a promissory note payable one month after date, to be renewed as often as it should fall due, and for each renewal one shilling in the pound was to be paid by way of discount, it was holden,^(e) that the promissory notes so given were protected by the stat. 3 & 4 Will. IV. c. 98. But the act does not extend^(f) to a bill or note given in addition to a security of another nature not protected by the statute, upon which the debt was really contracted.

By stat. 1 Vict. c. 80, bills and notes not having more than twelve months to run were exempted from the operation of the usury acts until the 1st of January, 1840; and now by stat. 2 & 3 Vict. c. 37, s. 1, [29th July, 1839,] from and after the passing of this act, no bill of exchange or promissory note made payable at or within twelve months after date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money, above 10*l.*, shall by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, [*344] *or negotiating, or transferring any such bill or note, be void, nor shall the liability of any party, to any such bill or note, nor the liability of any person borrowing any sum of money as aforesaid, be affected, by reason of any statute for the prevention of usury, nor shall any person or body corporate drawing, accepting, indorsing, or signing any such bill or note, or lending or advancing or forbearing any money as aforesaid, or taking more than the present rate of legal interest, in Great Britain and Ireland respectively, for the loan or forbearance of money as aforesaid, be subject to any penalties under any statute relating to usury, or any other penalty or forfeiture: Provided, that nothing herein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein. This act was to continue in force till the 1st of January, 1842, and has been continued till the 1st of January, 1846, by stat. 6 & 7 Vict. c. 45.

Before the statute of 58 Geo. III. c. 93, it had been holden that the stat. 12 Ann. c. 16, applied to those cases only where the bill was *originally* given for an usurious consideration; ^(g) for if the bill was fair and legal in its inception, an indorsement by the payee for an usurious consideration would not avoid it in the hands of a subsequent *bonâ fide* holder; but if a bill had been drawn upon an agreement between one of the original parties to it, and a person not a party to it, ^(h) that the latter should get it discounted by another person likewise not a party to the bill, upon usurious terms and it was so discounted accordingly, the bill was void for the usury, in the hands of an innocent indorsee; and in such case the bill was void, although the drawer, to whose order it was payable, was not privy to the usurious agreement. ⁽ⁱ⁾

^(e) *Holt v. Miers*, 5 M. & W. 168.

^(f) *Berrington v. Collis*, 5 Bingh. N. C. 332. See *King v. Braddon*, 10 A. & E. 675; 2 P. & D. 546.

^(g) *Parr v. Eliason and others*, 1 East's R. 92. See Also *Daniel v. Cartony*, S. P. per Kenyon, C. J., Middlesex Sittings, 1 Esp. N. P. C. 274.

^(h) *Young v. Wright*, 1 Campb. 141.

⁽ⁱ⁾ *Ackland v. Pearce*, 2 Campb. 599.

So where a bill of exchange affected by usury was in the hands of an innocent holder, who, on being informed of the usury, took a fresh bill in lieu of it, drawn by one of the parties to the original usury, and accepted by a third person for the accommodation of the other party; it was holden, *(k)* that he could not maintain an action against the acceptor of this substituted bill. If an usurious security be given for a legal pre-existing debt, although the security is void, the debt is not extinguished. *(l)* Where a party is *compelled* to take the goods in discounting a bill of exchange, a presumption arises that the transaction is usurious; and to rebut this presumption, evidence must be given of the value of the goods by the person who has supplied the goods *(m)* and sues on the bill. But where, in discounting a bill, a proposal is made that goods shall be taken, although such proposal originate with the *plaintiff, yet if the other party readily accedes to [*345] it, conceiving that he shall make a profit by the transaction, the presumption is, that the goods are charged beneath their value, and it lies upon the defendant to prove the contrary, if he would impeach the plaintiff's title to the bill on the ground of usury. *(n)* *(1)*

In cases where the illegality of the consideration was such as did not

(k) *Chapman v. Black*, 2 B. & A. 588.

(l) *Phillips v. Cockayne*, 3 Campb. 119, per *Bayley, J.*; *Sutton v. Toomer*, 7 B. & C. 419, S. P.

(m) *Davis v. Hardacre*, 2 Campb. 375.

(n) *Coombe v. Miles*, 2 Campb. 553.

(1) A contract usurious in its inception, cannot afterwards be rendered valid; therefore, a note given for a usurious consideration, will be void in the hands of a *bonâ fide* indorsee without notice of the usury. *Wilkie v. Roosevelt*, 3 Johns. Cas. 206. So a note indorsed for the accommodation of the maker, and passed by him as security for an usurious loan, is an usurious contract in its inception, as the lender is in fact to be considered the first holder of the note. *Jones v. Hake*, 1 Johns. Cas. 60; *Wilkie v. Roosevelt*, 3 Id. 66, 206. But a note given as collateral security for a judgment recovered, will not be affected by usury in the transaction upon which that judgment was obtained. *Stewart v. Eden*, 2 Caines' Rep. 150. And a security originally valid cannot be invalidated by a subsequent usurious transaction between the original parties and privies. *Bush v. Livingstone*, 2 Caines' Cas. 66. So a new security given to a *bonâ fide* holder of an usurious note is good. *Stewart v. Eaton*, 2 Caines' Rep. 150. *Jackson v. Henry*, 10 Johns. Rep. 185. *Chadbourn v. Watts*, 10 Mass. Rep. 121. And where a bill or note is valid, as between the drawer or maker and the payee, it is valid in the hands of an indorser who had discounted it at a higher rate than the legal rate of interest, and he may recover the full amount of the bill or note against the maker or acceptor. But he can only recover from his indorser the sum which he actually advanced. *Munn v. The Commission Company*, 15 Johns. Rep. 44; *Knight v. Putnam*, 3 Pick. 84. But a bill or note drawn for the purpose of being discounted at a usurious rate of interest, and indorsed for the accommodation of the maker or drawer, is void in its original formation. *Rennet v. Smith*, Ib. 355; *Powell v. Waters*, 8 Cowen, 669. A note ante dated so as to give more than the legal interest, is usurious. *Williams v. Williams*, 3 Green, 153. The transfer and indorsement by payee of a valid available note at a discount, is not usury, and he is liable for the advance and interest. *Cram v. Hendricks*, 7 Wend. 569. And the indorsee may recover the whole amount against the maker, although he bought it for less, and verbally promised the seller that he would demand only what he gave for it. Ib., and *Babron v. Webber*, 9 Pick. 163. A note reserving interest negotiated by a broker or agent, who obtains money on it for the maker from a third person, is not usurious in the hands of the holder, although the agent be the payee and receive twelve and a half per cent. for the negotiation, no part of such sum being paid or agreed to be paid to the lender. *Barrett v. Snowden*, 5 Wend. 181; *Gaul v. Willis*, 4 Am. Law Reg. 561. As to computation of interest according to Rowlett's tables, vide *Savings Bank v. Bates*, 8 Conn. 505.

fall within the statutes against gaming, &c., the holder was not affected with the transaction between the original parties, unless he either had notice, or took the bill, *after it became due*, from a person who had notice of the illegal consideration for which the bill was given. See *Peacock v. Rhodes*, Doug. 632; *Steers v. Lashley*, 6 T. R. 61; *Brown v. Turner*, 7 T. R. 630; *Day v. Stuart*, 6 Bingh. 109.

Gambling transactions in foreign funds^(o) are not within the Stock Jobbing Act, stat. 7 Geo. II. c. 8,^(p) nor are foreign securities.^(q) A plea, to an action by drawer against acceptor, that the bill was given for goods sold by the plaintiff, a foreigner, to the defendant, for less than the real value, to be smuggled into this kingdom, was holden^(r) bad, on special demurrer, a foreigner not being bound to respect the revenue laws of this country. N. The foreigner had not taken any personal part in the transaction.

A bill may be negotiated after it is due, unless there be an agreement for the purpose of restraining it.^(s)(1) But a party taking a bill of exchange or note after it is due, takes it subject to all its equities;^(t)(2) "nothing *dehors* the bill, as payment, &c., ought to affect an indorsee for value."^(u) In *Brown v. Davies*, 3 T. R. 82, it was said by Buller, J., that generally, when a note is due, the party receiving it takes it on the credit of the person who gives it to him. To this position *Kenyon*, C. J. agreed, with the addition of this circumstance, that if it appeared on the face of the note to have been dishonoured, or if knowledge could be brought home to the indorsee that it had been so. See Mr. J. *Lawrence's* approbation of the foregoing rule in *Boehm v. Stirling*, 7 T. R. 431. In *Taylor v. Mather*, 3 T. R. 483, n., Buller, J., said, that it had never been determined that a bill or note was not negotiable after it became due, but if there were circumstances of fraud in the transaction, and it came into the hands of plaintiff by indorsement, after it became due, he had always left it to the jury, upon the slightest circumstance, to presume that the indorsee was acquainted with the fraud. See also

(o) *Wells v. Porter*, 2 Bingh. N. C. 722.

(p) Made perpetual by stat. 10 Geo. II. c. 8.

(q) *Oakley v. Rigby*, 2 Bingh. N. C. 732.

(r) *Pellecat v. Angell*, 2 Cr. M. & R. 311.

(s) *Charles v. Marsden*, 1 Taunt. 224, recognized in *Lazarus v. Cowie*, 3 Q. B. 459; 2 G. & D. 487.

(t) Per *Cresswell*, J., in *Sturtevant v. Ford*, 4 M. & Gr. 101; 4 Scott's N. R. 668.

(u) Per *Tindal*, C. J., *S. C.*

(1) The indorsement of a note is presumed to have been *before* it was due, and it lies on defendant to show the contrary. *Pinkerton v. Bailey*, 8 Wend. 600. A note post-dated and negotiated before the day of its date is recoverable by indorsee, as it furnishes no ground of suspicion. *Brewster v. M'Cardell*, 8 Wend. 478. The maker of a note is bound to pay to the legal holder at maturity, and cannot prevent the negotiation of the note before it is due by any notice that he has a set-off, even if such notice is brought home to the indorsee, if he receive it *bonâ fide*, although as a security for a debt. *Springer Bank v. Bates*, 8 Conn. 505. But held in Massachusetts, that in an action against maker of a note indorsed before it fell due by payee to plaintiff, defendant may show that payee's name was given merely as surety, and that this was known to plaintiff at the time, and so be let into all equities as if they were immediate parties. *Grew v. Burdett*, 9 Pick. 265.

(2) A note payable on demand with interest under the legal rate, payable semi-annually, indorsed to the plaintiff after six months as collateral security, was held to be within this rule. *Thompson v. Hale*, 6 Pick. 259; *Nevins v. Townsend*, 6 Conn. Rep. 5.

Tinson v. Francis, 1 Campb. 19, where the holder of a note had given a full consideration for a note after it became *due, [*346] but was not permitted to recover in an action against the maker, the maker having proved that the note was originally made without consideration. Lord *Ellenborough*, C. J., observing, "That after a note or bill is due, it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he takes it, though he gives a full consideration for it, he takes it on the credit of the indorser, and subject to all the equities with which it may be encumbered." And in *Cripps v. Davis*, 12 M. & W. 165, *Parke*, B. says, The reason why a party who takes an overdue bill or note takes it with all its equities, is because on the face of it, it carries suspicion; that does not apply to the case of a bill or note payable on demand, a promissory note payable on demand, is intended to be a continuing security.(x) The indorsee of an overdue bill or note is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters existing between the earlier parties to it.(y)(1) Therefore to an action by the indorsee of an overdue note against the payee, a distinct debt due to the payee from a former indorsee cannot be set off.(z) But if the plaintiff has received the bill from a person who could have maintained an action on the bill, then the circumstance of the indorsement, after the bill became due, is not sufficient to let in the defence of an illegal consideration. *Chalmers v. Lanion*, 1 Campb. 283. Lord *Ellenborough*, C. J., whose opinion was afterwards confirmed by Court of B. R. Whoever takes a bill after its dishonour, takes it with all the infirmities belonging to it. *Crossley v. Ham*, 13 East, 498. A bill paid at maturity cannot be reissued, and no action can afterwards be maintained upon it by a subsequent indorsee; but if it be paid and indorsed before it becomes due, it will be a valid indorsement, in the hands of a *bonâ fide* indorsee.(2) Per Lord *Ellenborough*, C. J., *Burbridge v. Manners*, 3 Campb. 194. By arrangement between the drawer and acceptor of a bill of exchange, the acceptor received back the bill uncanceled; and before it became due indorsed it for value, the drawer was held liable to indorsee. It was also decided that a plea in such an action, that the bill was paid by the acceptor before it became due, and afterwards reissued by him without any new stamp, can be supported only by proof of actual payment in cash, and not be evidence of any arrangement between the drawer and acceptor, whereby the bill was treated as being satisfied.(a) If a bill

(x) Per *Parke*, B., in *Brooks v. Mitchell*, 9 M. & W. 18.

(y) *Burrough v. Moss*, 10 B. & C. 563.

(z) *Whitehead v. Walker*, 10 M. & W. 696, recognizing *Burrough v. Moss*, *ubi sup.*

(a) *Morley v. Culverwell*, 7 M. & W. 174.

(1) The indorsee of a note over due, takes it subject to all equities existing *previously* to transfer, and not arising out of *subsequent* or *collateral* matter. *Robinson v. Lyman*, 10 Conn. 30. It must be equities arising out of the note transaction itself. He is not liable to set-off of debts due by payee to maker, having no connection with the note. *Ib.*, and *Stedman v. Stillman*, *Ib.* 55.

(2) After a holder has judgment against maker, and the indorsee pays the note, and then indorses it to a third person, such indorsee cannot sue the maker on the note. *Prest v. Van Arsdalen*, 6 Halst. 194; *Clark v. Schwing*, 1 Dana, 336.

of exchange, payable to the order of a third person who has indorsed it, be dishonoured when due and taken up by the drawer, it ceases to be negotiable. *Beck v. Robley*, 1 H. Bl. 89, n., cited by *Patteson, J.*, as in point in *Bartram v. Caddy*, 9 A. & E. 281. But it is otherwise, if the bill be payable to the drawer's own order. *Callow v. Lawrence*, 3 M. & S. 95; *Hubbard v. Jackson*, 4 Bingh. *390.(1)

(1) In the United States, the doctrine that a want or failure of consideration may be set up as a defence, not only between the original parties, but also against a holder claiming by indorsement after the bill or note has become due, or taking it with a knowledge of fraud, or other equitable circumstances entitling the drawer to avail himself of the defence, is recognized in a great number of cases. *Thatcher v. Densmore*, 5 Mass. Rep. 299; *Bayley v. Taber*, 6 Id. 151; *Stone v. Wodley*, 3 Johns. Rep. 124; *Pearson v. Pearson*, 7 Id. 26; *Ten Eyck v. Vanderpool*, 8 Id. 120; *Denniston v. Bacon*, 10 Id. 198; *Woodhull v. Holmes*, Ib. 231; *Frisbee v. Hoffnagle*, 11 Id. 50; *Warner v. Lynch*, 5 Id. 239; *Tappan v. Van Wagenen*, 3 Id. 465; *Bacon v. Arnold*, 3 Caines' Rep. 279; *Havens v. Huntington*, 1 Cowen, 387; *Williams v. Matthews*, 3 Id. 252. The maker of a note, under such circumstances, may make any defence which would have been good against the original payee, such as fraud in the concoction, &c. *Tucker v. Smith*, 4 Greenl. 415. See also *Payne v. Cutler*, 13 Wend. 605; *Hart v. Palmer*, 12 Id. 523; *Rosa v. Brotherton*, 10 Id. 86; *Hall v. Hale*, 8 Conn. 336.

But it is no defence that a bill was drawn for the accommodation of the drawer, and without consideration, in an action by a *bonâ fide* holder, for a valuable consideration, against the acceptor, even if the holder took the bill after it was due. *Brown v. Mott*, 7 Johns. Rep. 361.

Where a note is indorsed for the maker's accommodation, for a discount at bank, the avails to be applied to certain demands for which a third person is surety for the maker, and the note is delivered to the surety, who, with a knowledge of the facts, offered it for discount, and on its refusal, had it protested when due, the indorser is not liable on the note to the surety. *Kasson v. Smith*, 8 Wend. 437; *Wardell v. Howell*, 9 Id. 170. Where a note is made by defendant, and delivered to plaintiff to get the payee's indorsement, and therewith paying a debt due from payee to a third person, on condition that plaintiff should procure a certain chattel from payee, and hold it for defendant's use, and plaintiff paid the debt with his own funds, and got the chattel from payee, but afterwards restored it to him. No suit lies on the note. *Boutelle v. Wheaton*, 13 Pick. 499. Where a note is made payable to a bank by a debtor, to raise money by its discount at the bank to pay a particular creditor, and is jointly executed by "A. B. surety," and is refused to be discounted, an action lies in the name of the bank, for the use of the creditor, against the makers. *Utica Bank v. Garson*, 10 Wend. 314. But see *Bank v. Ross*, 1 Blackf. 316. An accommodation acceptor is not liable to an accommodation indorser, with notice of the facts, where the drawer has made an assignment of his property, amongst other things, to indemnify the indorser when the assignee has funds. *Bradford v. Hubbard*, 8 Pick. 155. Where there is no limitation or restriction in an accommodation indorsement as to the manner in which the note is to be used, the maker may apply it to the payment or security of an antecedent debt, or to sustain his credit in any way. *Grandin v. Leroy*, 2 Paige, 509. Where defendant and B. exchange notes, and B. raises money on the note which he received, and after it was due defendant signs a note as surety for B. to take up the first note, and it is done by B., who, instead of returning the note to defendant, negotiates it to plaintiff: Held, that he had a right to do so, and plaintiff might recover. *Eaton v. Carey*, 10 Pick. 211. So a surety of a note made for the purpose of discount at a bank, for the accommodation of the principal, and transferred as collateral security to a judgment creditor of the principal, is liable on it. *Bank of Rutland v. Buck*, 5 Wend. 66.

The consideration of a promissory note taken before due, cannot be inquired into in a suit between the *bonâ fide* holder and maker, unless the note is void in its creation. *Baker v. Arnold*, 3 Caines' Rep. 279; *Vallett v. Parker*, 6 Wend. 615; *Woods v. Haynes*, 1 Scam. 103.

The indorsee who takes the note after it is due, takes it subject to all the equities between the original parties, arising from the note, including want or failure of consideration. *Sylvester v. Crape*, 15 Pick. 92; *Thompson v. Hale*, 6 Id. 259; *Ayer v. Hutchins*, 4 Mass. 370; *Wilson v. Holmes*, 5 Id. 543; *Rice v. Goddard*, 14 Pick. 293; *Barnet v. Offerman*, 7 Watts, 130.

In a suit in the name of a payee of a note not negotiable, for the use of an innocent

But the drawer of an accommodation bill is in the same situation as the acceptor of a bill for value; he is the person ultimately liable; and his payment discharges the bill altogether.(b)

A bankrupt, in the interval between the second and third meeting under his commission,(c) gave a promissory note as a security for a pre-existing debt to a creditor, who was acting as one of the commissioners at the time, and afterwards signed the bankrupt's certificate. The debt for which the security was given was not proved under the commission: Held, that such security was invalid, and that no action could be maintained upon it. So where a bill was accepted upon an agreement between the petitioning creditor, who had sued out a fiat, and the acceptor the bankrupt, that the fiat should be abandoned; it was holden(d) illegal and void as between the parties, and not merely against creditors, and that an action could not be maintained upon it. But where no other creditors interfere, and it may therefore be taken that none have any interest in keeping alive the fiat, or suing out a new one, there seems no reason why as between the parties themselves, the original debt should not continue with the remedy for its recovery.(e)

IV. *Of Presentment for Acceptance.* p. 347; *Acceptance.* p. 348; *Qualified Acceptance.* p. 349; *Liability of the Acceptor.* p. 351; *Non-Acceptance and Notice thereof.* p. 352; *Notice to Drawer.* p. 353; *Notice to Indorser.* p. 355; *Protest.* p. 359; *Liability of the Drawer on Non-Acceptance.* p. 361.

Presentment for Acceptance.(1)—When a bill is drawn payable within a certain time after sight, it is necessary, in order to fix the time when the bill is to be paid, to present it to the drawee for acceptance.—In other cases, it is not essentially necessary for the holder to present the bill before it is due:(f) but it is advisable to procure an ac-

(b) *Lazarus v. Cowie*, 3 Q. B. 459; 2 G. & D. 487.

(c) *Haywood, one, &c., v. Chambers*, 5 B. & A. 753. See also *Rose v. Main*, 1 Bingham N. C. 357.

(d) *Davis v. Holding*, 1 M. & W. 159; 1 Tyrw. & Gr. 371.

(e) Per Lord Denman, C. J., in *Davis v. Holding*, 11 A. & E. 719; 3 P. & D. 413.

(f) Chitty, 67.

indorsee, against the maker, the defendant may set up want of consideration. *Long v. Long*, 1 Morris, 43.

When a promissory note has been assigned, but not indorsed, proof by the maker that there was no consideration, or that the note was fraudulently obtained by the payee, is admissible. *Calder v. Billington*, 15 Maine, 398.

A note absolutely void, as for an illegal consideration, is void in the hands of an innocent indorsee for a valuable consideration without notice. *Lucas v. Wall*, 12 Smedes & Marsh. 157. A negotiable note given for a gambling debt, is void, even in the hands of a *bonâ fide* holder, for value. *Unger v. Boas*, 13 Penn. Rep. 301.

The maker of a negotiable note appearing on the face of it to have been given in consideration of the transfer of a patent right, which afterwards proved to be of no value, cannot set up this want of consideration as a defence to an action by a *bonâ fide* indorsee. *Goddard v. Lyman*, 14 Pick. 268.

(1) See Byles on Bills, 139, 3d Am. ed., and notes.

ceptance, if possible; for by that means another debtor is added to the drawer, who becomes a new security, and, consequently, makes the bill more negotiable. There is not any fixed time when a bill drawn payable within a certain time after sight, shall be presented to the drawee. But due diligence must be used, and care taken that the bill be presented within a reasonable time. "The only rule which can be applied to all cases of bills of exchange is, that due diligence must be used. Due diligence is the only thing to be considered, whether the bill be foreign or inland, or whether the bill be payable at or so many [*348] days after sight, or in any other *manner." Per *Buller, J.*, 2 H. Bl. 569. It seems that, whether due diligence has been used, is a question of law, but dependent upon facts, viz. the situation of the parties, their places of abode, and the facility of communication between them. See *Darbishire v. Parker*, 6 East, 3.(1) The holder went to the place at which the bill was addressed. Finding the house shut up, he inquired for the drawee in the neighbourhood; this was holden to be a sufficient presentment in *Hine v. Allely*,^(g) recognized in *Buxton v. Jones*,^(h) where *Tindal, C. J.*, said, it was not necessary to present the bill to the drawee personally. If he chose to remove from the house, pointed out by the bill as his place of residence, he was bound to leave sufficient funds on the premises.

Acceptance.—When the drawee accepts a bill in the most usual form and manner, he writes on the bill the word "accepted," and subscribes his name; or he writes the word "accepted" only, or he subscribes his name only.⁽²⁾ Formerly an acceptance, or promise to accept an existing⁽ⁱ⁾ bill, by collateral writing,^(k) or even by parol,^(l)⁽³⁾ (except for the purpose of charging the drawer of an inland bill with damages and costs, see 3 & 4 Ann. c. 9, s. 5,) was equally binding with an acceptance on the face of the bill: provided the expressions used clearly and unequivocally^(m)⁽⁴⁾ meant an acceptance of the bill.⁽⁵⁾ But now by stat.

(g) 4 B. & Ad. 624; 1 Nev. & Man. 433.

(h) 1 Man. & Gr. 83.

(i) *Johnson v. Collings*, 1 East, 98.

(k) *Powell v. Monnier*, 1 Atk. 611. It was said by Lord *Ellenborough, C. J.*, in *Wynne v. Raikes*, 5 East, 520, that the authority of this case had not been (as far as the court had been able to find) ever shaken. *Clarke v. Cock*, 4 East, 57.

(l) *Lumley v. Palmer*, 2 Str. 1000; C. T. H. 74.

(m) See *Rees v. Warwick*, 2 B. & A. 113; *Powell v. Jones*, 1 Esp. N. P. C. 17.

(1) See *Aymer v. Beers*, 7 Cow. 705.

(2) A bill drawn by one upon himself is to be regarded as accepted. *Cunningham v. Wardwell*, 3 Fairf. 466.

(3) *Williams v. Winans*, 2 Green, 339; *Leonard v. Mason*, 1 Wend. 522; *Ward v. Allen*, 2 Metc. 53; *Walker v. Lyde*, 1 Richardson, 249.

A letter written within a reasonable time, before or after the date of a bill, intelligibly describing it, and promising to accept it, is, if shown to one who takes it on the credit of the letter, a virtual acceptance, binding on the promissor. *Payson v. Coolidge*, 2 Gallis. 283; *S. C.*, 2 Wheat. 66; *Goodrich v. Gordon*, 15 Johns. 6; *Schimmelpennick v. Bayard*, 1 Peters, 265; *Farsley v. Sumrall*, 2 Id. 181; *Wilson v. Clements*, 3 Mass. 1; *Storer v. Logan*, 9 Id. 55; *M'Kim v. Smith*, 1 Hall's Law Journal, 486; *Parker v. Guelo*, 2 Wend. 545; 5 Id. 414; *Boyce v. Edwards*, 4 Peters, 111; *Williams v. Winans*, 2 Green, 339; *Russell v. Wiggin*, 2 Story, 213; *Bayard v. Lathy*, 2 M'Lean, 462; *Kennedy v. Geddes*, 8 Port. 263; *Ulster Bank v. M'Farlan*, 5 Hill, 433.

(4) A promise to accept amounts to acceptance when the bill is taken on faith of such

(5) See note (5), next page but one.

1 & 2 Geo. IV. c. 78, s. 2, no acceptance of any *inland* bill after the 1st of August, 1821, shall be sufficient to charge any person, unless

promise. *Williams v. Winans*, 2 Green, 339; *Ogden v. Gillayham*, 1 Bald. C. C. R. 145; *Boyce v. Edwards*, 4 Peters, 121. A mere verbal promise to accept a bill of exchange not yet drawn, is not such an acceptance as will in law bind the acceptor, even if made to the person in whose favor the bill is drawn. *Kennedy v. Geddes*, 8 Port. 263. By the English law, a promise to accept a non-existing bill of exchange, even though it be taken by the holder upon the faith of that promise, does not amount to an acceptance of the bill, when drawn in favor of the holder; but it has been held otherwise by the Supreme Court of the United States. Yet, if the bill be payable after sight and not after date, such a promise has never been held, in either country, to be an acceptance of a non-existing bill. *Coolidge v. Payson*, 2 Wheat. 66; *Wildes v. Savage*, 1 Story, 22; *Russell v. Wiggin*, 2 Story, 213. In the former of these cases, Judge Story said: "It is perhaps to be lamented that the doctrine of such virtual acceptance ever was established; and if the question had been entirely new, I am well satisfied that it would not have been recognized as fit to be promulgated, it being at once unsound in policy and full of inconvenience. But the Supreme Court yielded, as did the judge who decided that case in the Circuit Court, to what seemed at that time the true result of the English authorities upon an important practical commercial question. I am not sorry to find that professional opinion has now settled down in England against the doctrine; although there is no pretence to say, that up to this very hour there has been any formal decision in Westminster Hall against it. But it does not appear to me, that the doctrine ever was applicable, or could be applied to any bills of exchange except such as were payable on demand, or at a fixed time after date. Where bills are drawn, payable at so many days after sight, it is impracticable to apply the doctrine; for there remains a future act to be done, the presentment and sight of the bill, before the period for which it is to run, and at which it is to become payable, can commence, whether it be accepted or be dishonored. How can the time be calculated upon such a bill before it is presented? If a letter is written, promising to accept a non-existing bill to be thereafter drawn, at six months sight, when is the acceptance to be deemed made? At the date of the bill? Certainly not; for that would be at war with the obvious intent of the parties, which plainly is, that the acceptance shall be on a future sight of the bill. If it is said that the acceptance is to be treated as made when the bill is actually presented for acceptance, and it is dishonored by the drawee, it is as plain that we set up a prior intent or promise against the fact. Upon what ground can a court say, when a party promises to do an act in future, such, for example, as to accept a bill when it shall be drawn and presented to him at a future time, that his promise overcomes his act at that time? That his refusal to perform his promise amounts to a performance of it? It is quite another question, whether the holder who has taken such a bill upon the faith of such a promise, may not have some other remedy, either at law or in equity, for the breach of it, against the promisor. My judgment is, that the doctrine of a virtual acceptance of a non-existing bill by a prior promise to accept it when drawn, has no application to a bill drawn payable at some fixed period after sight; for it then amounts to no more than a promise to do a future act. I have looked into the authorities, and do not find in any one of them that the bill drawn, and to which the doctrine was applied, was a bill drawn, payable at or after sight."

A parol promise to accept a draft, founded on no new consideration, is not binding, either as an acceptance or a binding promise to accept. *Strohecker v. Cohen*, 1 Speers, 349; Byles on Bills, 146, 236, 3d Am ed. note.

An acceptance *after* the time of payment is good. *Williams v. Winans*, 2 Green, 339. When plaintiff indorsed a bill drawn on defendant, in consequence of a letter from him to the drawer, in which he says, "I have no objection to accept for you at three or four months for \$2,500, on the terms you propose," and plaintiff was compelled to pay. He may recover of defendant, on his acceptance contained in the letter, without showing what those terms were, or that they were complied with. *Greele v. Parker*, 5 Wend. 414. No consideration need be shown for an acceptance or agreement to accept, and a valid *agreement* to accept may be declared on as an acceptance. *Ontario Bank v. Worthington*, 12 Id. 593; *Grant v. Ellicott*, 7 Id. 227.

It has been determined in the Supreme Court of the United States, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in intelligible terms, and promising to accept it, if shown to a person, who afterwards takes the bill on the credit of the letter, is a virtual acceptance, binding upon the promisor.

such acceptance be in writing on such bill, or if there be more than one part of such bill, on one of the said parts. An unsigned acceptance,⁽ⁿ⁾ written on the face of a bill of exchange, is not made invalid by this statute; but it is a question for the jury whether it was intended to operate as an acceptance in its present form, or to be subsequently completed by signature. This statute extends to every part of the United Kingdom, and applies to the case of a bill drawn in one part of Scotland or Ireland, upon another; but a bill drawn in Ireland upon a person in England, is not an inland bill within the foregoing section, and consequently may be accepted^(o) without writing on such bill. The union between England and Ireland had not the effect of converting Irish bills drawn upon England from foreign into inland. The legislature, which has rendered invalid parol acceptances on inland bills, has not thought proper to alter the law merchant with regard to bills drawn out of Great Britain. Hence, with regard to such bills, [*349] *e. g.*, a bill drawn on Gibraltar, the parol *acceptance of it, if satisfactorily proved, is binding^(p) on the acceptor. But a promise to accept a bill not yet drawn, does not amount to an acceptance of it; although the bill be discounted for the drawer on the faith of such promise.^(q) Although, regularly, a bill ought to be accepted before the day on which the money is to be paid, yet an acceptance after that day will bind the drawee; and where upon an acceptance so given, it was stated in the declaration, that the drawee promised to pay the money according to the tenor and effect of the bill, the court refused to arrest the judgment on account of these words, observing, that the effect of the bill was the payment of the money and not the day of payment, and at most they were but surplusage.^(r)

Qualified Acceptance.—A *qualified acceptance* is, when the drawee undertakes to pay the bill in any other manner than according to the tenor and effect thereof. This species of acceptance, if qualified with

(n) *Dufaur v. Oxenden*, 1 M. & Rob. 90, *Patteson*, J.

(o) *Mahoney v. Ashlin*, 2 B. & Ad. 478.

(p) *Canepa v. Larios*, 2 Knapp, 276. See *Billing v. Devaux*, 3 M. & Gr. 565; 4 Scott's N. R. 175.

(q) *Bank of Ireland v. Archer*, 11 M. & W. 383.

(r) *Jackson v. Piggott*, Carth. 459; Lord Raym. 364; Salk. 127. See also *Mutford v. Walcot*, Lord Raym. 574; Salk. 129; recognized by Lord *Ellenborough*, *Wynne v. Raites*, 5 East, 521.

Coolidge v. Payson, 2 Wheat. Rep. 66; S. C. 2 Gallis. Rep. See also *Van Reimsdyk v. Kane*, 1 Id. 630; *M'Evers v. Mason*, 10 Johns. Rep. 207; *Mayhew v. Prince*, 11 Mass. Rep. 54; *Banorgie v. Hovey*, 5 Id. 11; *Wilson v. Clements*, 3 Id. 1; 2 Wheat. Rep. 75, note a; *Goodrich v. Gordon*, 15 Johns. Rep. 6; S. P., *Parker v. Greenleaf*, 2 Wend. 545; *Schimmelpennick v. Bayard*, 1 Peters's Rep. 283. A drawee who has agreed generally to accept bills from a foreign correspondent continues bound until notice not to draw is given and received, although he has no funds of the drawer in his hands. *De Tastet v. Crounillat*, 2 Wash. C. C. R. 132. See *Townsley v. Sumrall*, 2 Peters's Rep. 181.

(5) S. P. *Wilson v. Clement*, 3 Mass. Rep. 1; *M'Evers v. Mason*, 10 Johns. Rep. 207. In New York, by statute, every acceptance must be in writing. Before the statute a parol acceptance of a bill *already drawn* was good. But a parol agreement to accept a bill *to be drawn* could not be enforced by an indorsee who has not taken it on the faith of such promise, and between whom and the drawee no communication had passed. *Ontario Bank v. Worthington*, 12 Wend. 592. See Byles on Bills, 145, 3d Am. ed.

a condition, is called a *conditional* acceptance. The holder of a bill may consider a qualified acceptance as a nullity, and protest the bill for non-acceptance, after which he is precluded from insisting upon it as an acceptance;(s) but if the holder acquiesces in it, then such an acceptance becomes absolute only on the performance of the condition, which must be averred in the declaration. If the acceptor of a bill cancels his acceptance,(t) and the holder causes it to be noted for non-acceptance, he thereby precludes himself from contending, that an acceptance of a bill once made cannot be retracted in point of law. Whether an acceptance once made could be cancelled by the acceptor, while the bill remained in his hands, was considered as doubtful. Lord *Kenyon*, C. J., is said to have determined at *nisi prius*, that it could not. See 6 East, 200, and 15 East, 20. But it has since been solemnly determined that it can. *Cox v. Troy*, 5 B. & A. 474. If an agreement to accept is conditional, and a third person takes the bill, knowing the conditions annexed to the agreement, he takes it subject to such conditions. Per Lord *Mansfield*, C. J., delivering the opinion of the court, in *Mason v. Hunt*, Doug. 299. If a bill be accepted, payable at A.'s, who is the acceptor's banker,(u) the party taking such special acceptance, (which he is not bound to do,) thereby impliedly agrees to present it for payment within the usual banking hours, at the place where it is made payable: and if he present it after such hours, without effect, it is no evidence of the dishonour of the bill so as to charge the drawer. But eight o'clock in the evening will not be considered as an unseasonable hour for *demanding pay- [*350] ment at the house of a private merchant who has accepted a bill;(x) so although the house be shut up,(y) and on ringing and knocking no answer was given. See *post*, stat. 1 & 2 Geo. IV. c. 78, s. 1.(1)

The following cases will illustrate the nature of qualified acceptances:—

Defendant accepted a bill of exchange, to pay it *when goods consigned to him*,(z) and for which the bill was drawn, *were sold*. Plaintiff counted upon the custom of merchants. After verdict for plaintiff, it was moved in arrest of judgment, that this acceptance, depending on the contingency of the sale of goods, was not within the custom of merchants, or negotiable. But *the court* (after consideration) held it good; for though the plaintiff might have refused to take such an acceptance, yet he might submit to take it. And it would affect trade if

(s) *Sproat v. Matthews*, 1 T. R. 182.

(t) *Bentinck v. Dorrien*, 6 East, 199.

(u) *Parker v. Gordon*, 7 East, 385.

(x) *Barclay v. Bailey*, 2 Campb. 528; *Morgan v. Davidson*, 1 Stark. N. P. C. 114.

(y) *Wilkins v. Judis*, 2 B. & Ad. 188.

(z) *Smith v. Abbot*, Str. 1152.

(1) Where a foreign bill is drawn on persons residing in A., payable in B., without any particular place in the latter city being designated where payment is to be made, the holder may demand acceptance and payment of the drawee, at A., and a protest for non-acceptance or nonpayment will be good if made there: or the holder may, at his election, if payment is not made at B. at the maturity of the bill, protest the bill there for nonpayment. *Mason v. Franklin*, 3 Johns. Rep. 202; *Bort v. Franklin*, Ib. 207.

factors were not allowed to use this caution, when bills are drawn before they have an opportunity to dispose of the goods. So where defendant accepted a bill of exchange *upon account of the ship Thetis, when in cash for the said vessel's cargo*, (a) and the plaintiff averred, that at the day when the bill became payable, the defendant was in cash for the said ship's cargo; it was objected, in arrest of judgment, that the defendant was not liable by this conditional acceptance; but the court overruled the objection. So an answer that the bill would not be accepted till a navy bill was paid, (b) was holden a conditional acceptance to pay when the navy bill should be discharged. So when the answer was, "it will not be accepted until the ship with the wheat arrives from Scotland: this was holden (c) to import a promise to accept the bill on the arrival of the cargo; and that the cargo having arrived the defendant was liable as acceptor.

Whether an acceptance be conditional or absolute, is a question of law. (d) Defendant accepted a bill of exchange to pay part of the sum of money mentioned in the bill; (e) this was holden to be valid, although it was contended, that such partial acceptance was not within the custom of merchants. If the payee of a bill annexes a condition to his indorsement before the bill has been accepted, the drawee, who afterwards accepts it, is bound by that condition: and if the condition is not performed, the property in the bill reverts to the payee, and he may recover the contents against the acceptor. (f) (1)

There is also a kind of acceptance, called acceptance *supra protest*, where a bill being refused acceptance by the drawer, is accepted by some third person, for the honor of a party to it.

[*351] For the form of declaration on such acceptance, see *Mitchell v. Baring*, 10 B. & C. 11, *post*, 872.

Liability of the Acceptor.—The acceptor, by reason of his acceptance, which is *prima facie* evidence of his having in his hands effects of the drawer to answer the amount of the bill, is considered as the principal debtor, and primarily liable to all the parties to the bill; and an express agreement only will discharge him. (2) The acceptor undertakes to pay the sum specified in the bill, and interest according to the legal rate of interest where the bill becomes due; but his engagement does not extend any further; consequently the acceptor of a foreign bill is not liable for re-exchange. (g) It never was doubted, that any party to the bill (except the drawer) might maintain an action against

(a) *Julian v. Shobrooke*, 2 Wils. 9.

(b) *Pierson v. Dunlop*, Cowp. 571.

(c) *Miln v. Prest*, 4 Campb. 393.

(e) *Wegersloff v. Keene*, Str. 214.

(f) *Robertson v. Kensington*, 4 Taunt. 30.

(g) *Woolsey v. Crawford*, 2 Campb. 445.

(d) *Sproat v. Matthews*, 1 T. R. 182.

(1) An order on defendant who was employed by the heirs of a deceased person to collect his debts, by one of the heirs who was insolvent, to pay to plaintiff whatever balance was due the drawer, out of the estate, and "accepted to pay the balance when received," does not authorize defendant to retain any part of the amount for his own claim other than for collection. *Taft v. Aylwyn*, 14 Pick. 336.

(2) See Byles on Bills, 153, note 1, 3d Am. ed.

the acceptor, if the bill was not duly honoured. And in *Parminter v. Symons*, D. P. 22 February, 1748,^(h) it was solemnly determined, that the *drawer* of a bill of exchange (accepted generally by the drawee, having effects of the drawer in his hands, and protested by the payee for non-payment, and afterwards paid by the drawer) might maintain, in his own name, and without an assignment from the payee, a special action on the case against the acceptor, and recover the money so paid. If the holder of a bill of exchange brings separate actions against an acceptor,⁽ⁱ⁾ drawer, and indorser, at the same time, the court will stay the proceedings in any stage of the action against the drawer, or any of the indorsers, upon payment of the amount of the bill and costs of that particular action; and will now (by R. G. Trin. T., 1 Vict.) stay proceedings in the action against the acceptor, on the same terms; though formerly he must have paid the costs in all the actions, because he was the original defaulter and the occasion of all those costs. The holder of a bill of exchange,^(k) having been informed that the acceptor had not received any consideration for it, and that he had accepted the bill merely to accommodate the drawer, for several years after it became due, received interest upon the bill from the drawer, and neglected to call upon the acceptor for payment. At length he brought an action against the acceptor; and it was holden, that it would well lie; and *Buller, J.*, said, that nothing but an express agreement would discharge an acceptor; and the plaintiff's conduct in this case only meant, that he would try to recover the amount of the bill from the drawer, who was the true debtor, if he could. But the holder of the bill may discharge the acceptor by parol.^{(l)(1)}

*The drawee (who was also the payee) of a foreign bill of [*352] exchange drawn in three parts, accepted and indorsed one part to a creditor, to remain in his hands until some other security was given for it; and afterwards accepted and indorsed another part, for value, to a third person. The acceptor substituted another security for the part first accepted, whereupon it was given up to him: it was holden,^(m) that the holder of the part secondly accepted was entitled

(h) *Parminter v. Symons*, 2 Bro. P. C. 43, affirming judgment of the Court of King's Bench, which is reported in 1 Wils. 186.

(i) *Smith v. Woodcock*, *Same v. Dudley*, 4 T. R. 691. Confirmed by *Anonym.* H. 40 Geo. III. B. R.

(k) *Dingwall v. Dunster*, Doug. 247; *Parker v. Leigh*, 2 Stark. N. P. C. 228, S. P., Lord Ellenborough, C. J. See also *Adams v. Gregg*, 2 Stark, N. P. C. 531; and *Farguhar v. Southey*, 1 M. & Malk. 14.

(l) *Whatley v. Tricker*, 1 Campb. 35.

(m) *Holdsworth v. Hunter*, 10 B. & C. 449.

(1) It seems that if the drawer accept a forged bill in the hands of a *bonâ fide* holder, he is bound by it; he being presumed to know the handwriting of the drawers, and by his acceptance to take this knowledge upon himself. At all events, if he pay the bill, he cannot recover the money back. *Levy v. Bank United States*, 4 Dall. 234; 1 Binn. 72. When H. was indebted to a bank, and R. agreed to let him have the money to pay the bank, and a third person being indebted to R., sent a note to the bank to see if it could be discounted, which was done, and the proceeds applied to the debt of H.: Held, his debt was satisfied, although the note was a forgery. *Grafton Bank v. Hunt*, 4 New H. R. 488. See *Bank of Penn. v. Haldeman*, 1 Penn. 161.

to recover on the bill against the acceptor. An acceptance in blank⁽ⁿ⁾ is sufficient to charge the acceptor, where the bill is afterwards drawn in pursuance of his authority. The stat. 1 & 2 Geo. IV. c. 78, s. 2, does not affect such an acceptance; per Lord *Lyndhurst*, C. B. As to the mode of pleading a qualified acceptance, see *Lyon v. Walls*, 9 Bingham 660.

Non-acceptance, and Notice thereof.—If a bill is presented, and an acceptance refused, or qualified acceptance only offered, or any other default made, due diligence must be used in giving notice thereof to the drawer, if the holder means to resort to him for payment; and this rule ought to be observed, although the bill presented for acceptance be a bill payable at a certain time after date; for although it be not necessary to present a bill of this description for acceptance at all, yet if it be presented and dishonoured, notice becomes requisite in the same manner as upon non-payment: and it is not sufficient to give notice of the non-acceptance at the same time with the notice of non-payment.^(o) But the omission of the notice of non-acceptance will not vitiate the remedy against the drawer at the suit of a subsequent *bonâ fide* indorsee for a valuable consideration without notice, who was not in possession of the bill at the time of the dishonour.^(p) The notice of the dishonour, which may be by letter,^(q) must be given within a reasonable time.^(r) What is reasonable time appears to be a question of law dependent on facts, *viz.*, the situation of the parties, the place of their abode, and the facility of communication between them.⁽¹⁾ Where the parties reside in London, each party has a day to give notice.^{(s)(2)} In *Muilman v. D'Eguino*, 2 H. Bl. 565, which was the case of a foreign bill drawn payable in the East Indies, a certain time after sight; the court determined, that it was not necessary to send notice of the dis-

(n) *Leslie v. Hastings*, 1 M. & Rob. 119.

(o) *Roscow v. Hardy*, 2 Campb. 458; but see 1 Marsh. R. 613, and *Dunn v. O'Keefe*, 5 M. & S. 282.

(p) *Dunn v. O'Keefe*, *ubi sup.*

(q) Adm. per *Ellenborough*, C. J., Esp. N. P. C. 157.

(r) *Darbishire v. Parker*, 6 East, 3.

(s) *Smith v. Mullett*, 2 Campb. 208. See also *Jameson v. Swinton*, 2 Campb. 373.

(1) Where there is no dispute as to the facts, the sufficiency of the notice is a question of law for the court. *Remer v. Downer*, 21 Wend. 10; 23 Id. 620; 25 Id. 277; *Thompson v. The State*, 3 Hill, S. C. 77; *Fleming v. Fulton*, 6 Howard, Miss. 473; *Johnston v. McGrim*, 4 Devereux, 277; *Sinclair v. Lynch*, 1 Speers, 244; *Platt v. Drake*, 1 Dougl. 296; *Dole v. Gold*, 5 Barb. S. C. 490.

(2) Each party has a full day to give notice, but the over-diligence of one shall not be made to supply the under-diligence of another. *Brown v. Ferguson*, 4 Leigh, 37; *Simpson v. Tierny*, 5 Humph. 419; *American Life Ins. and Trust Co. v. Emerson*, 4 S. & M. 177; *Safford v. Wycoff*, 1 Hill, 11; *Whitman v. Farmers Bank*, 8 Port. 258; *Etting v. Schuylkill Bank*, 2 Barr, 355; *Smith v. Roach*, 7 B. Monr. 17; *Carmena v. Bank of Louisiana*, 1 Louis. Annual Rep. 369; *Crocker v. Getchell*, 10 Shepl. 392. An agent of the holder is allowed one day to give notice to his principal of a default, and the principal is entitled to one day after he receives notice by mail to the drawer or indorser. *Ellis v. The Commercial Bank*, 7 How. Miss. 294; *Crawford v. Branch Bank*, 7 Ala. 205; *Ohio Life Ins. and Trust Co. v. McCague*, 18 Ohio, 54; *Hill v. Planters Bank*, 3 Humph. 670; *McNeill v. Wyatt*, Ib. 125; *Foster v. McDonald*, 3 Ala. 34; *Carmena v. Bank of Louisiana*, 1 Louis. Annual Rep. 369; *Colt v. Noble*, 5 Mass. 167; *Church v. Barlow*, 9 Pick. 547; *Johnson v. Harth*, 1 Bailey, 482; *United States Bank v. Goddard*, 5 Mason, 366; *Fish v. Jackman*, 1 App. 467.

honour by any accidental foreign ship, which sailed thence, not direct for England; but that it was sufficient to have sent notice by the first regular English ship which sailed for England, considering the latter in the nature of a regular post between the two countries.

But where a bill was drawn in duplicate *on the 12th of [*353] August, at Carbonear, in Newfoundland, payable ninety days after sight, on S. & Co., in England, for the freight of a voyage from Liverpool to Carbonear; and the bill was not presented for acceptance until the 16th of November; and it was proved that Carbonear was twenty miles from St. John's, with a daily communication between those places, and from St. John's there was a post-office packet three times a week to England, the average voyage being about twelve days; it was holden,^(t) that the jury had properly found that the bill was not presented for acceptance within a reasonable time, no circumstances being proved in explanation of the delay.

On the 10th of September, 1820, a bill drawn by defendant on G. at Rio Janeiro, payable at sixty days after sight, was sold in the London money market by the defendant's order, and purchased by the plaintiff, who kept it in his own possession until the 1st of February, 1831, when it was again sold by the plaintiff, in the market, and put into circulation; the rate of exchange fell immediately after the purchase by the plaintiff, and continued lower down to the time when the plaintiff sold the bill. The drawee having failed before presentment, plaintiff, after paying his indorsee the amount, sued the defendant, the drawer; it was holden,^(u) that the jury were properly directed to consider whether, due regard being had to the interests of both drawer and holder, there had been unreasonable delay on the part of the plaintiff in forwarding the bill for acceptance, or putting it into circulation, and the jury having found for the plaintiff, the court refused to disturb the verdict.

The holder of a bill of exchange, on non-acceptance, and protest, and notice thereon, has an immediate right of action against the drawer; and the statute of limitations, therefore, runs against him from that time, and not from the non-payment of the bill when due.^(x)

Notice to Drawer.—The rule which requires notice to be given within a reasonable time by the holder of a bill of exchange to the drawer, of the drawee's refusal to accept, is calculated for the benefit of the drawer, in order that he may, upon receiving such notice, withdraw his effects out of the hands of the drawee.⁽¹⁾ On this rule, however, an excep-

(t) *Straker v. Graham*, 4 M. & W. 721.

(u) *Mellish v. Rawdon*, 9 Bingh. 416; 2 M. & Sc. 570.

(x) *Whitehead v. Walker*, 9 M. & W. 506.

(1) And this is matter of law for the court to determine. See *Phillipps v. M'Curdy*, 1 Har. & Johns. 187; *United States v. Barker*, Paine, 156; 12 Wheat. 559; *Stanto v. Blossom*, 14 Mass. 116; *Mallory v. Kirwin*, 2 Dall. 192; *Warder v. Carson's executor*, Ib. 233; *Steinmetz v. Curry*, 1 Id. 235; *Bank of North America v. M'Knight*, 1 Yeates, 147; *Denniston v. Imbrie*, 3 Wash. C. C. 396; *London v. Howard*, 2 Hayw. 332; *Scarborough v. Harris*, 1 Bay, 177; *Bryden v. Bryden*, 11 Johns. 187; *Ribble v. Jefferson*, 5 Halst. 139; *Stott v. Alexander*, 1 Wash. 331; *Dodge v. Bank of Kentucky*, 2 A. K. Marsh. 616; *Mohawk Bank v. Broderick*, 10 Wend. 304; 13 Id. 133; *Hager v. Boswell*, 4 J. J.

tion has been engrafted, (y) viz., that it is not necessary to give such notice to the drawer, where the drawer has not any effects in the hands of the drawee, *at the time when the bill is drawn*; because in this case the drawer cannot sustain any injury from the want of such notice; but if the drawer has effects in the hands of drawee, *at the time* [*354] *the bill is drawn*, (z) *though it does not appear to what amount, and though such effects are withdrawn before the bill can be presented, the circumstance of there not being effects in the hands of the drawee, *at the time when the bill is presented* for acceptance, and refused, will not supersede the necessity of notice; for it would be very dangerous and inconvenient, merely on account of the shifting of a balance, to hold notice not to be necessary; it would be introducing a number of collateral issues, in every case upon a bill of exchange, to examine how the account stood between the drawer and drawee, from the time the bill was drawn down to the time it was dishonoured. So if the drawer has effects in the hands of the drawee, at any time between the drawing of the bill and its becoming due, he is entitled to notice, although he had not any such effects at the time of bill drawn. (a)

In *Terry v. Parker*, (b) the question was, whether want of effects excused the holder of a bill from the necessity of presenting the bill for payment at its maturity, as well as of giving notice of dishonour to the drawer; and the court held, that it did so excuse him; for the same reason applied equally to both cases.

In *Shaw v. Croft*, sittings after T. T. 1798, Chitty on Bills, 98, Kenyon, C. J., said, that it did not make any difference who gave notice *to the drawer* of the dishonour of the bill; (1) and there ruled a notice from the acceptor sufficient, observing, that the only end of the notice was, that the drawer might have recourse to the acceptor. See also *Jameson v. Swinton*, 2 Campb. 373, where Lawrence, J., ruled, that the drawer, who had received due notice of dishonour from the first indorsee, was liable to the second indorsee, who had merely given notice to his indorser. And in *Rosher v. Kieran*, 4 Campb. 87, which was an action by indorsee against drawer, Lord Ellenborough held it sufficient to prove that defendant had notice of dishonour from the acceptor. But see *Exp. Barclay*, 7 Ves. jun. 598, contra per Eldon, Ch., and *Stewart v. Kennett*, 2 Campb. 177; per Lord Ellenborough, C. J., where notice was by a mere stranger. It may be observed, that in the case of *Exp. Barclay*, the attention of the court was not directed to Lord Kenyon's opinion in *Shaw v. Croft*. But this point is now quite settled in *Chapman v. Keane*, (c) in which it was holden, that it is suffi-

(y) *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652; *Rogers v. Stevens*, 2 T. R. 713.

(z) *Orr v. Maginnis*, 7 East, 359; *Blackhan v. Doren*, 2 Campb. 503.

(a) *Hammond v. Dufrene*, 3 Campb. 145.

(b) 6 A. & E. 507; 1 Nev. & P. 752.

(c) 4 Nev. & M. 607; 3 A. & E. 193.

Marsh. 61; *Bank of Utica v. Bender*, 21 Wend. 643; *Warren v. Gilman*, 3 Shepl. 70; *Brown v. Ferguson*, 4 Leigh, 37; *Routh v. Robertson*, 11 Smedes & Marsh. 382.

(1) See *Chonoine v. Fowler*, 3 Wend. 179, where this proposition is said to be too broad; and it was decided that a notice from a stranger was not sufficient.

cient if the notice be given by any person who is a *party* to the bill, and that it need not proceed either immediately or derivatively from the holder. "It is not necessary to say, whether the rule which dispenses with notice in cases where the drawer has no effects in the hands of the drawee, was wisely adopted or not. That rule certainly proceeds upon the ground of fraud in the drawer; and the courts have said, that where the drawer has been guilty of fraud, he shall not claim the protection of those rules which were introduced *for the benefit of drawers acting *bonâ fide*. When a person [*355] draws a bill upon another, who has no effects in his hands, he is not entitled to notice of its being dishonoured, since he must know, without such notice, that funds have not been provided to answer it." Per *Chambre, J.*, in *Clegg v. Cotton*, 3 Bos. & Pul. 239. In *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652, *Eyre, C. J.*, said, it might be a proper caution to bill-holders not to rely on it as a general rule, that if the drawer had not any effects in the hands of the acceptor, notice was not necessary. The cases of acceptances on the faith of consignments from the drawer, not come to hand, and the case of acceptances, on the ground of fair mercantile agreements, might be stated as exceptions, and there might possibly be many others. See also *Clegg v. Cotton*, 3 Bos. & Pul. 239, where A. the agent in America of B. in England, drew a bill upon B. and indorsed it to C. also residing in America, who indorsed it over. Before the bill became due, A. having reason to believe that B. would fail, lodged property belonging to B. in the hands of C. to answer the bill in case it should be returned, C. undertaking to restore the same whenever it should appear that he was exonerated from the bill. Acceptance and payment of the bill were refused, but no notice was given to A.; held, that A. was discharged; *Heath, J.*, observing, that no doubt the rule dispensing with notice proceeded on the ground of a supposed fraud; but that ground was not applicable to a case where an agent drew upon his principal, unless under very particular circumstances. See further on this subject the opinion of Lord *Ellenborough, C. J.*, in *Brown v. Maffey*, 15 East, 221; and *Thackray v. Blacket*, 3 Campb. 165. In this last case, Lord *E.* held, that the drawer having effects in hands of acceptor before bill became due, was entitled to notice, although he had not such effects at time of bill drawn. See also *Rucker v. Hiller*, 3 Campb. 217; 16 East, 43, *S. C.* See also *Claridge v. Dalton*, 4 M. & S. 226.(1) The insolvency of the acceptor,(d) although within the knowledge of the drawer, will not supersede the necessity of notice to the drawer, of the dishonour of the bill.(2) Although the holder may have lost his remedy against the drawer, by laches, in not giving notice, yet a sub-

(d) *Esdaile v. Sowerby*, 11 East, 114.

(1) See *Van Wart v. Smith*, 1 Wend. 219.

(2) And if the drawer has a right to draw in consequence of engagements between himself and the drawee, or from any other cause, he ought to be considered as drawing upon funds in the hands of the drawee, and therefore entitled to strict notice. *French v. Bank of Columbia*, 4 Cranch, 141.

sequent promise to the holder, by the drawer, that he will see the bill paid, will enable the holder to maintain an action on the bill.(e)

Notice to Indorser.—If the holder of a bill of exchange looks to the indorser for payment, it is incumbent on him to give notice of the dishonour of the bill within a reasonable time, otherwise the indorser will not be liable. In *Blesard v. Hirst and another*, 5 Burr. 2670, it was holden, that the indorsee of an inland bill of exchange, who [*356] had neglected to give notice to his indorser of the drawee's refusal to accept until a month had elapsed, in the course of which the drawer became a bankrupt, could not recover against such indorser. Lord *Mansfield*, C. J., said, in this case, 5 Burr. 2672, that there was not any difference in this respect between an inland and a foreign bill.

The holder of a bill before it was due having tendered it for acceptance, which was refused, kept it till due, *without giving notice of non-acceptance*, when it was tendered for payment and refused, and then immediately returned it to the second indorser, who, not knowing of the laches, took up the bill; it was holden, that his ignorance of the laches of the former holder did not entitle him to recover against the first indorser, who set up such defence.(f) With respect to the drawer, it has been observed, that want of effects in the hands of the drawee, at the time of bill drawn, will supersede the necessity of notice; but with respect to the indorser, as he has not any concern with the accounts between the drawer and drawee, notice of non-acceptance must be given to him by the *holder* of the bill, although the drawer has not any effects in the hands of drawee.(g) In *Tindal v. Brown*, 1 T. R. 167, an action was brought by indorsee against indorser of a promissory note. The defendant had, within a reasonable time after default of payment of the note, received notice thereof from the maker; but the plaintiff, the holder, had not given the defendant notice until two days after the bill had become due. On this ground the court held, that the plaintiff could not recover, and that due notice ought to be given by the holder himself to the indorser within a reasonable time after default of payment; *Buller*, J., observing, "that the purpose of giving notice to the indorser is not merely that the indorser should know that the note is not paid, for *he is chargeable only in a second degree*; but to render him liable, you must show that the holder looked to him for payment, and gave him notice that he did so. The notice by another person to the *indorser*, can never be sufficient; but it must proceed *from the holder* himself." The preceding case of *Tindal v. Brown*, was cited by *Eldon*, Ch., in *Exp. Barclay*, 7 Ves. jun. 598, and the same rule was applied by him to the case of the drawer, thereby overruling the opinion of Lord *Kenyon*, C. J., in *Shaw v. Croft*, Chitty, 98, and *ante*, p. 354, which case, however, was not noticed either in the argument or by the court in *Exp. Barclay*. And see *Chapman v. Keane*, *ante*, p. 354, overruling *Tindal v. Brown*, as to this point.

(e) *Hopes v. Alder*, 6 East, 16 n. See also *post*, p. 357.

(f) *Roscow v. Hardy*, 12 East, 434. But see *Dunn v. O'Keefe*, *ante*, p. 352.

(g) *Goodall v. Dolley*, 1 T. R. 712; *Wilkes v. Jacks*, Peake's N. P. C. 202, S. P. Per *Kenyon*, C. J.

The exception to the general rule dispensing with notice where there are not effects in the hands of the drawee, is confined to actions brought against the drawer, and the indorser is in all cases entitled to notice. Per Lord *Kenyon*, C. J., in *Wilkes v. Jacks*, Peake's N. P. C.

202. *A subsequent promise by the indorser, is a waiver of [*357] the objection for want of notice,^(h)(1) and it is immaterial whether such promise be made to the plaintiff, or to a third person,⁽ⁱ⁾ who held the bill at the time; but a subsequent proposal by the indorser to pay the bill by instalments, *made without knowledge of all circumstances* relative to the bill having been dishonoured, has been holden not to be a waiver of the objection for want of notice.^(k) The rule requiring notice to be given even to the indorser, is applicable only to fair^(l) transactions, where the bill has been given for value in the ordinary course of trade. In an action against the payee of a note, it appeared that the note was not presented for payment till the day after it became due, and that no notice was given till five days after such presentment; but it also appearing, that the defendant gave no value for the note, that he lent his name merely to give it credit, and that he knew at the time that the maker was insolvent, it was holden, that the plaintiff was entitled to recover. *De Berdt v. Atkinson*, 2 H. Bl. 336. So in *Sisson v. Thomlinson*, London Sittings, 17th December, 1805, MSS. Lord *Ellenborough*, C. J., ruled, on the authority of the preceding case, that where the indorser has not given any consideration for a bill, and knows at the time that the drawer has not any effects in the hands of the drawee, he (the indorser) is not entitled to notice of the non-payment as a *bonâ fide* holder for a valuable consideration would be.⁽²⁾ But see *Smith v. Becket*, 13 East, 187, and *Brown v. Maffey*, 15 East, 216; in which last case it was holden, that an indorser is entitled to notice of dishonour, although he has not received any value for his indorsement, if he did not know that the bill was an accommodation bill in its inception;⁽³⁾ and see also *Terry v. Parker*,^(m) in which Lord

(h) Peake's N. P. C. 202; *Lundie v. Robertson*, 7 East, 231, S. P., recognized in *Jones v. Morgan*, 2 Campb. 475, and in *Croxon v. Worthen*, 5 M. & W. 5, since the new rules, which do not affect the question. In this case the issue was on the fact of presentment. See also *Hopley v. Dufresne*, 15 East, 275, as to what shall be evidence of a waiver of the objection.

(i) *Potter v. Rayworth*, 13 East, 417.

(k) *Goodall v. Dolley*, 1 T. R. 712.

(l) *De Berdt v. Atkinson*, 2 H. Bl. 336.

(m) 6 A. & E. 507; 1 Nev. & P. 752.

(1) See *Pate v. M'Clase*, 4 Rand. 164.

(2) *S. P. Farmers' Bank v. Van Meter*, 4 Rand. 353.

(3) If a note be made for the accommodation of the indorser, and the money raised on it by a discount in the market, is received by him, he is not entitled to notice of non-payment by the maker. *French v. Bank of Columbia*, 4 Cranch, 141; *Bogg v. Keil*, 1 Mis. 743; *Holland v. Turner*, 10 Conn. 308; *Dorrance v. Rea*, 6 Shep. 137. But where the note has been made and discounted for the accommodation of the maker, the indorser is entitled to strict notice. *French v. Bank*, 4 Cranch, 141. So the indorser of a bill for the accommodation of the drawer is in all cases entitled to notice, although the drawee had no effects of the drawer in his hands. *May v. Coffin*, 4 Mass. Rep. 347; *Warder v. Tucker*, 7 Id. 449; *Hussey v. Freeman*, 10 Id. 36; *Sherrod v. Rhodes*, 5 Ala. 683; *Evans v. Norris* 1 Id. 571; *Sherley v. Fellowes*, 9 Porter, 300; *Reed v. Morrison*, 2 W. & S. 401.

Denman, C. J., delivering the judgment of the court, observed that the case of *De Berdt v. Atkinson* could hardly be supported, inasmuch as the defendant was not the party, for whose accommodation the note was made; on the contrary, he lent his name to accommodate the maker.

In addition to notice, it was formerly holden, that an indorsee could not sue his indorser until he had demanded payment of the *drawer*, on the ground that the indorser was only a warrantor for the payment of the drawer; but this doctrine has been overruled, and it is now settled, as well in the case of a foreign as in that of an inland bill, that such a demand is not necessary, as appears in the following cases:—

Case on a foreign bill of exchange by an indorsee against [*358] the *indorser.(n) On general demurrer, it was objected that plaintiff had not shown a demand on the drawer, in whose default only the indorser warrants. After two arguments, the court was of opinion, that the declaration was good enough; that to require a demand upon the drawer, would be laying such a clog on these bills as would deter all persons from taking them; that as to the notion which had prevailed, that the indorser warrants only in default of the drawer, there was not any colour for it; for every indorser was in the nature of a new drawer, and at *nisi prius* the indorsee was never put to prove the hand of the first drawer. The same point was ruled in the case of an inland bill of exchange, in *Heylin v. Adamson*, 2 Burr. 669. There is a dictum of Lord *Hardwicke*, Ch., to the same effect in *Lake v. Hayes*, 1 Atk. 281, assigning the same reason, viz. that every indorser is as a new drawer.

Foreign bills of exchange ought to be presented for acceptance to the drawee, by a notary public, or his clerk; provided that in the case of a presentment by the clerk, and non-acceptance, the notary duly makes the protest.(o)(1) If the drawee refuses to accept the bill,(p) then the notary ought to draw a protest for non-acceptance. In *Cromwell and another v. Hynson*, 2 Esp. N. P. C. 511, *Kenyon*, C. J., ruled, that when notice of non-acceptance was given to the indorser of a foreign bill, it was not necessary that such notice should be accom-

(n) *Bromley v. Frazier*, Str. 441.

(o) See Brooke's Treatise on the Office of a Notary in England, wherein he shows that the dictum of *Buller*, J., in *Leflley v. Mills*, 4 T. R. 175, "that the demand in the case of a foreign bill must be made by a notary public," is not well founded.

(p) Per *Holt*, C. J., 6 Mod. 29; *Buller v. Crips*.

(1) The notary who protests a foreign bill, is authorized to give notice of its dishonor to all persons who are responsible to the holders, and a notice describing himself officially, to which his name is printed, is good. *Crawford v. Branch Bank*, 7 Ala. 205; *Sussex Bank v. Baldwin*, 2 Harrison, 487; *Cowperthwaite v. Sheffield*, 1 Sandf. Sup. Ct. Rep. 416; *Shed v. Brett*, 1 Pick. 401.

It is not necessary that notice should be given by the holder; if given by any person authorized by the holder, it is sufficient. *Haslett v. Poultney*, 1 Nott & M'Cord, 466; *Stanto v. Blossom*, 14 Mass. 116; *Tunno v. Lague*, 2 Johns. Cas. 1; *Chanoine v. Fowler*, 3 Wend. 179; *Bank of Cape Fear v. Seawell*, 2 Hawks, 560; *Mead v. Engs*, 5 Cowen, 303; *Van Hoesen v. Van Alstyne*, 3 Wend. 75; *Cowperthwaite v. Sheffield*, 6 Sandf. S. C. Rep. 416; *Harris v. Robinson*, 4 Howard, U. S. Rep. 326; *Glasgow v. Pratte*, 8 Missouri, 338; *Glascock v. Bank*, Ib. 443.

Protest.—A protest on an inland bill of exchange was not necessary until the latter end of King William's reign. The frequent delays of payment of such bills having been found to be very inconvenient in the course of trade and commerce, it was enacted by stat. 9 & 10 Will. III. c. 17, that "where bills of exchange (of 5*l.* or upwards, payable at a certain time after date,^(s) and expressed to be for value received,) are drawn in, or dated at, any place in England, Wales, or Berwick-upon-Tweed, upon any persons of or in any other place, in such cases, after presentation and acceptance, *by underwriting* the bills under the parties' hands, and after the expiration of three days^(t) after the time when the same shall be due, on refusal or neglect of payment thereof, the party, to whom the said bill is made payable, his agent, &c., may cause the same to be protested by a notary public, and in default of such notary, by any other substantial person of the place, in the presence of two witnesses ;(2) the protest to be written under a copy of the bill in the following form :"—

Know all men, that I, A. B., on the day of at the

(t) See 4 T. R. 170.

(2) See *Read v. Bank of Kentucky*, 1 Monr. 91. And where protest is certified by a notary in Kentucky, it need not be authenticated by his notarial seal. *Bank of Kentucky v. Parsley*, 3 Id. 238.

any former debt or sum of money formerly due unto him, the same shall be esteemed a complete payment of such debt, if such person doth not take his due course to obtain payment thereof, by endeavouring to get the same accepted and paid, and make his protest, as aforesaid, either for non-acceptance or non-payment thereof."

Sect. 8. "Provided, that nothing herein contained shall extend to discharge any remedy⁽¹⁾ that any person may have against the drawer, acceptor, or indorser of such bill." "In case any *inland* *bills of exchange^(y) (for 5*l.* or upwards, payable at a cer- [*361] tain time after date, and expressed to be for value received) be lost or miscarried within the time before limited for payment, the *drawer* shall give other bills of the same tenor with those first given, the persons to whom they shall be so delivered giving security to the drawer to indemnify him in case the bills shall be found again."

The *indorsee* of a lost bill⁽²⁾ where the bill has been indorsed in blank, cannot recover at law against the acceptor, although a sufficient indemnity is tendered;^(z) he must resort to a court of equity for relief.^(a) But where a bill lost has a special indorsement upon it, an action may be maintained, without producing the bill.^(b)⁽³⁾ So the maker of a note, *not negotiable*, cannot refuse to pay the amount when due, on the ground that the payee has not got it in his possession or power, and cannot produce it for the purpose of delivering it up to the maker on payment.^(c)

(y) 9 & 10 Will. III. c. 17, s. 3.

(z) *Pierson v. Hutchinson*, 2 Campb. 211; *Hansard v. Robinson*, 7 B. & C. 90.

(a) See *Walmesley v. Child*, 1 Ves. 341, and *Exp. Greenway*, 6 Ves. jun. 812.

(b) *Long v. Bailie*, 2 Campb. 214, n. See also *Brown v. Messiter*, 3 M. & S. 281.

(c) *Wain v. Bailey*, 10 A. & E. 616.

had neglected to present it for payment, or to give notice of non-payment. See 12 Mod. 203; Ca. Temp. Holt, 299; Salk. 124. See *Bishop v. Rowe*, 3 M. & S. 362; *Maillard v. D. of Argyll*, 6 Scott's N. R. 994, and *ante*, 139.

(1) "The construction of this clause is, that it relates to the remedy for the principal sum in the bill, for these two acts, (*viz.*, 9 & 10 Will. III. c. 17; and 3 & 4 Ann. c. 9,) relate to and make a provision for protests, which are to be followed with interest, damages, and charges upon the drawer; and, therefore, this is a very natural proviso, that this should not extend to discharge any remedy that they might have for the principal sum, though there were no such protest." Per Lord Hardwicke, C. J., in *Lumley v. Palmer*, Ca. Temp. Hardw. 78.

(2) In case of a lost or destroyed note, it is not necessary to declare on it *specially* as such. *Vanauken v. Hornbeck*, 2 Green, 178; *Veles v. Moulton*, 11 Verm. 470; *Easton v. Friday*, 2 Richardson, 427. So, though partly destroyed, it may be declared on as entire, and proof received of the destroyed part. *Duckwall v. Weaver*, 1 Ohio, 262. Such proof of a note, overdue, need not be direct and positive. *Swift v. Stevens*, 8 Conn. 431. The *intentional* destruction of a note destroys the right of action on the note or the original debt; and, *quære*, whether a new promise would revive it. *Vanauken v. Hornbeck*, 2 Green, 179.

(3) The holder of a negotiable note, payable to *bearer*, cannot maintain an action *at law* on it on proving it to be *lost*, though he show that he lost it after it became due. *Secus*, if he show that it was actually destroyed. *Rowley v. Ball*, 3 Cowen, 303; see *M'Nair v. Gilbert*, 3 Wend. 444; *Pintard v. Tuckington*, 10 Johns. 104; *Hough v. Barton*, 20 Verm. 455. In the case of a bank note voluntarily cut by the owner, a recovery may be had upon one of the halves. *Bullet v. Bank of Pennsylvania*, 2 Wash. C. C. R. 172; 4 Id. 253; *Bank of Virginia v. Ward*, 6 Munf. 169; *Patton v. State Bank*, 2 Nott & M'C. 464, 471; *Farmers Bank v. Reynolds*, 4 Randolph, 186; see *Meeker v. Jackson*, 3 Yeates, 442; *Snyder v. Wolfley*, 8 S. & R. 331. And under the common money counts. *Hinsdale v. Orange Bank*, 6 Wend. 378.

Liability of the Drawer on Non-acceptance.—If the drawee, on presentment for acceptance, dishonour the bill, the drawer may be called on for immediate payment.(1) A foreign bill of exchange was drawn payable at 120 days after sight, but when the bill was presented for acceptance, that was refused; upon which an action was immediately brought against the drawer, without waiting till the expiration of the 120 days. On the trial, the defendant objected, that he was not liable until the expiration of the 120 days, and offered to call evidence to prove, that the custom of merchants was such. But Lord *Mansfield*, C. J., said, the law was clearly otherwise, and refused to hear the evidence.(d) In *Milford v. Mayor*, 1 Doug. 55, where the defendant was holden to bail, on an affidavit of debt, on a bill of exchange, drawn by defendant and indorsed to plaintiff, although the bill was not due at the time of the arrest; yet the drawee having dishonoured the bill, the court refused to discharge the defendant. In *Macarty v. Barrow*, Str. 949, (more fully and accurately reported from a note supplied by *Wilmot*, C. J., in 3 Wils. 17, and from Ford's note, in 7 East, 437, n. (a), and recognized in *Francis v. Rucker*, Ambl. 672,) the defendant having drawn bills on Spain, which were afterwards protested for non-acceptance, became a bankrupt before they were returned, and, being arrested, he was discharged upon motion, on the ground that it was a debt contracted before the bankruptcy, and at the very instant when the bills were drawn. And in *Ballingalls and another v. Gloster*, 3 East, 481, it was adjudged, that the indorsee of a foreign bill of exchange might bring an action against the person who had indorsed it to him, immediately on the non-acceptance of the drawee, [*362] *although the time for which the bill was drawn was not elapsed, on the ground that every indorser was in the nature of a new drawer.(2) And Lord *Ellenborough*, C. J., said, that, in a late case tried before him at Guildhall, it appeared to be the universally received law on the Continent, that an indorser was liable immediately on the non-acceptance of the drawee.(3)

(d) *Bright v. Purrier*, Bull. N. P. 269, cited by *Ellenborough*, C. J., in *Ballingalls v. Gloster*, 3 East, 483.

(1) Where, upon a bill payable at so many days after sight, the holder presents the bill for acceptance, and elects to consider what passes on such presentment as a refusal to accept, (though strictly he might have acted otherwise,) and protested the bill for non-acceptance, he is bound by such election, as to all the other parties to the bill, and must give due notice to them of the dishonor accordingly, otherwise they will be discharged. *Mitchell v. Degrand*, 1 Mason, Rep. 176.

(2) See *Evans v. Gee*, 11 Peters, 81.

(3) In this country it is the settled law, that the holder is bound to use due diligence to give notice of non-acceptance, as well as of non-payment to the drawer or indorser whom he intends to charge. But the agent of the holder is only bound to give notice to his principal, and transmit him the requisite protest, in order that the holder may give notice to the drawer. But when he undertakes to give notice, it will be good if given as early as it could have been received from the holder. And if a bill has been protested for non-acceptance, and due notice given to the antecedent parties, a protest and notice in case of non-payment, are not necessary to charge the same parties, for their liability is complete upon the non-acceptance. It has indeed been determined in the Supreme Court of the United States, that as to bills drawn in the United States upon Europe, the custom of merchants in this country does not ordinarily require, to recover

V. *Of the Transfer of Bills of Exchange, p. 362; Of the Party in whom the Right of Transfer is vested, p. 370.*

Bills payable to order,(1) or to bearer, are negotiable, and the transfer of them for a good and valuable consideration vests a right of action in the assignee. It is a rule of the common law, that choses in action are not assignable; but in the case of bills of exchange there is an exception to this rule, and in favour of commercial intercourse they are, by the custom of merchants, assignable to a third person not named in the bill, or party to the contract, so as to vest in the assignee a right of action *in his own name*.(2) Whether a bill of exchange be negotiable or not, is a question of law.(e) In respect of bills payable to order, the custom has directed that the assignment should be made by a writing on the bill, called an indorsement; and in respect of bills payable to bearer, that the assignment should be constituted by delivery only.(3) A transfer of a bill of exchange by indorsement is an

(e) *Grant v. Vaughan*, 3 Barr. 1523, 1526, 1528.

on a protest for non-payment, that a protest for non-acceptance should be produced. *Brown v. Barry*, 3 Dall. Rep. 365; *Clark v. Russell*, Ib. 415, 420, note. And such is the rule in Pennsylvania. *Reed v. Adams*, 6 S. & R. 356. But the learned American editor of Chitty on Bills, questions this doctrine, upon the ground, that unless due notice was given of the non-acceptance, the authorities are clear that no action would lie against the drawer or indorsers; and if duly given, the action immediately accrued on such notice, and the subsequent demand of payment became immaterial. Chitty on Bills, Am. edit. 1817, 237, a, note (c), 326, 12th ed.

(1) It must be observed, that the indorsement of a bill which has not the words, "or to his order," is good, or of the same effect between indorser and indorsee to make the indorser chargeable to the indorsee. Per *Holt*, C. J., *Hill v. Lewis*, Salk. 133. The indorsement of a bill or note is not merely a transfer of the paper, but is a new and substantive contract. *Slocum v. Pomeroy*, 6 Cranch. 222. It is the same as a new bill drawn by the indorser or the acceptor, in favor of the indorsee. *Van Staphorst v. Pearse*, 4 Mass. Rep. 258.

(2) An *indorsee* must be the *assignee* of the whole amount due on a note, or he cannot sue a prior party. *Douglass v. Wilkinson*, 6 Wend. 637. A deed conveying a number of bills, bonds, notes, &c., is not such a negotiation as gives the assignee a right to sue in his own name. *Hopkiss v. Page*, 2 Brock. C. C. R. 20. The action on a note must be brought by one who has the legal interest, or by his authority. If the payee who has negotiated it to a bank, fails and makes an assignment, his assignee cannot sue in the name of the payee, while the property and possession are in the bank, although before trial he satisfied the bank. *Bradford v. Buckman*, 3 Fairf. 15. In an action by indorsee against his immediate indorser, it is a good plea in bar that, before the commencement of the suit, plaintiff transferred the note to a third person, who had ever since been lawful owner and possessor. A replication that the suit is prosecuted *for the owner's benefit*, would be good. *Waggoner v. Colvin*, 11 Wend. 26. In such case, the holder of negotiable paper may sue in the name of a person who has no interest, and it is no defence that the suit is without his authority. *Gage v. Kendall*, 15 Wend. 640. Nor need he show title. *Dean v. Hewitt*, 5 Wend. 257. A person who holds a note as *trustee*, may sue in his own name; but a mere depositary and agent must sue in the name of principal. *Sherwood v. Boys*, 14 Pick. 172. If payee, after suit, parts with his interest by indorsement, the suit cannot be sustained. *Lee v. Tilson*, 9 Conn. R. 94. A promissory note may be purchased without indorsement, as well after as before suit brought; and the suit may be carried on without entering the use. *Williamson v. Allen*, 2 Gill & J. 344. A blank indorsement, over which is written "without recourse to me," does not prevent payee suing in his own name. *Thornton v. Moody*, 2 Fairf. 253.

(3) If a bill be payable to A., or bearer, and A. delivers it over for money received

act similar in effect to making a new bill, the indorser being in the nature of a new drawer.(f) By the law merchant, every person having possession of a bill, has (notwithstanding any fraud on his part, either in acquiring or transferring it) full authority to transfer such bill, but with this limitation, that, to make such transfer valid there must be a delivery, either by him or by some subsequent holder of the bill, to some one who receives such bill *bonâ fide* and for value, and [*363] who *is either himself the holder of it, or a person through whom the holder claims.(g)

Indorsements are of two kinds: 1st, blank: 2nd, full or special. An indorsement in blank, which is the most common, is made by writing the indorser's name on the back of the bill, without any mention of the name of the person in whose favour the indorsement is made. Indorsements, whether blank or special, subsequent to a blank indorsement by the payee, may be struck out even at the trial;(h)(1) consequently a remote indorsee may declare as the immediate indorsee of the payee or first indorser.(2) Indorsees of a bill of exchange against acceptor. The bill was indorsed in blank by the payee, and after several indorsements it came to one Jackson, a bankrupt, (whose assignees had indemnified defendant,) under a special indorsement to him or order. Jackson, without indorsing the bill, sent it to Muir and Atkinson, who discounted it with plaintiffs. Plaintiffs had struck out all the indorsements except the first. Per Lord *Kenyon*, C. J. "The fair holder of a bill may consider himself as the indorsee of the payee, and strike out all the other indorsements. This special indorsement being made after the payee had indorsed it, cannot affect the title of the present plaintiffs.(i) So where there were several blank indorsements intermediate between

(f) Per *Holt*, C. J., *Skin.* 411; *Hardwicke*, Ch., 1 *Atk.* 282; Lord *Mansfield*, C. J., 2 *Burr.* 674; Lord *Ellenborough*, C. J., 3 *East*, 482.

(g) Per *Alderson*, B., delivering judgment of the court in *Marston v. Allen*, 8 M. & W. 494, citing *Brind v. Hampshire*, 1 M. & W. 369, where it was holden that a delivery to the indorsee is necessary to complete a transfer by indorsement.

(h) *Theed v. Lovell*, Str. 1103.

(i) *Smith and others v. Clark*, Peake's N. P. C. 225; 1 *Esp. N. P. C.* 180, S. C.

without indorsement, this is a sale of the bill, and the seller does not become a new security, for if he had indorsed it, he had become a new security, and then he had been liable upon the new indorsement. Per *Holt*, C. J., *Governor and Company of the Bank of England v. Newman*, Lord Raym. 442; cited in *Emly v. Lye*, 15 *East*, 7, and *post*, tit. "Partners." If the payee of a note, payable to bearer, indorse his name on the note, he will be liable on it in the same manner as if it were payable to order. *Brush v. Reed*, *Adm.*, 3 *Johns. Rep.* 439.

(1) *Gorgerat v. M'Carty*, 2 *Dall.* 144; 1 *Yeates*, 94. See *Morris v. Foreman*, 1 *Dall.* 193; *Craig v. Brown*, 1 *Peters's C. C. Rep.* 171. *Lonsdale v. Brown*, 3 *W. C. C. R.* 404; *Weidner v. Schweigart*, 9 *S. & R.* 385; *Zeigler v. Gray*, 14 *S. & R.* 42; *Clark v. The United States*, 2 *Wheat.* 77. The contract *prima facie* implied from a blank indorsement of a negotiable promissory note by a third person is, that the note is due and payable according to its tenor; that the maker will be able to pay it at maturity; and that it is collectable by the use of due diligence. *Loflin v. Pomroy*, 11 *Conn.* 440; *Perkins v. Catlin*, *Id.* 213; *Walton v. Scott*, 4 *Id.* 527. Indorsement in blank of a note by one to whom it is not payable, as between the original parties, may be shown by parol to have been merely a collateral undertaking, *Barreres v. Lane*, 5 *Verm.* 161.

(2) When the holder writes over the first indorser's name an order to pay himself, and does not strike out the names of subsequent indorsers, they are still liable. *Cole v. Cushing*, 8 *Pick.* 48.

the indorsement by the payee and the indorsement by the defendant, and plaintiff declared that the payee indorsed the bill to the defendant, who indorsed it to the plaintiff; this was holden good.^(k) If A., the payee of a bill of exchange, indorses it in blank,^(l) and delivers it to B., and B. writes above A.'s indorsement, '*Pay the contents to C.*' without subscribing his own name, B. is not liable to C. as an indorser of the bill: for, in order to make a party liable as an indorser, his name must appear written with intent to indorse.⁽¹⁾ As by the law of France, an indorsement in blank does not transfer any property in a bill, the holder of a bill drawn in that country, and indorsed there in blank, cannot^(m) recover against the acceptor in the courts of this country. Where a bill actually made in this country is drawn on a firm in France, payable there, and accepted by them, it must be taken as between drawer and payee, to have been made in France, according to the principle embodied in the civil law maxim, *contraxisse unusquisque in eo loco intelligitur in quo ut solverit se obligaverit*. This being so between the drawer and payee, it is equally so between the indorser and indorsee. In this case the notice of dishonour must be governed by the law of France.⁽ⁿ⁾ An indorsement *in full, or special indorse- [* 364] ment, mentions the name of the indorsee, as thus, "Pay the contents to A. B.," and is subscribed with the name of the indorser. A full or special indorsement contains in itself a transfer of the interest in the bill to the person named in such indorsement.⁽²⁾ Poth. Traité du Contrat de Change, Part I. chap. 2, s. 23, 24. But a bare indorsement without other words purporting an assignment, does not work an alteration of the property. Per Cur., *Lucas v. Haynes*, Salk. 130. Clark having a bill of exchange payable to him or order, put his name upon it, leaving a vacant space above, and sent it to J. S., his friend, who got it accepted; but the money not being paid, Clark brought assumpsit against the acceptor. And it was objected, that the action should have been brought by J. S. But per *Holt*, C. J.; J. S. had it in his power to act either as a servant or assignee. If he had filled up the blank space, making the bill payable to him, as he might have done if he would, that would have witnessed his election to have received it as indorsee. The property of the bill would have been transferred to him, and he only could have maintained this action against the acceptor;

(k) *Chaters v. Bell*, 4 Esp. N. P. C. 210. Per Lord *Ellenborough*, C. J.

(l) *Vincent v. Horlock*, 1 Campb. 442.

(m) *Trimbey v. Vignier*, 1 Bingh. N. C. 151; 4 Mo. & Sc. 695.

(n) *Rothschild v. Currie*, 1 Q. B. 43; 4 P. & D. 737.

(1) The *bona fide* holder of a bill may write over a blank indorsement a direction to whom the bill shall be paid before or after suit, and does not thereby become an indorser. *Evans v. Gee*, 11 Pet. 81.

(2) When a bill is indorsed in full, the indorsee is the legal owner, and cannot sue in the name of payee. If, after such indorsement, it comes back in due course of commercial dealing into the payee's hands, he may strike out the indorsement and sue. *Bowie v. Ladd*, 1 Gill & J. 175; *Thompson v. Coquillam*, 3 Blackf. 437; *Smith v. Runnels*, Walker, 144. Where a bill of exchange is specially indorsed, and the indorsement is uncanceled, and there is no re-indorsement, nor other evidence of subsequent assignment, possession by original indorser is *prima facie* evidence of ownership. *Picquet v. Curtis*, 1 Sumner, C. C. R. 478.

but since he has not filled up the blank space, his intention is presumed to act as servant only to Clark, whose name was put there; that on payment thereof, a receipt for the money might be written over his name, and therefore the action is maintainable by Clark.^(o) From the foregoing case it appears that a blank indorsement is an equivocal fact, and that it is in the power of the party to whom the bill is delivered to make what use he pleases of such an indorsement. He may either use it as an acquittance to discharge the bill, or as an assignment to charge the indorser. Where a bill was specially indorsed by the payee, and the defendant, before its indorsement by the special indorsee, indorsed it; it was holden,^(p) that as against the defendant it operated as a new instrument, although it had no operation with regard to the other parties to the bill, but that it did not create a new one,⁽¹⁾ to require a fresh stamp.

Promissory notes and bills of exchange are frequently indorsed in this manner, "Pay the money to my use," in order to prevent their being filled up with such an indorsement as passes the interest. Per Lord *Hardwicke*, Ch., in *Snee v. Prescott*, 1 Atk. 249.⁽²⁾ "A bill, though once negotiable, is certainly capable of being restrained. I remember this being determined on argument. A blank indorsement makes the bill payable to bearer; but by a special indorsement the holder may stop the negotiability." Per Lord *Mansfield*, C. J., *Anchor v. Bank of England*, Doug. 639. These positions were recognized in *Sigourney v. Lloyd*, 8 B. & C. 622, where a bill payable to the order of A. was indorsed by A. to B., and then B. indorsed thus: [*365] "Pay to C. or his order *for my use*;" it was holden, ^{*}(notwithstanding the decision in *Evans v. Cramlington*, Carth. 5, and *post*, p. 370,) that this indorsement was restrictive, and that the property in the bill remained in B. On error, in Exch. Chamber, judgment was affirmed, 5 Bingham 525.

It is not necessary that in an indorsement of this kind the words "or order" should be subjoined to the name of the indorsee; for if a bill be drawn payable to order, the negotiability of the bill will not be restrained by the omission of the words "or order" in the indorsement, as will appear from the following cases:—

Upon a case made at nisi prius,^(q) coram *Pratt*, C. J., it appeared, that the plaintiff had declared on an indorsement made by A., whereby he appointed the payment to be to B. *or order*, and upon producing the bill in evidence, it appeared to be payable to A. or order, but the indorsement was in these words, "Pay the contents to B.;" and therefore it was objected, that the indorsement, not being to order, did not

(o) *Clark v. Pigot*, Salk. 126, and 12 Mod. 192.

(p) *Penny v. Innes*, 1 Cr. M. & R. 439; 5 Tyrw. 107.

(q) *Acheson v. Fountain*, Str. 557.

(1) If the holder of a bill, subject to certain obligations according to law where the bill is drawn or payable, wishes to impose the same on his indorsee, he must make a special indorsement, or otherwise it is subject only to those of the place of indorsement. *Ayman v. Shelton*, 12 Wend. 439.

(2) *Brown v. Jackson*, 1 Wash. C. C. R. 512; *Holmes v. Hooper*, 1 Bay, 160.

agree with the plaintiff's declaration; but, upon consideration, the whole court were of opinion, it was well enough, that being the legal import of the indorsement; and that the plaintiff might upon this have indorsed it over to another, who would be the proper order of the first indorser. Before this decision in the case of *Acheson v. Fountain*, the same doctrine had been laid down with respect to a promissory note, in the case of *More v. Manning*, Comyn's R. 311, viz., that where a note is drawn payable to order, and the payee indorses it to A. (omitting the words "or order,") A. has (notwithstanding such omission) all the interest in the note, and may indorse it to B., who, upon such indorsement, may maintain an action against the maker. So where a foreign bill of exchange was drawn by A. on B., (r) payable to C. or order, and accepted by B., and C. indorsed it to D. without adding the words "or order" and D. afterwards indorsed it to E., who brought an action against B. the acceptor, for non-payment; evidence having been adduced at the trial of the usage of merchants with respect to indorsements of bills payable to order, where the words "or order" were omitted in the indorsement, which evidence was contradictory, some merchants declaring that the omission did not make any difference, others, that it restrained the negotiability of the bill, and made it payable to the indorsee only; the jury found a verdict for the defendant.—On a motion for a new trial, on the ground that evidence of the usage ought not to have been allowed; that the custom of merchants was part of the law of England, and that the law of England was fully settled upon this point: the court were unanimous that a new trial ought to be granted; and Lord Mansfield, C. J., said, he was clear that the evidence ought not to have been admitted, for the law was fully settled in the cases *of *More v. Manning*, and *Acheson v. Fountain*, ante. [*366] The other judges concurred; and Denison, J., said, that there was not any instance of a restrictive limitation, where a bill was originally made payable to A. or order; that he had never heard of an indorsement to A. only, and that in general *the indorsement followed the nature of the thing indorsed*. As a bill of exchange payable to A.'s order, is, by the custom of merchants, payable to A. if he does not make any order; so, by an indorsement of a bill of exchange to the order of A., A. is entitled to payment if he makes no order. A bill of exchange was drawn, (s) payable to I. S., who indorsed it in this manner: "Pay the contents of the bill unto the order of Mr. Fisher." Fisher brought an action as indorsee, averring he had made no order to receive the money. The defendant demurred to the declaration, supposing that Fisher could not maintain the action, because the indorsement was not to him, *but to his order*; *sed per Curiam*: The action is well brought against the indorser; for among tradesmen this form of indorsement is commonly used, although it is intended to be made payable to the person whose order is mentioned.

A bill payable to the *order* of A. is payable to A., (t) if he does not

(r) *Edie v. East India Company*, 2 Burr. 1216, and 1 Bl. R. 295, recognized since the new rules, which do not make any alteration in the law merchant, in *Cunliffe v. Whitehead*, 3 Bingh. N. C. 830.

(s) *Fisher v. Pomfret*, Carth. 403.

(t) *Smith v. McClure*, 5 East, 476.

order it to be paid to any other person; and where no such order appears, it will be presumed that none was made. Defendant had given a bill under his hand to pay to E. G. or order a sum of money,^(u) and E. G., by indorsement ordered part of the money to be paid to plaintiff, upon which an action was brought; and a special custom among merchants was laid in the declaration according to the plaintiff's case: upon demurrer to an insufficient plea, which defendant had pleaded, it was adjudged a void custom, and that the declaration was ill; for where a man's contract has subjected him to only one action, it cannot be divided so as to subject him to two or more. It was admitted, however, that if the plaintiff had acknowledged the receipt of the residue, the declaration would have been good.

In order to derive a legal title to a bill of exchange payable to order, it is necessary for the indorsee in an action against the acceptor, to prove the hand-writing of the payee or first indorser;^(x) and, therefore, though the bill may come into the hands of another person of the same name with the payee, yet his indorsement will not confer a title, although the payee be not particularly described in the bill;^(y) such an indorsement, if made with the knowledge that he is not the person to whom the bill was made payable, is a forgery, through the medium of which a title cannot be derived.⁽¹⁾

With respect to bills payable to bearer, or bills payable to [*367] order, *but indorsed in blank, both which pass by delivery; if an assignee take them, without any knowledge⁽²⁾ of defect of title, *bona fide*, and for valuable consideration, such assignee is entitled to payment. This proposition, as far as it affects bills payable after sight, or after date, and not on demand, must be understood with this restriction, *viz.*, that the party seeking to recover on such bill has not taken it after it became due; for in that case he takes the bill subject to all its equities. See *ante*, p. 345.

The following case, decided on a promissory note, will illustrate this position: Trover for a bank note of 21l. 10s. payable to A. or bearer,

(u) *Hawkins v. Cardee*, Salk. 65; Carth. 466; Lord Raym. 360, S. C.

(x) *Smith v. Chester*, 1 T. R. 654.

(y) *Mead v. Young*, 4 T. R. 28; per three justices, *Kenyon*, C. J., diss.

(1) Indorsements of bills are usually made after acceptance, and before payment; but though the term *transfer* supposes a pre-existing bill, a transfer may generally be made previously to a bill being complete. Thus if a man indorse his name on a blank piece of paper, with the intent that a bill or note should be written on it, such an indorsement will operate as a letter of credit for an indefinite sum, and will bind the indorser to pay it at any time which the person to which he entrusts the paper chooses to insert in it. *Russell v. Langstaff*, Doug. 514; *Newsom v. Thornton*, 6 East, 21; *Collins v. Emmett*, 1 H. Bl. 313; *Violet v. Patton*, 5 Cranch, 142; *Putnam v. Sullivan*, 4 Mass. Rep. 45. So where A. made a note with a blank for the sum, and sent it to the payee, and requested him to fill it up, it was held that the payee might lawfully fill up the blank and recover upon the note. *Jordan v. Neilson*, 2 Wash. Rep. 164; *Bank of Limestone v. Penick*, 5 Monroe, 25.

(2) See *Good v. Coe*, cited in argument, in *Boehm v. Sterling*, 7 Term, R. 427, where the plaintiff had taken the note, on which he sued, for a valuable consideration, three months after it was due; and it appearing that the note had been lost by the true owners, and that the person from whom the plaintiff received it *had notice of this*, Lord *Kenyon* held, that the plaintiff was not entitled to recover.

on demand.(z) A. being possessed of the note, sent it by the general post, under cover, to B. in Oxfordshire. The mail was robbed, and the note stolen. The note in question afterwards came into the hands of plaintiff for a valuable consideration, *in the course of his business*, and without notice that it had been stolen. The plaintiff having delivered the note to defendant, who was a clerk in the Bank, for payment, he refused either to pay the money or re-deliver the note, whereupon this action was brought. On a case reserved, the court were of opinion, that plaintiff had sufficient property in the note to maintain this action: that a contrary determination would be attended with injurious consequences to commerce, since bank notes are constantly treated and considered as money, and paid and received as cash, and it was necessary that their currency should be established and secured. So where a bill of exchange(a) with a blank indorsement, had been lost by the holder, and afterwards discounted by the plaintiffs, (who were bankers,) in the usual course of their business, without notice, for a person unknown to them, the plaintiffs were permitted to recover against the acceptor, upon proving the consideration which they had paid for the bill, which *Kenyon, C. J.*, thought necessary. N. The holder had advertised the bill, but it did not appear that plaintiffs had ever seen the advertisement.

In cases of this description, Lord *Tenterden, C. J.*, used to direct the jury to find for the defendant, if they thought that the plaintiff had taken the bill or note under circumstances which ought to have excited the suspicions of a prudent man. See *Gill v. Cubitt*, 3 B. & C. 466, and *Down v. Halling*, 4 B. & C. 330. But *in *Crook v. [*368] Jadis*,(b) where the *C. J. Denman* had left it to the jury to say, whether there had been *gross negligence* on the part of the plaintiff in taking a bill, the court were of opinion that this was a more accurate mode of submitting the question than the language adopted in *Gill v. Cubitt*, and *Down v. Halling*. In *Easley v. Crockford*,(c) it was left to the jury to find, whether the defendant had used due caution in taking a bank-note of the amount of 200*l.*, and the jury having found that he had not, the court refused to disturb the verdict.(d)(1) But it is now clearly settled that gross negligence only is not a sufficient answer, where the party has given consideration for the bill; and that gross negligence may be evidence of *mala fides*, but is not the same thing;(e) and that the owner of a bill is entitled to recover upon it, if he has

(z) *Miller v. Race*, 1 Burr. 452.

(a) *Lawson v. Weston*, 4 Esp. N. P. C. 56.

(b) 3 Nev. & M. 257; 5 B. & Ad. 909; recognized in *Backhouse v. Harrison*, 5 B. & Ad. 1098; 3 Nev. & M. 188.

(c) 10 Bingh. 243; 3 M. & Sc. 700.

(d) See also *Foster v. Pearson*, 1 Cr. M. & R. 849, and 5 Tyrw. 255; *Snow v. Peacock*, 3 Bingh. 406; *Snow v. Sadler*, 3 Bingh. 610.

(e) *Goodman v. Harvey*, 4 A. & E. 870; 6 Nev. & M. 372, recognized in *Uther v. Rich*, 10 A. & E. 784.

(1) No property passes to A. in a \$1000 bank note stolen and transferred to him by one indebted in a less sum on a promissory note, where he does not give any credit therefor, nor return the promissory note, and the bank note is stopped in a bank to which A. had taken it to get it exchanged. *Sylvester v. Girard*, 4 Rawle, 185.

come by it honestly; and that that fact is implied *prima facie* by possession, and that to meet the inference so raised, fraud, felony, or some such other matter must be proved.(f)

Defendant, on the 22nd(g) October, 1763, gave Bicknell, who was husband of a ship belonging to defendant, a cash-note, or check, on his banker, which was worded thus: "Pay to ship Fortune, or bearer, 70*l*." B. lost the cash note, which having been offered to plaintiff, a grocer at Portsmouth, on the 25th October, 1763, *in the course of business*, he took it *bond fide*, and gave a valuable consideration for it, without notice of the loss. Defendant having directed his banker not to pay the cash-note, an action was brought: and plaintiff declared; first, as on an inland bill of exchange; and, secondly, for money had and received. Verdict for defendant. A motion was made for a new trial, which, after argument, was granted; the court observing, that notes of this kind were negotiable by delivery, and as plaintiff came fairly by the note in question, for a valuable consideration, he was entitled to recover. And per *Yates, J.*, "It has been doubted whether that species of action, where the plaintiff declares upon the note itself, as upon a specialty, was proper; but here is a count for money had and received. The question, whether plaintiff can maintain this action, depends upon the note's being assignable or not. The original advancer of the money manifestly appears to have had money in the hands of the drawer; and therefore *he* was certainly entitled to bring this action; and if he transfer his property to another person, that other person may also maintain the like action. Bicknell must, [*869] under the circumstances of **the case*, be considered as having delivered this instrument to plaintiff, which is tantamount to indorsement; and there is not any doubt of his having come by it fairly, *bond fide*, and for a valuable consideration. Case on a bill of exchange payable to I. S. or bearer, against the drawer.(h) Upon evidence, ruled by Lord *Pemberton*, that plaintiff must entitle himself to it on a valuable consideration, (though among bankers they never make indorsements in such case,) for if he come to be bearer by casualty or knavery, he shall not have the benefit of it. A bank-bill payable to A. or bearer, being given to A. and lost,(i) was found by a stranger, who transferred it to C. for a valuable consideration. C. got a new bill in his own name. Per *Holt, C. J.*—"A. may have trover against the stranger, who found the bill, for he had not any title, though payment to him would have indemnified the bank; but A. cannot maintain trover against C. by reason of the course of trade, which creates a property in the bearer." A bill of exchange, payable to order, with a blank indorsement, stands on the same footing as a bill payable to bearer; both passing by delivery. On this principle, and on the authority of the preceding cases of *Miller v. Race*, and *Grant v. Vaughan*, it has been holden,(k) that a bill with a blank indorsement having been

(f) Per Lord *Denman, C. J.*, in *Arbouin v. Anderson*, 1 Q. B. 498; 1 G. & D. 403.

(g) *Grant v. Vaughan*, 3 Burr. 1516; 1 Bl. R. 485, S. C.

(h) *Hinton v. —*, 2 Show. 235.

(i) *Anon. B. R. London Sittings*, M. 10 Will. III. Salk. 126. Ld. Raym. 738, S. C.

(k) *Peacock v. Rhodes*, Doug. 633.

stolen and negotiated, the innocent indorsee thereof, for a valuable consideration *in the usual course of business*, without notice, might recover against the drawer.(1)

A banker is bound(l) to pay a check drawn by a customer within a reasonable time after he (the banker) has received sufficient funds belonging to the customer; and the customer may maintain an action of tort against the banker for refusing payment of a check under such circumstances, and is entitled to have a verdict for nominal damages, although he cannot prove that he has sustained any actual damage. This decision rests entirely on the consideration that the action, an action on the case, was founded on a contract, not on a general duty implied by law. The contract creates a duty, and the neglect to perform that duty, or the non-feasance, is a ground of action upon a tort.(m)

Where a customer of the Bank of England was in the habit of making his acceptances payable at the Bank, and one of such acceptances being presented for payment at eleven o'clock in the morning, was dishonoured, for want of assets, and was presented again by a notary at six in the evening, when the same answer was given by a person stationed for that purpose; it was holden,(n) in *an action [*370] for dishonouring the bill, that the Bank, although they had, before six o'clock, received assets, were not bound to pay the bill, it being after the usual hours of business.

Of the Party in whom the Right of Transfer is vested.—Defendant drew a bill of exchange upon A.,(o) payable at so many days' sight to B. or order, for the use of C.; B. indorsed this bill to plaintiff for value received: this bill was accepted, but payment having been refused, plaintiff brought this action as indorsee, against defendant as drawer. Defendant, after oyer of the bill, pleaded that C. (the *cestui que use*,) was an officer in the excise, and indebted to the King in such a sum, and that upon an exchequer process, at the suit of the king, the sum mentioned in the bill was extended in his hands: upon demurrer, it was adjudged by the court for the plaintiff;(p) first, because C. had an equitable and not a legal interest to have the money, for he could not maintain an action against the acceptor. Secondly, the indorsement was for value received of plaintiff by B., and so B. received the money to which C., as *cestui qui use*, had an equity: but the sum demanded by plaintiff is not that sum, but another due to him for value received, in which sum C. was not concerned, for which reason the money now in demand was not extendible. This judgment was affirmed

(l) *Marzetti v. Williams*, 1 B. & Ad. 415.

(m) Per *Tindal*, C. J., delivering the judgment of the Exchequer Chamber, in *Boorman v. Brown*, 3 Q. B. 526; 2 G. & D. 793.

(n) *Whitaker v. Bank of England*, 1 Cr. M. & R. 744.

(o) *Evans v. Cramlington*, Carth. 5.

(p) E. 1 Will. & Ma. *Holt*, C. J.

(1) A bank note payable to *W. Pitt*, or bearer, is in effect payable to the bearer; as between any *bonâ fide* holder and the bank, such holder is to be deemed the bearer to whom the bank is originally liable. *Ballard v. Bell*, 1 Mason's Rep. 252.

in error in the Exchequer Chamber. E. 2 Will. & Ma. See 2 Vent. 307. See remarks on this case in *Sigourney v. Lloyd*, 8 B. & C. 630.

It is the constant usage of merchants for administrators to indorse and assign over bills of exchange, (q) made payable to their intestate's order. Where a bill of exchange has been indorsed by the payee to A. and B. as executors, (r) they may declare as such in an action against the acceptor. (1) When a bill of exchange is drawn, payable to A. and B. or their order, (s) and A. and B. are not partners: to make it negotiable, the bill should be indorsed by A. and B., such being the usage of merchants; (2) but in such case, if the bill be indorsed by A. in the name of himself and B., and afterwards the drawee accepts the bill so indorsed, (t) it is not competent to him to object; that the bill has not been regularly indorsed. See *Porthouse v. Parker*, post, tit. "Partners," Sect. IV.

[*371] *VI. *Of Presentment for Payment, and herein of the Days of Grace.* p. 371; *Non-payment and Notice thereof.* p. 373; *Protest.* p. 380.

Where bills of exchange are drawn payable at usance, (3) or a certain time after date, or after sight, such bills ought not to be presented for payment at the expiration of the time mentioned in the bills, but at the expiration of what are termed days of grace. (4) In an action against the drawer of a bill of exchange, the evidence being that the bill had been demanded from the acceptor on the day preceding the last day of grace; the plaintiff was nonsuited. (5) *Wiffen v. Roberts*, 1 Esp. N. P. C. 262. *Kenyon*, C. J. "In case of foreign bills of exchange, the custom is, (u) that three days (6) are allowed for payment

(q) Per *Denison*, J., 3 Wils. 4.

(r) *King v. Thom*, 1 T. R. 487.

(s) *Carvick v. Vickery*, Doug. 653, n.

(t) *Jones v. Radford*, 1 Campb. 83, n.

(u) Per merchants in evidence at Guildhall, Trin. 7 Will. III. coram *Holt*, C. J., *Tassel v. Lewis*, Lord Raym. 743.

(1) If a negotiable note be made payable to two executors as such, it cannot be transferred by the indorsement of one of them; but both must indorse the note to pass the property by assignment. *Smith v. Whiting*, 4 Mass. Rep. 334.

(2) As the property in a bill of exchange passes to the holder, when he pays the consideration, and as indorsement is merely evidence of the transfer, a trader, who before his bankruptcy has parted with a bill for a valuable consideration, but omitted to indorse it, may indorse it after his bankruptcy: and such indorsement will be a sufficient title to the party to whom it was delivered. *Smith v. Pickering*, Peake's N. P. C. 50.

(3) This term signifies the time which, by the usage of the countries between which the bills are drawn, is appointed for the payment of them. Poth. s. 15. See a table of usances, Chitty, 142, 143. Usances are calculated exclusively of the date of the bill. Id. 143. The computation of time, when expressed by months, is by calendar months. Ib. Where bills are payable so many days after sight, the days are computed from the day the bills are accepted, or protested for non-acceptance.

(4) Days of grace are part of the original contract, and the negotiability of a note is as unrestricted then as before. *Savings Bank v. Bates*, 8 Conn. 505.

(5) *Platt v. Eads*, 1 Blackf. 81; *Leavitt v. Simes*, 3 N. H. R. 14. Demand must be made on the last day of grace. *Eldridge v. Rogers*, Minor, 392; *Mitchell v. Le Grand*, 1 Mason, 176; *Ontario Bank v. Petree*, 3 Wend. 456.

(6) Three days, exclusively of the day on which the bill becomes due, everywhere,

of them, and if they are not paid on the last of the said days, the party ought immediately to protest the bill, and return it, and by this means the drawer will be charged; but if he does not protest on the last of the three days of grace, there, although he upon whom the bill is drawn fails, the drawer will not be chargeable; for it shall be reckoned his folly that he did not protest, &c. But if it happens that the last of the said three days is a Sunday, or a great holiday, as Christmas-day, &c., upon which no money used to be paid, there the party ought to demand the money on the second day; otherwise it will be at his own peril, for the drawer will not be chargeable." [See *City Bank v. Cutter*, 3 Pick. R. 414.] Good Friday is to be considered as a Sunday or Christmas-day.(x) By stat. 7 & 8 Geo. IV. c. 15, s. 2, bills of exchange becoming due on a day appointed by proclamation for fast or thanksgiving are payable on the day preceding: and by sect. 3, Good Friday, Christmas-day, and every such day of fast or thanksgiving is to be considered, as regards bills of exchange and promissory notes, as Sunday.(1)

The foregoing passage from Lord Raymond's Reports, mentions only foreign bills of exchange; but it was said, by Lord *Kenyon*, C. J., in *Brown v. Harraden*, 4 T. R. 152, that it had been settled *for more than half a century, that inland bills of exchange [*372] were payable at the same time as foreign bills of exchange.(2) A foreign bill of exchange was drawn on C. and Co. at Liverpool, payable to A. in London. C. and Co. having refused to accept, it was accepted by B. in London, for the honour of the payee, if regularly protested and refused when due. It was holden(y) in an action against B., that under the special form of the acceptance, a presentment for payment to C. and Co. at Liverpool, a refusal by them, and a protest

(x) Stat. 39 & 40 Geo. III. c. 42.

(y) *Mitchell v. Baring*, 10 B. & C. 4.

except at Hamburgh, where that day makes one of the days of grace. Chitty, 140. A bill, drawn at five days *after sight*, and accepted on the *first* day of a month, is payable on the *ninth* day of the same month, the day of the acceptance being excluded, and the three days of grace allowed; a demand on the *eighth*, and protest for non-payment, is too early, and therefore void. *Mitchell v. Degrand*, 1 Mason's Rep. 176.

(1) *Martin v. Ingersoll*, 8 Pick. 1; *Chamberlain v. Maitland*, 5 B. Monr. 448; *City Bank v. Cutter*, 3 Pick. 414.

Payment may be demanded on the last day of grace, and if the bill or note be not then paid, an action may be commenced on that day. *Greeley v. Thurston*, 4 Greenl. 479. *S. P. Shed v. Brett*, 1 Pick. 401. *Contra*, *Osborn v. Moncure*, 3 Wend. 170, where it was held to be ground of nonsuit, that the action was commenced on the third day of grace. The rule in South Carolina seems to be the same as that of Massachusetts. *Wilson v. Williman*, 1 Nott & M'C. 440. See also *Renner v. Bank of Columbia*, 9 Wheat. 581; *Mills v. Bank of U. S.*, 11 Id. 431; *Bank of Washington v. Tuplett*, 1 Peters's Rep. 25.

(2) In the United States, the days of grace are allowed, except in Massachusetts, where they are not allowed unless expressly stipulated in the contract. *Jones v. Fales*, 4 Mass. Rep. 245. See Rev. St. c. 33, § 5. In France, the days of grace are abolished by the new commercial code, and all bills and notes are payable at the time mentioned in the bills. Code de Commerce, liv. 1, tit. 10; Des Letters deChange. Not allowed on common notes of hand in Ohio. *Contra*, as to those payable at banks. *Sharp v. Ward*, 7 Ohio, 223. See also *Harvell v. Bixler*, Walker, 176. A note not negotiable is not entitled to *grace*. *Backus v. Danforth*, 10 Conn. 300. See Byles on Bills, 161, 3 Am. ed; Story on Bills, § 334.

there were necessary, and therefore that the bill was properly presented for payment there on the day it became due.

There is a distinction between bills payable at a certain time after date, and bills payable at a certain time after sight. The holder of a bill payable after date is bound to use all due diligence, and to present such bill at its maturity, but in case of a bill payable after sight, the holder may put the bill into circulation before he presents it;(z) or, although he does not circulate it, he may take a reasonable time to present it. A delay to present until the fourth day a bill on London, given within twenty miles thereof, is not unreasonable. I am not aware that it has ever been solemnly decided, that days of grace are allowable on bills of exchange payable *at sight*. If the reader wishes to pursue the dicta on this subject, he will find them collected in Mr. Chitty's *Treatise on Bills of Exchange, &c.*, p. 144, 145, 146.(1) The weight of authority is in favour of such an allowance. Days of grace are not allowed on bills payable on demand. Chitty, 146. There are not any days of grace in France.(a) No debt arises upon a bill payable after sight, until a presentment for payment; and consequently the statute of limitations will not operate as a bar to such bill, unless it has been presented for payment six years before the action commenced.(b) With respect to promissory notes payable on demand, the statute runs from the date of the note;(c) but where the note was payable "two years after demand;" it was holden,(d) that the statute did not begin to run until two years after demand of payment had been made. Upon a promissory note, payable on demand "at sight," an action cannot be maintained(e) until after presentment. Where the defendant promised, in consideration of the plaintiff having agreed not to sue him on two bills, to pay him "whenever his circumstances would enable him to do so, and he should be called upon for that purpose;" it was holden, that the limitation of action ran from the time of defendant being [*373] able to pay, though plaintiff had *made no demand, and had not been informed by defendant, or otherwise had knowledge of such ability.(f)

Non-payment and Notice thereof.—The acceptor of a bill of exchange(g) having, or being presumed to have, in his hands effects of the drawer, for the purpose of discharging the bill, is considered as the principal debtor, and is primarily liable; payment must, therefore, be demanded of the acceptor, in the first instance, on the day when the

(z) Per Gibbs, C. J., in *Goupy v. Harden*, Holt, N. P. C. 344; *Fry v. Hill*, 7 Taunt. 397.

(a) *Rothschild v. Currie*, 1 Q. B. 43; 4 P. & D. 737.

(b) *Holmes v. Kerrison*, 2 Taunt. 323.

(c) *Christie v. Fonsick*, C. B., London Sittings after M. T., 52 Geo. III. Sir J. Mansfield, C. J., M. S.; *Norton v. Ellam*, 2 M. & W. 461, S. P., where note was payable with interest on demand.

(d) *Thorpe and Wife v. Booth*, 1 Ry. & Moo. 388, and 8 D. & R. 347, under the name of *Thorpe v. Combe*.

(e) *Dixon v. Nuttall*, 1 Cr. M. & R. 307; 4 Tyrw. 1013.

(f) *Waters v. Earl of Thanet*, 2 Q. B. 757; 2 G. & D. 166.

(g) *Dagglish v. Weatherby*, 2 Bl. R. 747.

(1) And in Byles on Bills, p. 162, and Story on Bills, § 334.

bill becomes due; and in case of refusal or default, due notice of such demand and refusal or default must be given to the drawer, within a reasonable time after such demand and refusal or default, in order that he may withdraw his effects as speedily as possible from the hands of the acceptor. Until these previous steps have been taken, the drawer cannot be resorted to for non-payment of the bill. The want of notice to a drawer who has effects in the hands of the acceptor, after dishonour of the bill, is considered as tantamount to payment by him. The notice of dishonour may be given on the same day on which payment is refused.^(h) Want of effects in the hands of the drawee at the time of drawing the bill and of its maturity, and the absence of reasonable grounds for expecting that the bill will be paid, will dispense with the necessity of presenting the bill for payment to the drawee, when it arrives at its maturity;⁽ⁱ⁾ and if it be presented two days after and payment is refused, the drawer is liable.

In an action by an indorsee of a bill against the drawer,^(k) it appeared that the bill had been drawn on the 1st of March, 1806, by the defendant, on one Moses Agar, payable three months after date: and the plaintiff, having become the holder of it, had placed it in the hands of his bankers, Down and Co. On the 4th of June, when the bill became due, a clerk of Down and Co. presented it for payment; and it was dishonoured. On the 5th they returned it to the plaintiff, who by letter put into the two-penny post on the 6th, gave notice to the defendant of the dishonour; the plaintiff living in London, and the defendant at Shadwell. The case was left to the jury on the question whether the notice of the dishonour had been given in a reasonable time; and the jury, being of opinion that it had, found a verdict for the plaintiff. And on motion for a new trial, on the ground that due diligence had not been used, the court refused the rule:—*Le Blanc*, J., observing that it could not be contended that a banker ought to give notice of the dishonour to any but his customer,^(l) for whom he held the bill; and he thought that the holder of a bill might avail himself of the conveyance by the two-penny post. The distance at which the parties live from one another is immaterial, provided they are within the limits of the two-penny *post; and it is sufficient if the letter [*374] be put into the receiving-house in time for the party to have it on the day when he ought to have notice of its dishonour.^(m)(1) Notice to the drawers of non-payment, by sending to their counting-house, during hours of business, on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being

(h) *Burbridge v. Manners*, 3 Campb. 193.

(i) *Terry v. Parker*, 6 A. & E. 502.

(k) *Scott v. Lifford*, 9 East, 347; 1 Campb. 246, S. C. See also *Langdale v. Trimmer*, 15 East, 291.

(l) See *Robson v. Bennett*, 2 Taunt. 388.

(m) *Hilton v. Fairclough*, 2 Campb. 633.

(1) The post mark on the letter is not conclusive evidence of the time at which the letter was sent. *Stocken v. Collin*, 7 M. & W. 515.

Devonport. The notes never were presented at all. Per *Cur.*(b) "This is the ordinary case of a bill or note payable to the bearer, on demand, on a banker, given by way of payment. A party receiving such a note, if payable in the place where it is given, is not bound to present it until the morning of the next day of business after its receipt; and if payable elsewhere, he is bound to send it by the post of the day next following that on which it was given him. The plaintiff was not bound to send these before the Saturday's post, in which case they could not have been presented, as the bank had stopped." Where the holder of a bill of exchange intends to sue any of the indorsers, it is incumbent on him first to demand payment from the acceptor, on the day when the bill becomes due,(c) and in case of refusal, to give due notice thereof, within a reasonable time, to the indorser.(1) Notice of dishonour must be given within a reasonable time. The general rule as it may be collected from *Tindal v. Brown*, 1 T. R. 167, seems to be, with respect to persons living in the same town, that the notice shall be given by the next day; and with regard to such as live at different places, that it shall be sent by the next post. But if in any particular place the post should go out so early after the receipt of the intelligence, as that it would be inconvenient to require a strict adherence to the general rule, then, with respect to a place so circumstanced, it would not be reasonable to require the notice to be sent till the second post. In *Haynes v. Birks*, 3 Bos. & Pul. 599, where the bill, which was put by plaintiff in the hands of his banker to present for payment, having been dishonoured in London, about two o'clock on Saturday, and presented again at nine in the evening by a notary, and notice [*377] given of the dishonour to the *plaintiff on Monday, at Knightsbridge, who gave notice to the indorser of it on Tuesday at noon, in Tottenham Court Road; it was holden, that this notice was reasonable notice; Lord *Alvanley*, C. J., observing, that it did not appear at what time on Monday the plaintiff received the notice from his banker; that he was not bound to be at home the whole of the day; and supposing him to have returned home late in that day, he was not bound to send a special messenger to the defendant; if he informed the defendant by the course of the post it was sufficient; and supposing him to have so done, the defendant would only receive his letter on Tuesday. The chief justice added, "There is not any law which requires notice to be given within any certain fixed time; it need not be given with all the despatch which can possibly be used, but with all the despatch that can reasonably be expected." Whether notice has been given within a reasonable time appears to be a mixed question of law and fact, or rather a question of law, dependent on facts, *viz.*, the situation and places of parties, post hours, and the like. See *Darbishire v. Parker*, 6 East, 3, where this question was agitated, and the cases

(b) *James v. Holditch*, MS., and 8 D. & R. 40.

(c) *Rushton v. Aspinall*, Doug. 679.

(1) The indorser of a note *not negotiable*, guarantees its payment, and is not entitled to proof of demand and notice. *Seymour v. Vanslyck*, 8 Wend. 403.

on this point are collected. (1) A country banker, with whom a bill of exchange made payable in London is deposited, has an entire day after receiving notice of its dishonour to transmit the same to his customer, so that notice by the next day's post, though it be not the next post, will be time enough; therefore, where the indorsee of a bill, payable at a banker's in London, deposited it with his bankers in the country, who caused it to be duly presented for payment on the 14th, when it was dishonoured, and notice sent by the post to the country bankers on the 15th, which reached them on the morning of the 17th, (being Sunday,) and they on the next day sent notice by the post to the indorsee, but not until after twelve at noon, at which hour the post had set out for the place where the indorsee resided, in consequence of which it did not go until the next post; it was holden, that the notice was within time. *Bray v. Hadwen*, 5 M. & S. 68. See also *Williams v. Smith*, 2 B. & A. 496, and *Wright v. Shawcross*, *ibid.* 501, n., where the same rule was laid down, that the party, in order to avoid laches, must give notice by the next day's post, and not by the next possible post. In *Edwards v. Glyde*, Devon Summ. Ass. 1829, *Tindal*, C. J., nonsuited the plaintiff, who had given notice, not by the next day's post, but on the day after. So before the indorsee of a promissory note payable to A. or order, brings an action against the indorser, he must make a demand, or use due diligence to obtain payment, from the maker of the note, per Lord *Mansfield*, C. J., in *Heylyn v. Adamson*, 2 Burr, 676-7, who added, that this was determined in C. B. on great consideration, in Pasch. 4 Geo. II., cited by *Lee*, C. J., in *Collins v. Butler*, 2 Str. 1087. (2) But where the indorser has paid part of the money, that circumstance is sufficient to dispense with proving a demand on the maker of the note. Per *Lee*, C. J., Str. 1246. It is not an excuse for not making a demand on a note or bill, or for not *giving [*378] notice of non-payment, that the maker or acceptor has become a bankrupt, as many means may remain of obtaining payment by the assistance of friends or otherwise. Admitted in *Russell v. Langstaffe*, Doug. 515; and in *Warrington v. Furber*, 8 East, 245. But as to country bank-notes, see *ante*, p. 376, *James v. Holditch*. (3) Such de-

(1) *Stockert v. Anderson*, 3 Whart. 116; *Davis v. Herrick*, 6 Ohio, 66.

(2) See Byles on Bills, p. 212, and notes to 3d Am. ed., by Sharswood. In *Shedd v. Brett*, 1 Pick. 401, where notice was put in the post-office for an indorser who lived at a distance, and the writ was served before the notice could be received in the course of the mail, it was held that the action was maintainable. *Secus*, where the parties lived in the same town, and the writ was served on the day when the note became due, and before notice to the indorser. *New England Bank v. Lewis*, 2 Pick. 125.

(3) A demand of payment of a note should be made on the last day of grace, and notice of the default of the maker be put into the post-office, if he live in another place, early enough to be sent by the mail of the succeeding day. *Lenox v. Roberts*, 2 Wheat. Rep. 363. And where the parties reside in the same place, the notice of non-acceptance or non-payment must be personal, or left at the dwelling-house or place of business of the party to be charged by the notice. *Ireland v. Kip*, 10 Johns. Rep. 490; *S. C.* 11 Id. 231. In a case of a temporary removal of the indorser from the place where payment is to be made, notice at his last place of residence there, is sufficient. *Stewart v. Eden*, 2 Caines' Rep. 121; *Sed. vide Blakeley v. Grant*, 6 Mass. Rep. 386. And if the agent of the holder call at the indorser's house, and finding it shut up, and that he had gone out of town, put a letter into the post-office addressed to him, informing him of the non-payment or non-acceptance, it is sufficient notice. *Ojden v. Cowley*, 2 Johns. Rep. 274.

mand, refusal, or default, and notice thereof, must be alleged in the

If due diligence be used to give notice to the party to be charged, and he cannot be found, this is equivalent to due notice. *Ogden v. Cowley*, 2 Johns. Rep. 274; *Blakeley v. Grant*, 6 Mass. Rep. 386. The putting of a letter into the post-office giving the notice, is sufficient, without proof of its having been actually received. *Munn v. Baldwin*, 6 Mass. Rep. 316; *Miller v. Hackley*, 5 Johns. Rep. 375. And if the party to be affected with the notice reside in a different place from the holder, the notice may be sent through the post-office to the post-office nearest the party entitled to such notice. *Freeman v. Boynton*, 7 Mass. Rep. 483; *Ireland v. Kip*, 11 Johns. Rep. 231. The holder of a bill must use reasonable diligence to ascertain the residence of the drawer for the purpose of giving him notice of its dishonor; and it is not sufficient to look for the drawer at the place where the bill is dated, if his residence be elsewhere. *Freeman v. Boynton*, 7 Mass. Rep. 483; *Fisher v. Evans*, 5 Binn. Rep. 541. Due diligence is necessary to find the maker, although the indorser had told the plaintiff the maker had no place of abode; and a promise to pay does not waive a demand unless it is affirmatively shown he knew no demand had been made. *Otis v. Hussey*, 3 N. H. R. 346. If at the time when a note or bill falls due, the indorser or drawer is absent from the state, and has left no known agent to receive notice; there is no necessity to prove a notice in order to charge him upon non-acceptance or non-payment by the maker or drawee. *Blakeley v. Grant*, 6 Mass. Rep. 388. *McMurtrie v. Jones*, 3 W. C. C. R. 206. So where at the maturity of a note, the maker was out of the state, and the holder left a written demand of payment at his dwelling-house, not knowing of his absence, and on the same day gave notice to the indorsers, it was held sufficient to charge the latter. *Sauger v. Stimpson*, 8 Mass. Rep. 260. When the maker, before maturity, removes into another state, the holder is not bound to make demand to charge indorser. *Gist v. Lybrand*, 3 Ohio, 319. And if the maker has absconded before a note becomes due, and this fact is known to the indorser, no demand of payment is necessary to charge the indorser. *Putnam v. Sullivan*, 4 Mass. Rep. 45. Where the indorser lives in the same place with the maker, notice ought to be given to him upon the same day on which the demand is made upon the maker. *Woodbridge v. Brigham*, 12 Mass. Rep. 403; *Anderson v. Drake*, 14 Johns. 114. Where a note is not payable at any particular place,* and the maker has a known and permanent residence, within the state, the holder is bound to make a demand of payment there in order to charge the indorser. *Anderson v. Drake*, 14 Johns. Rep. 114. After a note was made, and indorsed for the accommodation of the maker, he, without the knowledge or consent of the indorser (both of whom re-

* A note negotiable at a bank is not therefore made payable there. *Barnett v. Wills*, 4 Leigh, 114. A note payable "at either of the banks in Boston," where there are many, is not payable at a place certain. *North Bank v. Abbot*, 13 Pick. 465. No action lies on a bill payable at a particular place till demand and dishonor there; and the statute of limitations runs from the time of such demand, and not from the time when due, according to their tenor. *Picquet v. Curtis*, 1 Sumner, C. C. R. 478. On a note payable at a particular place, a demand there must be averred and proved to charge the maker. *Gilly v. Springer*, 1 Blackf. 257; *Palmer v. Hughes*, Ib. 328. On the contrary, held in Virginia, that on a note payable at a particular place, it is not necessary to prove the demand there to charge the maker, but it is to charge the indorser. *Watkins v. Crouch*, 5 Leigh, 522. So too, in Ohio, but if averred, it must be proved. *Coun v. Gano*, 1 Ohio, 224. And New Hampshire. *Eastman v. Fifield*, 3 N. H. R. 333. Contra, as to proof of averment. *Remick v. O'Kyle*, 3 Fairf. 340. And in Maine. *Bacon v. Dyer*, Ib. 19; *Remick v. O'Kyle*, Ib. 340. Where a note is payable at the house of payee, plaintiff, at a certain day, no demand is necessary in a suit against maker. *Bowie v. Ladd*, 1 Gill & J. 175. It is sufficient evidence of demand and refusal to pay a note payable at a particular place, if the note is left there, and no funds are provided to take it up. *Nichols v. Goldsmith*, 7 Wend. 160. When a note is payable at one of several banks, and the holder places it there for discount or collection, with notice to maker, holder is not bound to present it elsewhere. *North Bank v. Abbot*, 13 Pick. 465. It is not sufficient to look for the drawer at the place where the bill is drawn, in order to give him notice; reasonable diligence should be used to ascertain his residence. *Fisher v. Evans*, 5 Binn. 541; *Blakeley v. Grant*, 6 Mass. 386; *Branch Bank v. Pierce*, 3 Ala. 921; *Barnwell v. Mitchell*, 3 Conn. 101; *Carroll v. Upton*, 3 Coms. 272; *Hill v. Varrell*, 3 Greenl. 233; *Loury v. Scott*, 24 Wend. 358; *Foard v. Johnson*, 2 Ala. 565; *Denny v. Palmer*, 5 Ired. 610; *Page v. Prentice*, 5 B. Monr. 7. Where a notary, on the non-payment of a bill, left a notice for the indorser at his boarding-house, with his fellow-boarder, requesting him to deliver it to the indorser, who was not within at the time, the notice was held sufficient. *Bank v. Hatch*, 6 Pet. 250; *S. C. 1 M'Lean*, 90; *Miles v. Hall*, 12 S. & M. 332.

declaration and proved.(1) The reason on which this rule proceeds is

sided in Albany, where the note was made,) added, in the margin, "payable at the Bank of America," and payment was demanded at that bank in the city of New York, and due notice of the non-payment sent by post to the indorser in Albany: held, that the addition of the place of payment was an immaterial alteration, and did not vitiate the note; and that the demand and notice were sufficient to charge indorser. *Bank of America v. Woodworth*, 18 Johns. Rep. 315. This decision has since been reversed in the Court of Errors. 19 Johns. 391. See *United States Bank v. Smith*, 11 Wheat. 171; *Caldwell v. Cassidy*, 8 Cowen, 271. Where the indorser of a note resides in a different place from that in which it is payable, if the notice is sent by mistake to the wrong place, without showing that due diligence was used to ascertain the right place, he will be discharged. *Bank of Utica v. Mott*, 13 Johns. Rep. 432. The holder of negotiable paper, is bound to inquire as to the proper office to which he should send notice. *Cuyler v. Nellis*, 4 Wend. 398. When he is informed by the officers of the bank to which the note was presented for discount, that the indorser resided in the town where it was dated, notice sent there is sufficient, although the indorser had removed a few weeks previously to the date of the note. *Bank of Utica v. Darwin*, 5 Id. 487. Notice sent to the town designated by the agent who procured the discount at a bank, in answer to the cashier's inquiry, is sufficient, although there happened to be four post-offices in the town, and the post-office bearing the name of the latter was nine miles distant from that near which the indorser lived. *Catskill Bank v. Stall*, 15 Wend. 364. It is not necessary notice of protest should be sent to the office nearest indorser, nor even to the town where he resides. It is sufficient if sent to the office to which he usually resorts for his letters. *Bank of Geneva v. Howlett*, 4 Id. 328. A mistake in the name of the office to which notice is directed, is of no consequence, if it is as well known under that as the true name. *Ib.* If the indorser be dead at the time the note becomes payable, and there are executors or administrators known to the holder, notice of the non-payment must be given to them, for they represent the estate. But where the note falls due on the 22d December, and the indorser died at sea, on the 12th of December, but his death was not known to the holder until in March following, and letters testamentary were not granted until April: it was held, that a notice of non-payment left, at the time, at the last place of residence of the indorser in New York, and also sent to his family, who had removed into the country, was sufficient to support an action against his executors, and excuse the want of notice to them. *Merchants' Bank v. Birch*, 17 Johns. Rep. 25. Notice of non-acceptance or non-payment may be given through the post office, but a demand of payment cannot be made in this manner, unless by express consent of the maker, or drawer, or by known usage regulating the contract. Notice sent through the post-office is not such a demand as the law requires, when his residence is known. *Stuckert v. Anderson*, 3 Whart. 116; *Whittier v. Graffam*, 3 Greenl. 82. If the place of payment of a note is designated in a memorandum at the bottom, or if to the acceptance of a bill is added a particular place of payment, with the assent of the holder, such memorandum or qualification is part of the contract, and demand of payment ought to be made at such place. *Tuckerman v. Hartwell*, *Ib.* 147. A notice to an indorser was held sufficient, although it did not state at whose request it was given, nor who was the owner of the note. *Shed v. Brett*, 1 Pick. 401. Where the indorser lives in another town, putting the notice into the post-office is sufficient, although it should never be received. *Ib.* *Smith v. Hawthorne*, 3 Rawle, 355. Notice addressed to the post-office of the town where the indorser resides, is sufficient. *Bank of Manchester v. Slason*, 13 Verm. 334; *Carson v. State Bank*, 4 Ala. 148; *Draper v. Colemens*, 4 Missouri, 52; *Glasscock v. Bank of Missouri*, 8 Id. 443; *Crawford v. Branch Bank of Mobile*, 7 Ala. 205; *Dunlap v. Thompson*, 5 Yerg. 67; *Rand v. Reynolds*, 2 Gratt. 171; *Union Bank of Louisiana v. Stoker*, 1 Louis. Annual Rep. 269; *Seneca County Bank v. Neass*, 5 Denio, 329. Where a notice is sent to the post-office from which an indorser will get a notice soonest, it is sufficient, though it is not the nearest office in point of distance. *Bank v. Lane*, 3 Hawks, 453; *Farmers' Bank v. Battle*, 4 Humph. 86; *Sherman v. Clark*, 3 M'Lean, 91; *Mercer v. Lancaster*, 5 Barr, 160; *Walker v. Bank*, 3 Kelly, 486; *Hunt v. Fish*, 4 Barb. S. O. 324. Where the holder of a negotiable security knows the residence of the indorser, but does not know the post-office nearest thereto, notice of protest, directed to the post-office which, after diligent inquiry, is supposed to be nearest, will bind the indorser. *Marsh v. Barr*, 1 Meigs, 69; *Pierce v. Sendar*, 5 Metc. 352; *Wheeler v. Field*, 6 Id. 290; *Thom v. Rice*, 3 Sheph. 263; *Spencer v. Bank*, 3 Hill, 520; *Winans v. Davis*, 3 Harr. 276; *Hoopes v. Newman*, 2 Smedes & Marsh. 71; *Godley v. Godley*, 6 Id. 253; *Remer v. Douner*, 23 Wend. 620; 25 Id. 277;

(1) See note (4), next page but one.

this: the indorser is in the nature of a surety only,⁽¹⁾ and his under-

Belden v. Lamb, 17 Conn. 441; *Haley v. Brown*, 5 Barr, 178; *Smith v. Bank of Washington*, 5 S. & R. 322. Going with the note to demand payment to the place of business of the makers, at business hours, and finding it shut, is using due diligence. 1 Pick. 413. See *Eagle Bank v. Chapin*, 3 Id. 180; *Barker v. Parker*, 6 Id. 80. A demand of payment of a lost note, on presentation of a copy, is sufficient, and satisfies the usual averment of due presentation. *Hinsdale v. Miles*, 5 Conn. Rep. 331. See *Mead v. Engs*, 5 Cowen, 303. In *Sewall v. Russell*, 3 Wend. 276, it was determined, that where information of the dishonor of a bill was sent to an agent who is not a party, either actually or nominally, with a request to give notice to the drawers, and he omitted to give notice until the next day after receiving the information, the drawers were discharged. And such, also, was the decision of the Supreme Court of the United States in *The United States v. Barker*, 12 Wheat. 559. Where a bill was payable in *London*, but by mistake sent to *Liverpool*, to be presented for payment, and the mistake was discovered and the bill sent to *London*, where it did not arrive until two days after its maturity, it was held, that the oversight or negligence of the clerks of the post-office was not a sufficient excuse for failing to present the bill on the day it fell due. *Schofield v. Bayard*, 3 Wend. 488. If the drawer be insolvent at the time of the indorsement and when the note became due, and the fact be known to the indorser, he is nevertheless entitled to notice. *Barton v. Baker*, 1 S. & R. 334; *Gibbs v. Cannon*, 9 Id. 201. *Secus*, where the note is held as collateral security. *M'Murtrie v. Jones*, 3 W. C. C. R. 206. How far the rule as to notice, &c., applies to the case of a bill remitted in payment of a pre-existing debt, see *Gallaher v. Roberts*, 2 W. C. C. R. 191; *Denniston v. Imbrie*, 3 Id. 396. No precise form of notice is necessary, nor will a mistake of the date of the note, vitiate the notice, if it contain a sufficient description of the note. *Mills v. Bank of United States*, 11 Wheat. 431. The government of the United States, whenever it becomes the holder of a bill, is bound to use the same diligence as a private individual. *United States v. Barker*, 12 Wheat. 559. See *Mitchell v. Degrand*, 1 Mason, 176. Where a note is payable at a particular place, *e. g.*, a bank, and on a particular day, and the indorser is at the bank until it closes, at the usual hour on the day on which the note falls due, ready to receive payment, no further demand on the drawer is necessary. *Rham v. Philadelphia Bank*, 1 Rawle, 335. Verbal notice to the indorser is sufficient. *Ib.*; *Cuyler v. Stevens*, 4 Wend. 566. Where the drawer has removed from the place at which he resided when the bill or note was drawn, the holder is bound to use every reasonable endeavor to find out whither he has removed, and if he succeed, he must present it for payment. *Galpin v. Hard*, 3 M'Cord, 394. The same demand and notice must be given in the case of bills payable to *bearer* as of those payable to *order*. Where there was a post-office within four or five miles of the indorser's place of residence, a notice sent to a post-office sixteen miles from his residence, (although by misinformation,) is insufficient. *Davis v. Williams*, Peck's Rep. 191; *Broddie v. Searcy*, Id. 182.

In the case of *Magruder v. Union Bank*, 3 Peters's Rep. 87, it was held, that the circumstance of the indorser having become administrator to the drawer, who died before the note fell due, did not dispense with demand and notice. A promise to pay, made *not* under a mistake of facts, waives notice. *Martin v. Ingersoll*, 8 Pick. 1. If drawer or indorser of a bill pay under ignorance that no notice was given, he may recover back the amount. *Offatt v. Vick*, Walker, 99. The holder of a bill as collateral security for indorsing another, cannot recover on the collateral, if he pays the last without receiving due notice. *Bachelior v. Priest*, 12 Pick. 399. The indorser of a note who takes it up, may sue a prior party without showing he himself had due notice. *Ellsworth v. Brewer*, 11 Pick. 316. Notice of protest is not invalidated by statement of wrong amount, or by not giving date of the note, if the jury are satisfied the indorser was not misled thereby. *Bank of Rochester v. Gould*, 9 Wend. 279. Notice to one joint indorser is notice to both. *Higgins v. Morrison*, 4 Dana, 107. A duplicate, original, or copy of notice is good evidence, without notice to produce the original, nor is notice to produce the original necessary when no copy is kept. *Smyth v. Hawthorn*, 3 Rawle, 355; *Offatt v. Vick*, Walker, 99; *Leavitt v. Simes*, 3 N. H. R. 14. On a note that fell due on Saturday, protested, the notary, on Monday, inquired of a subsequent indorser where the first indorser lived, and the former went to another party to inquire, and ascertaining it was in Philadelphia, on Tuesday the notice was put in the post-office, and held in time. *Smyth v. Hawthorn*, 3 Rawle, 355. The memorandum of a deceased cashier of a bank, who frequently notified indorsers in the name of the notary, that on such a day he sent notice by mail, is competent *prima facie* evidence to charge indorser. *Nichols v. Gold-*

(1) See note (5), next page.

taking to pay the bill is not an absolute, but conditional undertaking: that is, in the event of a demand made on the acceptor, (who is primarily liable) *at the time when the bill becomes due*, and refusal on his part, or neglect to pay. It is not necessary to make any demand on the drawer. (d) The notice must contain an intimation that payment has been refused by the acceptor; (e) for a letter merely containing a demand of payment, has been holden not to be a sufficient notice. (1)

(d) *Heylyn v. Adamson*, 2 Burr. 678.

(e) *Hartley v. Case*, 4 B. & C. 339.

smith, 7 Wend. 160. Notice may be proved by the book of a messenger of a bank, whose duty it was to give notice, who has absconded from the commonwealth. *North Bank v. Abbott*, 13 Pick. 465. It is not competent evidence of delivery of notice to show that it was the invariable and uniform practice of an agent's house to forward notices immediately on receipt, and that the witness believed from the course of their business, it was so done in the particular case. *Flack v. Greer*, 3 Gill & J. 474. When sent by mail, if there be *prima facie* evidence of due diligence, and no proof that it was sent to a wrong place, it is enough. *Wells v. Whitehead*, 15 Wend. 527. Notice alone is sufficient against an indorser without a copy of the bill and protest. *Ib.* Need not be given on the 4th July. *Cuyler v. Stevens*, 4 Id. 566. Ought to be proved by legal evidence, and not to rest on presumption; and where the residence of indorser is known, and he has given directions where to send notice, any deviation therefrom, or from the ordinary course of transmission to his place of residence, is at the risk of holder. *Paterson Bank v. Butler*, 7 Halst. 268. A state of war dispenses with the necessity of giving notice of non-payment and protest, if given as early as possible afterwards. *Hopkins v. Page*, 2 Brock. C. C. R. 20. Left at a boarding-house by notary, with a fellow boarder of indorser, is sufficient. *Bank of U. S. v. Hatch*, 6 Peters, 250. Notice sent by mail to Dashville, N. Jersey, when the true residence is Dashville, N. Y., known to plaintiff, but not to the notary who gave notice, is bad. *Paterson Bank v. Butler*, 7 Halst. 268. A notice left by a notary's clerk, with a person whom he did not know, but who informed him he was brother of the indorser, and would give it to him as soon as it could be sent by mail, is not sufficient. *Ib.* To charge an indorser of a note held by a bank, the presentment and notice must be conformable to the general law, or the strict usage of the bank. Thus, it is the usage of the banks in Boston to send notice to the maker on the last day, exclusive of the days of grace, and on the last day of grace, *after* bank hours, to send notices to makers and indorsers of notes unpaid. A bank holding a note, had sent the first notice to the maker in the usual manner, and on the last day of grace, *before* banking hours, sent another notice by mail to makers, and immediately and *before* banking hours, notified indorser; held, not sufficient. *Boston Bank v. Hodges*, 9 Pick. 420. Where drawee is unable to accept, and so notifies drawer, who authorizes him to redraw, which he does, and the drawer refuses to accept, this does not excuse neglect to give notice of the dishonor of the first bill. *Brown v. Ferguson*, 5 Leigh, 37. Each party must use due diligence. The over diligence of one will not supply the under diligence of another, although the defendant receives notice as early as he regularly could. *Brown v. Ferguson*, 4 Leigh, 37. Vide also as to due diligence, *Hodges v. Galt*, 8 Pick. 251. *Flack v. Green*, 3 Gill & J. 474.

(4) Where the declaration contains an averment of due notice, legal notice must be proved. Evidence that the holder used *due diligence* without effect, will not support the declaration. *Hill v. Varrell*, 3 Greenl. 233. But see *Taunton Bank v. Richardson*, 5 Pick. 436.

(5) The principle of law that a surety is discharged if the creditor does not on request pursue the principal, does not apply to an indorser. *Beardsly v. Warner*, 6 Wend. 610.

(1) *Stanton v. Blossom*, 14 Mass. Rep. 116. The notice may, however, be given by a notary. *Hartford Bank v. Stedman*, 3 Conn. Rep. 489. A personal demand on one of the makers of a note by an agent having the note with him, is sufficient, without any written authority to the agent. *Shed v. Brett*, 1 Pick. 401. A demand of the maker by the cashier of a bank where a note was deposited for collection, is sufficient to charge indorser, though the cashier had not the note then with him; all the parties residing in the town where the bank was. *Gallagher v. Roberts*, 2 Fairf. 489. Where a bill indorsed in blank by payee, but made payable to a particular person by the last indorsement, was

this: the indorser is in the nature of a surety.

Belden v. Lamb, 17 Conn. 441; *Haley v. Brown*, 5 Bar-
ton, 5 S. & R. 322. Going with the note to demand
the makers, at business hours, and finding it shut.
See *Eagle Bank v. Chapin*, 3 Id. 180; *Barker v. I.*
of a lost note, on presentation of a copy, is suf-
due presentation. *Hinsdale v. Miles*, 5 Conn.
303. In *Sewall v. Russell*, 3 Wend. 276, it was
dishonor of a bill was sent to an agent with
with a request to give notice to the draw-
day after receiving the information, the
the decision of the Supreme Court of
12 Wheat. 559. Where a bill was
to be presented for payment, and
where it did not arrive until two
or negligence of the clerks of
present the bill on the day it
be insolvent at the time of the
be known to the indorser,
& R. 334; *Gibbs v. Cannon*
M. Murtrie v. Jones, 3 W.
case of a bill remitted;
C. C. R. 191; *Dennist*
nor will a mistake of
description of the
ment of the United
same diligence as
Mitchell v. Degre
a bank, and or
usual hour on
demand on the
notice to the
drawer has

the holder
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S.
(i) *Furze v. Sharwood*, 2 Q. B. 388, in which all the cases are considered.
(k) *Edwards v. Dick*, 4 B. & A. 212.
(m) *Firth v. Thrush*, 8 B. & C. 387; 2 M. & R. 359.
(l) *Bateman v. Joseph*, 12 East, 433; *Buxton v. Jones*, 1 M. & Gr. 83, and ante, p. 348.

presented to drawee by the last indorser, who was *bona fide*, in possession; held, sufficient
to charge the preceding indorser. *Bachelor v. Priest*, 12 Pick. 399.

(1) Where a note is transmitted for collection by the holder to an agent, and is pre-
sented by the agent and dishonored, notice sent to the principal, and by him given to the
indorser is sufficient, although it does not reach him so soon as if sent directly by the
agent. *Church v. Barlow*, 9 Pick. 549. A bill of exchange indorsed by C. at New Orleans,
payable in Boston and owned in New York, was dishonored by non-acceptance on the
11th of August. The Boston agent of the holder wrote by the same day's mail, inform-
ing him of the dishonor; and on the 13th the holder requested his agent to give notice,
which he did by letter to C., mailed at Boston on the 19th. Held, the notice was too
late even if the agent was authorized first to send to his principal at New York. *Talbot*
v. Clark, 8 Pick. 51. See *Brown v. Ferguson*, 4 Leigh, 37.

(2) See *Taunton Bank v. Richardson*, 5 Pick. 436; *Prentiss v. Danielson*, 5 Conn. Rep.
176, as to waiver of notice. In *Prentiss v. Danielson*, the indorser, after he had become
discharged by the laches of the holder, took an assignment of property from the maker to

(3) See note (3), next page.

unless
stor: (f)
to con-
notice of
ent, if it
ne holder
whom he
(i) In an
accepted,

that place, was
acceptor of non-
impracticable to make
due diligence to obtain
a demand. In like manner,

unknown to the holder, if due
place of residence, and notice is
ed, it is sufficient. (l) The indorsee of

acceptor, being ignorant of the place of
indorsers, employed an attorney to give notice

prior indorsers; the attorney, having received
of the indorser's residence, on the following day,

his client, and on the third day gave notice of
it was holden (m) sufficient. (1)

requiring notice is introduced for the benefit of the party
each notice is given, of course it may be waived by that

Quilibet potest renunciare juri pro se introducto. (3) In

rule is dispensed with, as where the drawer has not any effects of the acceptor; for then the drawer is presumed that the bill will not be paid; besides, not having any effects in the hands of the acceptor, he cannot sustain an action of notice.⁽¹⁾ But the circumstance of the bill being in the hands of the acceptor will not entitle the drawer to sue on the bill, as in the case of *Walwyn v. St. Quintin*, where the drawer brought an action of assumpsit on a bill of exchange indorsed by one Dean, (by whom it was accepted,) and it was indorsed to plaintiff. The bill was indorsed by Thomas the indorser, who had placed securities to raise money in the hands of the acceptor, but not any effects in the hands of the acceptor. The bill was not paid when due, was protested; but notice of non-payment was not given to drawer till four days afterwards. The drawer then threatened to sue the indorser and acceptor, the indorser then paid the money due on the bill to plaintiff's attorney: afterwards, on a representation being made to the plaintiff of the probability of the acceptor being able to pay at a future period, plaintiff agreed not to press him. It was holden, that it was not necessary to give the drawer notice of the dishonour, the drawer not having any effects in the hands of the acceptor, although the indorser had. But the authority of this case was much shaken in *Cory v. Scott*, 3 B. & A. 619, where, under circumstances hardly distinguishable from those in *Walwyn v. St. Quintin*, it was holden, that notice was necessary; and *Cory v. Scott* was recognized and acted upon in *Norton v. Pickering*, 8 B. & C. 610. There Naylor and Ellis being indebted to the plaintiff for goods sold by him, requested the defendant to draw and indorse the bill, and

save himself from loss by indorsements for the maker; it was held, that this was not a waiver. See *Richter v. Selin*, 8 S. & R. 436; *Levy v. Peters*, 9 S. & R. 125; *Thornton v. Winn*, 12 Wheat. 183; *Juniata Bank v. Hale*, 16 S. & R. 157; *Pate v. McClure*, 4 Randolph, 164. Indorser who takes an assignment of all the estate of maker to meet his responsibility before the note is due, is not entitled to demand of notice. *Mechanics Bank v. Griswold*, 7 Wend. 165. But see *Watkins v. Crouch*, 5 Leigh, 522. Where a promissory note drawn to order of the plaintiff was indorsed by defendant as a security to plaintiff for a loan to the drawer, plaintiff may write a guarantee over defendant's name; and notice of non-payment is not necessary if defendant was acquainted with the fact of the maker's insolvency at the time the note fell due. *Leech v. Hill*, 4 Watts, 448.

(3) A stipulation to waive notice does not waive the necessity of demand, unless the indorser has guaranteed payment. *Backus v. Shipard*, 11 Wend. 629. A promise by the drawer of a bill after due to make a satisfactory arrangement, does not waive demand and notice, if he has no knowledge of want of notice. *Jones v. Savage*, 6 Id. 658. Nor will the mere fact of his including such claim in his list of creditors under the insolvent laws. *Ib.* But where an indorser, on payment asked, said he was legally exonerated, but promised to pay, the promise binds without further proof of his knowledge. *Leonard v. Gay*, 10 Id. 504.

(1) See *Baker v. Gallaher*, 1 Wash. C. C. R. 461. But this circumstance does not dispense with notice to the indorser. *Ramdyollday v. Darieux*, 4 Id. 61; *Cathell v. Goodwin*, 1 Har. & Gill, 468; *Hopkirk v. Page*, 2 Brock. 20; *Letson v. Durham*, 2 Green, 307.

(2) Where a note was given for the accommodation of maker, the indorser having no funds in the hands of maker, who was insolvent from its execution to maturity, but not so known to indorser at time of indorsement, and the indorser held the goods for which the note was given as security for his indorsement, notice is still necessary. *Holland v. Turner*, 10 Conn. 308.

BILLS OF EXCHANGE.
An absolute, but conditional undertaking:
made on the acceptor, (who is primarily
due, and refusal on his part, or
to make any demand on the
indorser that payment has
merely containing a
notice.)

Sheppard and Co. to accept the same; and Naylor and Ellis then indorsed the bill to the plaintiff. Neither Naylor and Ellis nor the defendant had any effects in the hands of Sheppard and Co. during the time the bill was running. It was holden, that the drawer was entitled to notice of dishonour. These cases appear to have been decided on the ground, that the drawer had a remedy over, at all events, against the party in whose favour the bill was drawn, if not against the acceptor, and consequently the drawer would be prejudiced by want of notice.

In *Plimley v. Westley*, 2 Bingham N. C. 249, where plaintiff [*380] had received from defendant, *in payment for goods, a promissory note indorsed by defendant, but not made payable to order, the note having been dishonoured by the maker; it was holden, that the plaintiff was entitled to recover the price of the goods, although he had omitted to give defendant due notice of the dishonour of the note.

Action by plaintiff, as drawer, against defendant, as acceptor, of a bill for 300*l.* at two months, accepted payable at Messrs. Coutts and Co.; no proof of notice to defendant of dishonour; but proof that, although defendant when bill was drawn had a balance of 700*l.* in the hands of Messrs. Coutts and Co., yet that balance at the time when the bill became due was reduced to 40*l.* Held(*n*) that defendant was not entitled to notice of dishonour. Q. if in such case any notice be necessary; for the acceptor, having appointed a special place for payment, may be considered as having made Messrs. Coutts & Co. his agents for the purpose of paying the bill, and then the refusal to pay may be considered as a refusal by him. From the circumstance of part payment of a bill without any objection to the want of notice,^(o) a jury may be directed to presume that notice was regularly given.⁽¹⁾

Protest.—In addition to notice of dishonour, it is necessary for the holder, in the case of a foreign bill, to protest⁽²⁾ it for non-payment: but where there has been a promise of payment, after the bill became due, such promise supersedes the necessity of proving either presentment for payment,^(p) notice of dishonour, or protest.^(q) But where the drawer of a foreign bill of exchange, at the time of drawing was in a foreign country, but returned home before it became due, at which time it was dishonoured and protested, but notice of the dishonour only, and not of the protest, was left at the drawer's house; held that this was sufficient.^(r) Where drawer was resident abroad, it was holden^(s) sufficient to inform him that the bill had been protested for non-payment, without sending him a copy of the protest. It appears, from a passage extracted

(*n*) *Smith v. Thatcher*, 4 B. & A. 200.

(*o*) *Horford v. Wilson*, 1 Taunt. 12.

(*p*) *Greenway v. Hindley*, 4 Campb. 52.

(*q*) *Gibbon v. Coggon*, 2 Campb. 188.

(*r*) *Robins v. Gibson*, 1 M. & S. 288.

(*s*) *Goodman v. Harvey*, 4 A. & E. 870; 6 Nev. & M. 372.

(1) *Levy v. Peters*, 9 S. & R. 125; *Read v. Wilkinson*, 2 Wash. C. C. R. 514.

(2) See the form of protest used in England. Chitty on Bills, 159. Indorser of a note is liable for fees of protest. *Menitt v. Benton*, 10 Wend. 118; and see Byles on Bills, 200, and notes to 3d Am. ed.

from the case of *Tassell v. Lewis*, Lord Raym. 743, *ante*, p. 871, that this protest ought to be made on the last day of grace.⁽¹⁾ This strictness, however, is not observed in practice. The modern usage is for the notary to make a minute on the bill, consisting of his initial, the day, month, and year when payment was refused, and charges for making the minute. This minute, which is called noting, is unknown in the law as distinguished from the protest. The notary, having made his minute, draws up the protest at his leisure. In Buller's *Nisi Prius*, p. 272, it is said, "That the use of noting is, that it should be done the very day of refusal, and the protest may be drawn any day after by the notary, and be dated on the day the noting was made. The practice certainly is as here stated; but in *Chaters v. Bell*, 4 Esp. N. P. C. 48, a question was raised, whether the protest ought not to be drawn on the day on which the bill is dishonoured; and it was contended, that the mere noting the bill on that day, and drawing a protest on a subsequent day, was insufficient. Lord *Kenyon* was of opinion that it was sufficient; and a new trial having been granted, Lord *Ellenborough* agreed in opinion with Lord *Kenyon*. A case was then reserved for the opinion of the court; and after argument, the court, conceiving the question to be of great importance, directed it to be turned into a special verdict. But the sum in dispute being very small, and the parties unwilling to incur the expense of a special verdict, the recommendation of the court was not attended to, and the case was not mentioned again.

The protest must be stamped. The protest for non-payment on inland bills of exchange is regulated by the statute 9 & 10 Will. III. c. 17; for at common law a protest was not required on such bills; and the power of protesting given by this statute is attended with very few advantages; so that it is not very frequently exercised.

Doubts having arisen as to the place in which it is requisite to protest for non-payment bills of exchange, which on presentment for acceptance to the drawees should not have been accepted, such bills being made payable at the place other than the place mentioned therein to be the residence of the drawees, it was for the removal of such doubts enacted, by stat. 2 & 3 Will. IV. c. 98, that all bills of exchange wherein the drawers shall have expressed that such bills are to be payable in any place other than the place by them therein mentioned to be the residence of the drawees, and which shall not on the presentment for acceptance thereof be accepted, shall or may be, without further presentment to the drawees, protested for non-payment in the place in which such bills shall have been by the drawers expressed to be payable, unless the amount owing upon such bills shall have been paid to the holders on the day on which such bills would have become payable had the same been duly accepted.

Bills of exchange had been occasionally accepted, *supra* protest for honour, or had a reference thereon in case of need; doubts having arisen as to the day on which it was requisite to present for payment

(1) With regard to foreign bills of exchange, all the books agree that the protest must be made on the last day of grace. Per Buller, J., in *Leftley v. Mills*, 4 T. R. 174.

discharges the indorser.(d)(1) So if the indorsee receive part payment from the acceptor,(e) and take from him a security for the remainder, with the exception of a nominal sum, the indorser is discharged. Receipt of part of the money from an acceptor will not discharge the drawer, if timely notice be given that bill is not duly paid. Bull. N. P. 271. The receipt of part of the sum mentioned in the bill from the drawer, will operate as a discharge to the acceptor, only *pro tanto*.(f) Notwithstanding the receipt of part from the indorser, the holder may recover the whole amount of the bill from the drawer.(g) Where the holder, after receiving part payment from the acceptor,(h) agreed to take a new acceptance from him for the remainder, payable at a future date, and that in the mean time the holder should keep the original bill in his hands as a security; it was holden, that such agreement amounted to giving time and a new credit to the acceptor, and discharged the indorser, who was not a party to such agreement.(2) And

(d) *Ex parte Smith*, Co. B. L. 5th edit. p. 168, 169; 3 Bro. Ch. C. 1, S. C.

(e) *English v. Darley*, 2 Bos. & Pul. 61. See the opinion of Eldon, C. J.

(f) *Bacon v. Searles*, 1 H. Bl. 88. See *Purssord v. Peek*, 9 M. & W. 196.

(g) *Johnson v. Kennion*, 2 Wils. 262; *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652.

(h) *Gould v. Robson*, 8 East, 576.

(1) A covenant by payee not to sue the maker within a limited time, does not bar a suit within that time, by an indorsee of the note, although overdue. *Perkins v. Gilmar*, 8 Pick. 229. A second indorser, who executes a release to the maker, under a voluntary assignment, before the maturity of the note, is not bound by the release, if he subsequently becomes fixed for its payment. *Keeler v. Bartine*, 12 Wend. 110. The maker of a note made a general assignment, which was executed by the holder and by the indorser of the note, and contained a release of all claims against assignor, with a proviso, that no lien or pledge, created or obtained, as security for debt, should be impaired or affected. Held, that the indorsement was a lien or pledge, and that indorser having agreed to the release by being a party, was not discharged. *Gloucester Bank v. Worcester*, 10 Pick. 523. And whether the indorser executes the indenture before or after the holder, is immaterial. *Parsons v. Gloucester Bank*, 10 Id. 533. See *Lewis v. Bank of Penn Township*, 3 Whart. 531. Where the holder of a note sued the maker, and obtained judgment, and the maker filed a bill in chancery for an injunction, and the execution was stayed three or four years, when the suit in chancery was abandoned, and judgment rendered in the suit at law for the amount thereof and interest, so far as it came within the demand of the declaration, and it was satisfied, no suit lies against the indorser for the balance of interest on the note, not included in the judgment, as the note is satisfied as to the maker; and the indorser is discharged. *Couch v. Waring*, 9 Conn. 261.

(2) The holder of a bill discharges indorser by an agreement, on sufficient consideration, to give time to drawer. *Planters' Bank v. Sellman*, 2 Gill & J. 230. The acceptance by the holder of a note from the maker of a check on a bank, drawn by a firm composed of the maker and a third person, for the amount payable in six days, which was to be in full satisfaction of the note, if paid at maturity, suspends the remedy against the maker, and discharges the indorser. *Okie v. Spencer*, 1 Miles, 299; S. C. 2 Whart. 253. *Couch v. Waring*, 9 Conn. 261; *Bank v. Henrick*, 2 Story, 416; *Wood v. The Bank*, 9 Cow. 194; *Newcomb v. Rayner*, 21 Wend. 108; *Hawkins v. Thompson*, 2 McLean, 111. An indorser of a bill is discharged by an agreement between the holder and the drawer, against whom a suit was pending, to continue the case until after a term at which judgment might have been had, in consideration the drawer would permit a person whom he had in execution to attend as a witness for the holder in another case. *Bank of U. S. v. Hatch*, 6 Peters, 250. Mere indulgence or delay, however, will not have that effect. There is no obligation to use due diligence, as is generally the case, against a principal, in order to hold a surety liable, at least where the surety calls upon the creditor to act. *Bank v. Myers*, 1 Bailey, 412; *Powell v. Waters*, 17 Johns. 176; *Worsham v. Goar*, 4 Port. 441; *Stafford v. Yates*, 18 Johns. 327; *Sterling v. Marietta Co.*, 11 Serg. & Rawle, 179. *State Bank v. Wilson*, 1 Devereux, 484; *Foreman's Bank v. Rollins*, 1 Shepley, 202;

it has been holden, that in such a case the holder cannot sue till the second bill has become due.⁽ⁱ⁾

But a mere forbearance to sue the acceptor after protest for non-payment, and notice, or what is equivalent to notice, thereof to the drawer, will not discharge the drawer.^(k) If the executor of the acceptor verbally promise to pay the holder out of his own estate, provided the holder forbear to sue, and he forbears accordingly, the *drawer is not thereby discharged, inasmuch as the promise [*384] of the executor, not being in writing, is void by the statute of frauds, and, consequently, the holder does not derive from such promise any better security than the bill had given him.^(l)

A bill of exchange having been dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first. The payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards, for a valuable consideration, indorsed it to plaintiff: it was holden,^(m) that the second bill was merely a collateral security, and that the receipt of it by the payee did not amount to giving time to the acceptor of the first bill so as to exonerate the drawer. The cases *Ex parte Smith*, and *English v. Darley*, seem to have proceeded on a principle of law resulting from the relation in which the acceptor of a bill of exchange may be considered as standing with respect to the other parties. Although by his acceptance he only undertakes to pay the debt of another, viz. of the drawer, yet he is primarily liable; for it is incumbent on the holder of the bill to resort to him in the first instance. Under this view, although his engagement is really only a collateral engagement, yet he may in this respect be considered as the principal debtor, and the remaining parties as sureties only. Now, in the case of simple contracts, if a creditor give time to the principal debtor,⁽¹⁾ the collateral sureties are discharged both in

(i) *Kendrick v. Lomax*, 8 Tyrwh. 447.

(k) 2nd Resolution in *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652, fully stated, *ante*, p. 379.

(l) *Philpot v. Briant*, 4 Bingh. 717; 1 M. & P. 754.

(m) *Pring v. Clarkson*, 1 B. & C. 14.

Page v. Webster, 3 Id. 249; *Pierce v. Whitney*, 1 Id. 113; *Bank of Utica v. Ives*, 17 Wend. 501.

In some states, however, due diligence must be used, and the same principles are applied as between principal and surety in ordinary cases. *Lee v. Love*, 1 Call, 497; *Bronaugh v. Scott*, 5 Id. 878; *Smallwood v. Woods*, 1 Bibb, 542; *Berrin v. Broadwell*, 3 Dana, 596; *Horton v. Frink*, 5 Day, 530; *Huntington v. Hawery*, 4 Conn. 124; *Treadway v. Drybread*, 4 Blackf. 20; *Bishop v. Yeazle*, 6 Ib. 127; *Pillard v. Darst*, 6 Mis. 358; *Kilpatrick v. Heaton*, 3 Brev. 92; *Richetson v. Wood*, 10 Mis. 547; *Bestor v. Walker*, 4 Gil. 3; *Hopper v. Sisk*, 1 Smith, 102.

(1) Without any reserve of the remedy against the sureties; per Lord Eldon, Ch., *Exp. Gifford*, 6 Vesey, 807; *Boulton v. Stubbs*, 18 Id. 21. See also *Orme v. Young*, Holt's N. P. C. 84, recognized in *Combe v. Woolf*, 8 Bingh. 156, and *Dunn v. Slee*, Holt's N. P. C. 399; in which last case it was holden, that time given to a surety, without the privity of the co-surety, would not discharge the co-surety. But see *Nicholson v. Revill*, 6 Nev. & M. 192; 4 A. & E. 675, questioning *Exp. Gifford*. See also, on this subject, *Oakeley v. Pasheller*, D. P. 10 Bligh, N. R. 548; and *Bell v. Banks*, 3 M. & Gr. 258; 3 Scott, N. R. 497.

VIII. *Of the Action on a Bill of Exchange.* p. 386; *Pleading under the New Rules.* p. 391; *Evidence.* p. 393; *Recovery of Interest.* p. 397.

A bill of exchange being a simple contract, the form of action which is usually adopted for the recovery of the sum of money mentioned

giving the delay, the holder knows it to be an accommodation note. *Lambert v. Sanford*, 2 Blackf. 137. See *Letson v. Durham*, 2 Green, 307; *Holland v. Turner*, 10 Conn. 308; *Church v. Barton*, 9 Pick. 547; *Bank of Montgomery v. Walker*, 9 S. & R. 229; S. C., 12 Id. 382.

If the holder receive part payment from the maker when a note becomes due, and before giving notice to the indorser, allows further credit to the maker, the indorser is discharged. *Cain v. Colvell*, 3 Johns. Rep. 384. But if the holder receive part payment, and give due notice to the indorser, the latter will be holden for the payment of the residue. *James v. Badger*, 1 Johns. Cas. 131. And it has been held, that any credit given by the holder of a bill to the drawer, acceptor, or indorser, takes away the holder's remedy against the other parties. *Shaw v. Griffith*, 7 Mass. Rep. 494. But this rule does not apply where the acceptor is discharged by the holder, and the drawer is sued, having funds of the acceptor in his hands, which have been retained for the express purpose of paying the bill. *Sargent v. Appleton*, 6 Id. 85. Nor to cases where the holder has not given time to the drawer, &c., but has merely taken security without giving a new credit. *Hurd v. Little*, 12 Id. 502; *Wood v. Jefferson Bank*, 9 Cowen, 194. See *Haslet v. Etrick*, 1 Nott & M'C. 116; *Moodie v. Morrall*, 1 Rep. Const. Ct. 367. The acceptance, by holder of a note over due, of a note of a third person at a future day, as collateral security, stipulating that it should not prejudice their claim against drawer or indorser, nor prevent a suit if ordered by indorser, does not discharge him. *Bailey v. Baldwin*, 7 Wend. 289. See *Wainer v. Beardsly*, 8 Id. 194. So, if the holder of a note release one of several joint makers, excepting from such liability as he may be under to the indorsers, those indorsers cannot, in an action against them by such holder, set up such release in discharge. *Stewart v. Eden*, 2 Caines' Rep. 121.

It has been held by the Supreme Court of New York, that if the holder of a note is requested by one of the joint makers, (being as a surety merely,) to proceed without delay and collect the money of the principal, who is solvent, and he omits to do it until the principal becomes insolvent, the surety will be exonerated at law. *Paine v. Packard*, 13 Johns. Rep. 174. But this decision has been questioned by Mr. Chancellor Kent; *King v. Baldwin*, 8 Johns. Ch. Rep. 563; vide S. C. on appeal, 17 Johns. Rep. 384; and the Supreme Court of the United States have determined that the indorser of a note, who has been charged, by due notice of the default of the maker, is not discharged, at law, by the refusal of the holder to issue an execution, or by his countermanding an execution against the maker; nor is the indorser entitled, in such a case, to the protection of a court of equity, as a surety. *Lenox v. Prout*, 3 Wheat. Rep. 520. All that the indorser seems to have a right to, in such a case, is to pay the amount of the note or bill, or note to the holder, and to be subrogated to all his rights by obtaining an assignment of the holder's judgment against the maker. *Ib.* And if the holder be called upon by the indorser, after the note has become due, to sue the maker, of whom the amount might then be collected, but who afterwards becomes insolvent, and the holder neglects to do so, this does not discharge the indorser; for, although he is in the nature of a surety, yet he is answerable on an independent contract, and it is his duty to take up the note when dishonored. *Tremble v. Thorne*, 16 Johns. Rep. 152; *Beardsly v. Warner*, 6 Wend. 610. When the holder of a note neglects to avail himself of the means of payment out of a fund in the sheriff's hands, arising from real estate bound by a judgment against the drawer, the indorser is discharged *pro tanto*. *Ramsey v. Westmoreland Bank*, 2 Penn. R. 203. But a judgment and levy against the real estate of the drawer, does not bar an execution against the goods of indorser. *Gro v. Huntingdon Bank*, 1 Id. 425. So where several years are suffered to elapse after a note is due without proceeding against the drawer or his representatives, defendant is discharged from a guaranty. *Iselt v. Hoge*, 2 Watts, 128. And merely receiving partial payment from the acceptor or maker of a bill or note, without compounding with and releasing him, will not discharge the other parties from their liability. *Lynch v. Reynolds*, 16 Johns. Rep. 41. But if the beneficial holder of a note agrees, on receiving a premium for delay, to wait a stipulated time, without suing the maker, he hereby discharges the indorser. *Hubbley v. Brown*, 16 Johns. Rep. 70.

in the bill in case of non-acceptance or non-payment is a special *assumpsit.(1) Formerly the declaration extended to [*387] a great length; but under the new rules T. T. 1 Will. IV.,(y) concise forms are given on notes and inland bills, according to the principle of which, declarations on foreign bills may be drawn with the necessary variations. See these forms; but it must be remembered, that these rules were made before the Uniformity of Process Act, 2 Will. IV. c. 39; and the forms given by them, which were correct in actions by bill, (because then the declaration was the commencement of the suit,) are so no longer,(z) the suing out the writ being now the commencement of the suit. If in an action of assumpsit against the *drawer* of a bill, the declaration does not allege a promise to pay, it will be bad on special demurrer.(a) It is however mere matter of form, and can therefore only be taken advantage of on special demurrer.(b) The frequent nonsuits, which used to occur on the ground of variances between the instrument as set forth in the declaration, and that produced in evidence, have been greatly obviated by the stat. 9 Geo. IV. c. 15; and the stat. 3 & 4 W. IV. c. 42, s. 23, *post*, under tit. "Covenant, non est factum." Where the declaration was on a promissory note for 250*l.* made by the defendant, dated the 9th of November, 1838, payable to plaintiff or order on demand: plea, that defendant did not make the note; and the proof was of a joint and several promissory note for 250*l.*, made by defendant and his wife, dated the 6th of November, 1837, payable 12 months after date, and no proof was given of any other note between the parties; this was considered to be a variance properly amended at N. P. under 3 & 4 W. IV. c. 42, s. 23.(c) A declaration in assumpsit by indorsee against acceptor, after stating non-payment of the bill when due, alleged that defendant after-

(y) 2 B. & Ad. 783; 7 Bingham 774; 5 M. & P. 813; 1 Cr. & J. 468; 1 Tyr. 520.

(z) Per Parke, B., in *Abbott v. Aslett*, 1 M. & W. 209.

(a) *Henry v. Burbidge*, 3 Bingham N. C. 501; 4 Sc. 296; *Smith v. Cox*, 11 M. & W. 475.

(b) *Stericker v. Barker*, 9 M. & W. 321.

(c) *Beckett v. Dutton*, 7 M. & W. 157.

(1) For the cases in which an action of debt may be maintained on a bill of exchange, see *post*, tit. "Debt, II." Debt on simple contract.

An averment that the partners of a firm made the note, "the proper name and firm of the partners being thereunto subscribed," is proved by producing the note signed by one partner in the partnership name. It is unnecessary to state that one of the partners signed in the name of the firm; but if so stated, it is good. *Manhattan Company v. Ledyard*, 1 Caines' Rep. 192. And an averment that "certain persons using the name, style, and firm of W. & W. made the note, the proper handwriting of one of them in their said copartnership name, style, and firm, being thereunto subscribed," is good. *Kane v. Scofield*, 2 Caines' Rep. 368. But if in an action against two persons, the declaration does not allege them to be partners, or to act under a firm, and it is averred that they "made their note in their own proper hands and names thereto subscribed," proof that one of the defendants subscribed the note with the joint name or firm, is not sufficient to maintain the declaration. *Pease v. Morgan*, 7 Johns. Rep. 468.

It is not necessary to state the indorsement to be "for value received;" and if it be so stated, the averment is surplusage, and need not be proved. *Wilson v. Codman's ex.*, 3 Cranch, 193; See vide *Welch v. Lindo*, 7 Cranch, 159. But the words "for value received" in setting forth a promissory note in a declaration are words of description, and not an averment; and therefore if the words are not in the note, the variance is fatal. *Saxton v. Johnson*, 10 Johns. Rep. 418. See 2 Greenl. on Evid. § 156.

wards promised to pay plaintiff the said bill according to the tenor and effect of his said acceptance. This was holden sufficient on special demurrer, for per *Cur.* ; after the dishonour of a bill, it is payable on request; a promise therefore by acceptor, after the bill is due, to pay it according to the tenor and effect of his acceptance, is a promise to pay on request.(d) Where the acceptance was written before the bill was drawn, the declaration described the transaction in the usual order of time, viz. the drawing first, and then the acceptance; this was [*388] holden(e) not to be a variance. And so with *respect to an indorsement, whether made before(f) bill drawn, or after(g) bill became due.

By stat. 1 & 2 Geo. IV. c. 78, s. 1, if any person shall accept a bill payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed, to all intents and purposes, a general acceptance of such bill:(1) but if the acceptor, shall, in his acceptance, express that he accepts the bill payable at a banker's house or other place *only*, and *not otherwise or elsewhere*, such acceptance shall be deemed to be to all intents and purposes a qualified acceptance, and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been duly demanded at such banker's house or other place. Since this statute it has been adjudged, that the holder of a bill accepted, payable at a banker's, but omitting the words "there only," is not bound to present it at the banker's, and consequently is not guilty of laches, if he omits to do so; and may still recover against the *acceptor*, in the event of the banker's failure, although a considerable time, *e. g.*, three weeks, have elapsed since the bill became due, during all which time the acceptor had funds in the banker's hands, exceeding the amount of the bill.(h) In such case no averment or proof of presentment for payment at the place mentioned is necessary.(i)(2) But in an action against the *drawer* of a bill (payable at a *particular* place, where the drawee accepts it payable at that place,) on the ground of non-payment by the acceptor, it is necessary to prove a presentment to the acceptor at that place; for the statute neither intended to alter, nor has it

(d) *Christie v. Peart*, 7 M. & W. 491.

(e) *Molloy v. Delves*, 7 Bingh. 428; 5 M. & P. 275.

(f) *Russell v. Langstaffe*, Doug. 514.

(g) *Young v. Wright*, 1 Campb. 139.

(h) *Turner v. Hayden*, 4 B. & C. 1.

(i) *Selby v. Eden*, 3 Bingh. 611; *Fayle v. Bird*, 6 B. & C. 531. See also *Hartey v. Borwick*, 4 Bingh. 135

(1) Such a bill may in an action against it be declared upon as made payable at that place; although, under this statute, such an acceptance amounts to a general acceptance. *Blake v. Beaumont*, 4 M. & Gr. 7, S. C.; *Blake v. Bowman*, 4 Scott's N. R. 617.

(2) In an action by the *payee* of a bill against the *acceptor*, where the bill is drawn payable at a *particular place*, and accepted, it is not necessary for the plaintiff to aver or prove a demand of payment at the time and place appointed; but the defendant, if he means to avail himself of the want of a demand, must plead that he was ready at the time and place appointed to pay, but that the plaintiff did not come there, and which defence goes only to the damages and costs, and not to the cause of action. *Walcott v. Santfoord*, 17 Johns. Rep. 248. See also *Caldwell v. Cassidy*, 8 Cowen, 271; 2 Greenl. on Evid. § 180, a.

altered the liability of *drawers*; but is confined in its operation to *acceptors* only.(k)

A conditioned acceptance cannot be declared on as an absolute acceptance, even after condition performed.(l) In action on a bill against an acceptor for the honour of the drawer, it must be alleged, that when the bill arrived at maturity, it was presented to the drawee for payment. And this rule holds whether the bill be a bill payable after date(m) or after sight.(n) Where a bill has been accepted by the drawee, if another person accepts it also for the purpose of guaranteeing the first acceptor, the second acceptance *is merely a collateral [*389] undertaking, and must be declared on(o) as such; for there is not any custom of merchants authorizing a series of acceptors.

In *Heys v. Heseltine and another*,(p) where it was averred that the defendants accepted the bill, and the acceptance was by an agent thus, "for Heseltine and Co., John Wilson:" Lord *Ellenborough* was of opinion, that the evidence supported the declaration; observing, that if the defendants accepted the bill by an agent, in contemplation of law, they accepted it themselves: and it was a general rule in pleading, that facts might be stated according to their legal effect.

When the action is brought between the immediate parties to the bill, it is usual to subjoin such counts as will embrace the consideration for which the bill has been given: for as the bill does not merge the original demand, if the plaintiff fail in substantiating in evidence the special count, he may resort to evidence on the common counts.(1) Under the new rules, counts upon a bill or note, and for the consideration in goods, money, or otherwise, are considered as founded on distinct subject-matters of complaint. In *Alves v. Hodgson*, 7 T. R. 241,

(k) *Gibb v. Mather*, 8 Bingh. 214; 2 Cr. & J. 254, S. C.

(l) *Langston v. Corney*, 4 Campb. 176.

(m) *Hoare v. Cazenove*, 16 East, 391.

(n) *Williams v. Germaine*, 7 B. & C. 468.

(o) *Jackson v. Hudson*, 2 Campb. 447.

(p) 2 Campb. 604.

(1) Where there is privity of contract, it may be declared on and the note or bill given in evidence. *Hanna v. Pegg*, 1 Blackf. 181. It may be privity in fact or law. Assumpsit lies by indorsee of a note against previous party for money had and received. *Ellsworth v. Brewer*, 11 Pick. 316. See *Cole v. Cushing*, 8 Id. 48; *Olcott v. Rathbone*, 5 Wend. 490; *Penn v. Flack*, 3 Gill & J. 369. If the payee or indorsee of a note gives it up as part consideration for a new note, which is afterwards avoided on the ground of usury, he may recover of the maker the amount of the original note. *Ramsdell v. Soule*, 12 Pick. 126. The note of a third person guaranteed by defendant, and given in payment of goods, supports the money counts. *Butler v. Haight*, 8 Wend. 535. A note for value received, payable in specific articles, supports the money counts. *Crandall v. Bradley*, 7 Wend. 311. A second action lies by second indorser against the first indorser for money paid on account of the note after a former action and recovery for moneys previously paid, and that before the note is taken up. *Wright v. Butler*, 6 Wend. 284. Assumpsit for money had and received lies by an indorser against holder, to recover money paid under a judgment against him, where the holder had previously to its payment released or discharged a prior party. *Brown v. Williams*, 4 Wend. 360. A memorandum by payee of a note for \$2500, indorsed on the back of the note, "Mr. Olcott, pay on within \$750," cannot be given in evidence on the money counts. *Douglass v. Wilkison*, 6 Wend. 637. The payee and indorser of a note for the accommodation of maker, who pays it to the holder, must sue the maker on the note, and it is barred by lapse of six years from its maturity, although he paid the amount within that time. *Kennedy v. Carpenter*, 2 Wharton, 344.

where the plaintiff had declared specially on a written contract made in Jamaica, and on a *quantum meruit*, and was prevented from establishing the special count, because the contract, by the laws of the Island of Jamaica, was void for the want of a stamp; it was holden, that he might recover on the *quantum meruit*. So where a promissory note had been given for money lent, which when produced in court was unstamped, Lord *Kenyon*, C. J., permitted the plaintiff to recover on a common count for money lent, by proving that when the money for which the note had been given, was demanded of the defendant, he acknowledged the debt.(q) In cases of this kind, if the defendant call for a particular of the plaintiff's demand, the causes of action in the general counts ought to be stated in the particular, otherwise the plaintiff will not be permitted to go into evidence on them.(r) Where a declaration in assumpsit contained three counts; the two first on promissory notes for 50*l.* each, and the third for 100*l.* on an account stated, and the particulars of demand stated "This action is brought to recover the sum of 50*l.*, being the amount of the promissory note in the first count of the declaration mentioned, and also the further sum of 50*l.*, the amount of the promissory note in the second count mentioned;" and then stated that the plaintiff would avail himself of the whole or any part of the declaration; no evidence of the notes was given at the trial, but a conversation with the defendant was proved, in

which he acknowledged he owed the plaintiff 100*l.*: it was [*390] holden, that the *particulars were insufficient to enable the plaintiff to recover; and that in order to do so, he was bound to prove an admission, or an account stated with reference to the promissory notes.(s) If the plaintiff's particular conveys the requisite information to the defendant, however inaccurately it may be drawn up, it is sufficient, unless the defendant will undertake to swear that he has been misled by the inaccuracy.(t) And although the general rule is, that the plaintiff who has delivered an imperfect particular, shall be restricted in his evidence, and not permitted to recover any thing ultra the contents of such particular, yet if the defendant, in attempting to defeat the restricted claim of the plaintiff, gives him a better case than he was at liberty to make for himself, he will be entitled to a verdict for all that is proved due to him; what he could not have insisted on as a right, he may receive as a boon. *Hurst v. Watkis*, *Ellenborough*, C. J., 1 Campb. 68. Bills of particulars are not to be construed with all the strictness of declarations. Per *Mansfield*, C. J., in *Brown v. Hodgson*, 4 Taunt. 190. See also *Davies v. Edwards*, 3 M. & S. 380, and *Lambirth v. Roff*, 8 Bingh. 411. Disbursements are recoverable under an item for "cash advanced." *Harrison v. Wood*, 8 Bingh. 371. By R. G. Trin. T. 1 Vict.,(u) in any case in which plaintiff (in order to avoid the expense of a plea of payment) shall have given credit in the particulars for any sum therein admitted to have been paid to

(q) *Tite v. Jones*, 1 East's R. 58, n. (a); *Wilson v. Kennedy*, 1 Esp. N. P. C. 245, S. P.

(r) *Wade v. Beasley*, 4 Esp. N. P. C. 7 *Kenyon*, C. J.

(s) *Roberts v. Elsworth*, 10 M. & W. 653.

(t) *Day v. Bower*, *Ellenborough*, C. J., 1 Campb. 69, n.

(u) 8 A. & E. 280; 3 Nev. & P. 379; *ante*, p. 136.

plaintiff, it shall not be necessary for defendant to plead payment of such sum.

Proceedings subsequent to the Declaration.—The plaintiff having declared, the defendant, if he has not any defence, either compromises the action by paying or giving security for the debt and costs, or he lets judgment go by default. If the holder commences one action against the drawer,(x) and another against the indorser, the court will stay all the proceedings upon payment of the amount of the bill and the costs of the two actions, without regarding the costs which may have been incurred in actions brought by the holder against any other parties to the bill. When the application for staying proceedings came from the acceptor, the original defaulter, the court would not regard it, except upon payment of the amount of the bill and costs in *all* the actions.(y) But now by R. G. T. T. 1 Vict.,(z) in any action against an acceptor of a bill, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of his debt and costs in that action only. When the defendant suffers judgment to go by default, the plaintiff must, before he is entitled to final judgment and execution, ascertain the amount of the debt. Formerly this was done by executing *a writ of inquiry of damages; but of [*391] late years, in the Courts of King's Bench,(a) and Common Pleas,(b) and now in the Court of Exchequer,(c) in actions upon promissory notes and bills of exchange, where it appears on the face of the declaration, that the actions are brought on the notes or bills,(d) and the money mentioned therein is not foreign money, it is usual to apply to the court for a rule to show cause why it should not be referred to the master to see what is due for principal and interest, and why final judgment should not be signed thereon, without executing a writ of inquiry; which rule is made absolute on an affidavit of service, unless good cause be shown to the contrary. In vacation time application may be made to one of the judges at chambers. N. The rule ought not to be applied for on the day of signing interlocutory judgment, but some day after.(e) The rule to compute will be allowed, although bill has been destroyed.(f) Where the bill of exchange is for foreign money,(g) *e. g.* for Irish money, the court will not permit the master to ascertain the value. In this case, therefore, the plaintiff must have recourse to a writ of inquiry; upon the execution of which it is now holden,(h) notwithstanding former decisions to the contrary,(i) that it

(x) *Smith v. Woodcock*, 4 T. R. 691, S. P. on a promissory note, *Windham v. Wither* and *Windham v. Trull*, Str. 515.

(y) Admitted per *Cur.*, in *Smith v. Woodcock*, 4 T. R. 691.

(z) 8 A. & E. 277.

(a) *Shepherd v. Charter*, case on a bill of exchange, 4 T. R. 275.

(b) *Rashleigh v. Salmon*, case on a promissory note, C. B., June 15th, 1789, 1 H. Bl. 252; *Andrews v. Blake*, case on a bill of exchange, C. B., Nov. 25, 1790, 1 H. Bl. 529.

(c) See *Biggs v. Stuart*, 4 Pri. (Ex.) 134.

(d) *Osborne v. Noad*, 8 T. R. 648.

(e) *Gordon v. Corbett*, Smith's R. 179.

(f) *Clarke v. Quince*, 3 Dow. P. C. 26.

(g) *Maunsell v. Lord Massareene*, 5 T. R. 87. But see stat 6 Geo. IV. c. 79, for assimilating the currency in the United Kingdom.

(h) *Green v. Hearne*, 3 T. R. 301.

(i) *Snowdon v. Thomas*, 3 Wil. 155; 2 Bl. R. 478, S. C.; but see *Lane v. Mullins*, 2 Q. B. 255.

is not in any case necessary to *prove* the bill of exchange, the bare production of it being sufficient: for by suffering judgment to go by default, the defendant admits the cause of action to the amount of the bill. The bill, however, must be produced to the jury, in order that they may see whether or not any part of it has been paid.⁽¹⁾

Pleading under the New Rules.—By R. G. H. T. 4 Will. IV., No. 2, in all actions upon bills of exchange and promissory notes, the plea of non-assumpsit shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *ex. gr.* the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour, of the bill or note.⁽²⁾ [“The new rule is confined(*k*) to cases where the action is only on the note, and on the promise contained in or implied by law from it: it is to be read, as if it were worded thus: ‘in all actions on bills of exchange and promissory notes simpliciter, without any other matter.’ Hence where an executor declared on a note payable to his testator, laying a promise to pay him, the [*392] executor, after the *death of the testator; it was holden,^(l) that such promise might be denied by a plea of non-assumpsit, notwithstanding the new rules.”]

No. 3.—All matters of confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable, on the ground of fraud or otherwise, shall be specially pleaded, *ex. gr.* illegality of consideration, drawing, indorsing, accepting, &c., bills or notes, by way of accommodation, &c. If the plea be, that no consideration was given for the bill or note, and the replication, that there was; the onus lies on the defendant to prove that there was not any consideration, although the plaintiff, in his replication, alleges the affirmative.^(m) To a declaration by indorsee against acceptor, the defendant cannot plead that the bill was accepted by him without consideration⁽ⁿ⁾ from the drawer; for such is not inconsistent with plaintiff's legal demand, indorsement *prima facie* importing consideration.^(o) Under the new rules, every matter, independent of the making of the promise, should be affirmatively stated; for the object of those rules was, to make each side understand what they were come to try. The court, therefore, discountenances pleas in the negative. Hence, if defendant relies on want of consideration, he

(*k*) Per Parke, B., in *Timmis v. Platt*, 2 M. & W. 721.

(*l*) *Timmis v. Platt*, 2 M. & W. 720. See *Donaldson v. Thompson*, 6 M. & W. 316; recognized in *Oridge v. Sherborne*, 11 M. & W. 374.

(*m*) *Lacey v. Forrester*, 5 Tyrw. 567. See *Whitaker v. Edmunds*, 1 A. & E. 638.

(*n*) *Low v. Chifney*, 1 Bingh. N. C. 267.

(*o*) *Reynolds v. Iremey*, 3 D. P. C. 453.

(1) It is the settled practice of the courts of the United States, wherever the action is brought for a sum certain, or which may be made certain by computation, as on a bill or note, to enter up judgment for the damages without a writ of inquiry. *Renss v. Marshall*, 1 Wheat. 215.

(2) In an action against the indorser of note, a plea that an agreement was made by plaintiff and maker to accept a check on bank payable six days after date, and drawn by a firm of which the maker was a partner, which was to be in full satisfaction if paid at maturity, and that it was given and accepted by the parties, is good, although it does not state in terms that the contract was to give time. *Kie v. Spencer*, 1 Miles, 299. S. C. 2 Whart. 253.

should state, in his plea, affirmatively, such facts as show the want of it.(p) A plea containing a constructive denial that the bill was indorsed to the plaintiff, has been holden good after verdict,(q) but bad on special demurrer.(r) Assumpsit by the indorsee against the acceptor of a bill. Plea, that the defendant accepted the bill for the accommodation of the drawer, and that the drawer did not give, nor did the defendant receive, any consideration for his accepting or passing the bill; that the drawer indorsed the bill to the plaintiff without any consideration, and that the plaintiff held the bill without consideration; it was holden,(s) that the onus probandi lay on the defendant; that where there is not any fraud, or any suspicion of fraud, but the simple fact as is here, the plaintiff is not called upon to prove that he gave value for the bill. To a declaration in assumpsit by indorsee against maker of a promissory note, the defendant pleaded, that the note was indorsed and delivered to the plaintiff by his indorser, in violation of good faith, and in fraud and contempt of an order for referring the claim of that indorser to arbitration, and that the plaintiff took the note with full knowledge of the premises. The plaintiff replied, that he had not, when he *took the note, any [*393] knowledge of the premises in the plea mentioned. Issue thereon. Upon these pleadings it was holden, that the defendant was bound to begin at the trial, and to prove the plaintiff's knowledge of the fraud; and that the plaintiff was not bound in the first instance to prove consideration given for the indorsement to him.(t) When a bill has been altered after acceptance, the defendant may take advantage of it, under a plea,(u) that he did not accept the bill declared on. In this case the defendant has the right to begin,(x) and the bill ought to be produced without notice. And where the bill is written on paper improperly stamped, the consequence is that it cannot be given in evidence; and this defence is admissible under the plea of non-acceptance.(y)

Evidence.—The date of a bill of exchange, unless impeached by evidence, is considered(z) as the true date. In an action by the indorsee of a bill against the acceptor,(a) it is not necessary for the plaintiff to prove the handwriting of the drawer, for when a bill is presented for acceptance, the acceptor is supposed to look at the handwriting of the drawer, and on that account he is precluded from disputing it afterwards, and cannot give in evidence even a forgery of such hand-writing. And if in such an action the acceptor dispute the hand-writing of the

(p) *Easton v. Pratchett*, 1 Cr. M. & R. 798; 4 Tyrw. 472; *Stoughton v. Earl of Kilmorey*, 2 Cr. M. & R. 72.

(q) *Adams v. Jones*, 12 A. & E. 455; 4 P. & D. 174.

(r) *Jones v. Corbett*, 2 Q. B. 828; 2 G. & D. 308.

(s) *Mills v. Barber*, 1 M. & W. 425; overruling *Heath v. Sansom*, 2 B. & Ad. 291.

(t) *Smith v. Martin*, 9 M. & W. 304.

(u) *Cock v. Coxwell*, 2 Cr. M. & R. 291.

(x) *Barker v. Malcolm*, 7 C. & P. 101.

(y) *Dawson v. Macdonald*, 2 M. & W. 26; recognized in *Field v. Woods*, 7 A. & E. 114, ante, p. 332.

(z) *Anderson v. Weston*, 6 Bingh. N. C. 296.

(a) *Jenys v. Fowler*, Str. 946, coram *Raymond*, C. J. Per *Buller*, J., in 1 T. R. 655, S. P. Per *Dampier*, J., in *Bass v. Clive*, 4 M. & S. 13, S. P.

drawer by a plea, the plaintiff may reply the acceptance by way of estoppel.(b) But the hand-writing of the first indorser must be proved, because the acceptor is not supposed to look any further than the hand-writing of the drawer.(c) In an action by indorsee against acceptor, where the defence was, that the acceptance was a forgery; evidence, that a collection of bills, having on them forgeries of defendant's signature, had been in plaintiff's possession, and that some of such bills had been circulated by him, was holden(d) inadmissible; distinct proof not having been given, that the bill, on which the action was brought, formed part of the collection; inasmuch as such evidence would have been inadmissible on an indictment for forgery. The acceptance of a bill drawn by procuration, admits the drawer's hand-writing and the procuration.(e) But although the bill be indorsed by the same procuration, the date thereof not appearing, the acceptance does not admit(f) the [*394] procuration to indorse. Proof, first, that J. S. was the confidential *clerk of the defendants, and had been introduced by them to their bankers, as one to whom they were to pay the same attention as they would to the defendants themselves: 2ndly, that defendants had, in repeated instances, recognized his authority to draw both bills and checks by procuration for them; lastly, that on three occasions J. S. had *indorsed* bills by procuration for them, on one of which occasions the defendants must have known of it; and in the other two instances, the defendants had received the money raised upon the bills: it was holden,(g) that although an authority to draw does not in itself import an authority to indorse, yet the evidence of such authority to draw was not to be withheld from the jury, who were to determine on the whole evidence, whether such authority to indorse existed or not, and from the foregoing facts they might well draw the inference that it did. A bill of exchange was shown to the defendant, whose name appeared on the bill as acceptor, and he was asked whether it was his hand-writing; he said it was, and that the bill would be duly paid; Lord *Ellenborough*, C. J., held, that this accredited the bill, and the plaintiff having been thereby induced to take it, the defendant could not set up as a defence that his name, as written on the bill, was a forgery.(h) A forged bill was drawn upon the plaintiff, which he accepted and paid to an innocent indorsee, who had given a valuable consideration for the bill; on discovering the forgery, the plaintiff brought an action for money had and received, to recover back the money; it was holden, that the action would not lie; Lord *Mansfield*, C. J., observing, that it was incumbent on the plaintiff to have been satisfied as to the drawer's hand-writing before he accepted the bill.(i) 'The defendants took a bill, accepted payable at the plaintiffs', who were the drawee's bankers, and indorsed it to their, the defendants',

(b) *Sanderson v. Collman*, 4 M. & Gr. 209; 4 Scott's N. R. 638.

(c) *Smith v. Chester*, 1 T. R. 654; *Cooper v. Lindo*, B. R. London Sittings after M. T. 52 Geo. III. S. P., as to handwriting of second indorser being alleged in declaration.

(d) *Griffiths v. Payne*, 11 A. & E. 131; 3 P. & D. 107.

(e) *Robinson v. Yarrow*, 7 Taunt. 455.

(f) S. C.

(g) *Prescott v. Flinn*, 9 Bingh. 19.

(h) *Leach v. Buchanan*, 4 Esp. N. P. C. 226.

(i) *Price v. Neal*, 3 Burr. 1354; 1 Bl. R. 390, S. C.

agents, to whom the plaintiffs paid it when due, and seven days after sent it as their voucher to the drawee, who apprized them that the acceptance was forged. Held by three Js. against *Chambre, J.*, that the plaintiffs could not recover from the defendants the amount which they had thus paid them on the forged acceptance.^(k) But where the plaintiffs (bankers) discounted for the defendants (bill-brokers) a bill of exchange which the latter did not indorse, and it turned out that the signatures of the drawer and acceptor (the latter of whom kept an account with the plaintiffs) were forged; it was holden,^(l) that the defendants were liable to refund the money. Where a bill of exchange purports to be drawn by a plurality of persons, and is so declared on, the acceptor of such bill will not be permitted to prove that the supposed firm consisted of one person *only.^(m) In a de- [*395] claration by indorsee against acceptor of a bill of exchange stated to be "drawn by certain persons by and under the name, style, and firm of G. & Son," and that "the said persons by and under the said name, style and firm of G. & Son" indorsed it: this was holden a sufficient description of the drawer and indorser.⁽ⁿ⁾ Where a bill is drawn in the name of a fictitious person, payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as drawer; and therefore, an indorsee may bring evidence to show that the signature of the supposed drawer, to the bill and to the first indorsement, are in the same hand-writing.^(o) Where a bill of exchange, purporting to be drawn by B. & W. (a really existing firm,) payable to their order, and to be indorsed by them, was negotiated by the acceptor with that indorsement upon it, and the drawing and indorsement were forgeries; it was holden that if the bill was accepted and negotiated by the acceptor with knowledge of the forgery, he was estopped from denying the indorsement as well as the drawing by B. & W.^(p)

Action by the indorsee against the indorser of a bill of exchange.^(q) The declaration stated several indorsements prior to that of the defendant, which was immediately to the plaintiff. A question arose, whether, upon proof of the defendant's hand-writing, it was necessary to prove the hand-writing of any of the prior indorsers, and particularly that of the original payee. The plaintiff's counsel contended, that the defendant's indorsement admitted all antecedent indorsements; that even if they were forged he would be liable; that he was to be considered as the drawer of a new bill of exchange; and that his contract was very different from that of the acceptor, who only undertook to pay to the payee or his order, and against whom, therefore, a title through the payee must be established. Lord *Ellenborough* was of this opinion, and the plaintiff had a verdict. Action for money paid^(r) by plaintiffs,

(k) *Smith v. Mercer*, 6 Taunt. 76.

(l) *Fuller and others v. Smith*, 1 Ry. & Moo. 49.

(m) *Bass v. Clive*, 4 M. & S. 13.

(n) *Tigar v. Gordon*, 9 M. & W. 347. See *Ball v. Gordon*, 9 M. & W. 345.

(o) *Cooper v. Meyer*, 10 B. & C. 468.

(p) *Beeman v. Duck*, 11 M. & W. 251.

(q) *Critchlow v. Parry*, B. R. 2 Campb. 182.

(r) *Forster v. Clements*, 2 Campb. 17.

Messrs. Fosters, Lubbock & Co., bankers for defendant. A bill of exchange was drawn on defendant by one Hanley, payable to his own order, which defendant accepted, "payable at Fosters, Lubbock & Co., London," the plaintiffs; when this bill was presented at the plaintiffs' house, it was paid by them, and the action was brought to recover the sum so paid. Plaintiffs proved the acceptance, and the fact of payment, and contended they were entitled to recover without proving the indorsement of the drawer, which was upon the bill at the time it was paid by them; alleging that the bill, when presented, being *prima facie* in a negotiable state, they were authorized to pay it, and were not bound to inquire into the title of the holder; but Lord *Ellenborough* [*396] ruled that it was necessary to prove *the first indorsement. In an action against the drawer of a bill,^(s) it was holden, that payment of money into court, upon the whole declaration, was such an admission of the cause of action as superseded the necessity of proving the hand-writing of the drawer.⁽¹⁾

The declarations of third persons alive, in the absence of any community of interest, are not to be received to affect the title or interest of other persons, *merely* because such declarations are against the interest of those who make them. The general rule, that the living witness is to be examined on oath, is not subject to any exception so wide; and the circumstance of fraud being acknowledged does not introduce any difference in principle.^(t)

A receipt upon a negotiable instrument may be contradicted^(u) or explained by parol evidence. Where the plea was, want of consideration for the defendant's acceptance, concluding with a verification, and the plaintiff replied, setting it out, under a *scilicet*, and concluded to the country; it was holden^(x) that the plaintiff was not bound to prove the consideration.

The signature of a party (L. B. Sapio) to a bill, may be proved by a person who has seen him write^(y) his surname only, several times. But in a case^(z) where the acceptance purported to bear the signature of the acceptor's Christian as well as surname, proof by a witness who never saw the acceptor write his Christian, and had seen him write his surname only, was not deemed sufficient by Lord *Ellenborough*, C. J.

The copy of an original letter, giving notice of the dishonour of a

(s) *Gutteridge v. Smith*, 2 H. Bl. 374.

(t) Per Lord *Denman*, C. J., delivering judgment of court, in *Phillips v. Cole*, 10 A. & E. 111; 2 P. & D. 291.

(u) *Scholey v. Walsby*, Peake's N. P. C. 24, recognized by Lord *Tenterden*, delivering judgment in *Graves v. Key*, 3 B. & Ad. 318.

(x) *Low v. Burrowes*, 4 Nev. & M. 367; and see *Batley v. Catterall*, 1 M. & Rob. 379.

(y) Per *Abbott*, C. J., *Lewis v. Sapio*, M. & Malk. 39.

(z) *Powell v. Ford*, 2 Stark. N. P. C. 164.

(1) An offer by maker of a note to pay in goods declined by agent of holder for want of authority, waives proof of handwriting of maker and indorser. *Keplinger v. Griffith*, 2 Gill & J. 296.

A promise by an indorser to pay a bill or note, dispenses with the necessity of proving a demand on the drawee or maker, or notice to the indorser himself. *Pierson v. Hoeker*, 3 Johns. Rep. 68; *Hopkins v. Liswell*, 12 Mass. Rep. 52.

bill(*a*) produced, and subject-matter of action, is admissible in evidence without notice given to produce the original; but, *secus*, if bill not produced, nor subject-matter of action.(*b*) But notice of dishonour must contain an intimation that payment of the bill has been refused by the acceptor; hence, a letter merely containing a demand of payment was holden(*c*) to be insufficient. It is not necessary to give a notice to produce the notice of dishonour.(*d*)

In an action against the drawer of a foreign bill,(*e*) the protest, being part of the custom of merchants with respect to foreign bills, must be proved,(1) if the bill has been drawn for actual value in *the hands of the drawee, but not otherwise.(*f*) A promise [*397] by the drawer,(*g*) after the bill is due, that he will pay it, supersedes the necessity of producing the protest; for in such case it will be presumed, from the party's not objecting to the want of a protest at the time when he made the promise, that he has received due notice of dishonour by a protest regularly drawn up by a notary. The presentment of a foreign bill in England must be proved in the same manner as if it were an inland bill. A notarial protest under seal is not evidence of such presentment.(*h*)(2)

(*a*) *Kine v. Beaumont*, 3 Brod. & Bingh. 288. By C. B., after conference with B. R.

(*b*) *Lanauze v. Palmer*, M. & Malk. 31.

(*c*) *Hartley v. Case*, 4 B. & C. 339.

(*d*) *Swain v. Lewis*, 2 Cr. M. & R. 261.

(*e*) *Gale v. Walsh*, 5 T. R. 239.

(*f*) *Legge v. Thorpe*, 12 East, 171; 2 Campb. N. P. C. 310, S. C.

(*g*) *Gibbon v. Coggon*, 2 Campb. 188.

(*h*) *Chesmer v. Noyes*, 4 Campb. 129, per Lord Ellenborough, C. J.

(1) If in a declaration on an inland bill of exchange, a protest and notice thereof be set forth, the plaintiff must prove them; inasmuch as protests on inland bills of exchange are material, entitling the holder to costs under stat. 9 & 10 Will. III. c. 17, and 3 & 4 Ann. c. 9. Per Lord Kenyon, C. J., in *Boulager v. Talleyrand*, 2 Esp. N. P. C. 550. See further as to protest, *ante*, 380.

(2) In an action by the holder against the drawer, (*Staples v. Okines*, 1 Esp. N. P. C. 332; Peake's Evid. 154, 155, per Kenyon, C. J.; see also *Walwyn v. St. Quintin*, 2 Esp. N. P. C. 515,) the acceptor is a competent witness to prove that the drawer had not any effects in his hands, and thereby to relieve the holder from the necessity of proving notice of dishonor; for though, by supporting the action against the drawer, he relieves himself from an action at the suit of the holder, he at the same time gives an action against himself at the suit of the drawer, in which the evidence he has given of the want of consideration will not avail him, for that fact must be proved by another witness. In an action by the indorsee against the acceptor, the defendant may call the payee and indorser to prove that the bill was void in its creation, as being drawn in London without a stamp, though dated abroad. *Jordaine v. Lashbrooke*, 7 T. R. 601. So in an action by an indorsee of an accommodation bill, payable to the drawer's own order against the acceptor, it was holden, that the drawer who had indorsed the bill to the plaintiff, might be a witness to prove that the bill was given by him to the plaintiff on an usurious consideration, the witness having been released by the acceptor, (*Rich v. Topping*, Peake's N. P. C. 224; 1 Esp. N. P. C. 177, S. C.) or, without a release, to prove that there was usury in the discount of the bill by the witness. *Brard v. Ackerman*, 5 Esp. N. P. C. 119.

The current of authority in the United States is against permitting a party to a negotiable instrument, as a witness to prove it originally void. *Winter v. Saidler*, 3 Johns. Cas. 135; *Wilkie v. Roosevelt*, 3 Johns. Cas. 206; *Coleman v. Wire*, 2 Johns. Rep. 165; *Churchill v. Suter*, 4 Mass. Rep. 156; *Warren v. Merry*, 3 Id. 27; *Parker v. Lovejoy*, 3 Id. 565; *Widgery v. Monroe*, 6 Id. 449; *Jones v. Coolidge*, 7 Id. 199; *Bank of United States v. Dunn*, 6 Peters, 51; *United States v. Leffler*, 11 Ib. 86-95; *Scott v. Loyd*, 12 Ib. 149; *Henderson v. Anderson*, 3 How. U. S. 73; 1 Greenl. on Evid. § 385 and note. But he is

A bill of exchange payable to the order of the drawer, may be given in evidence under the count for money had and received, in an action brought by the drawer and payee against the acceptor.⁽ⁱ⁾ It seems,^(k) that in an action by payee against acceptor, the bill would not be evidence of an account stated, in a case where the bill was drawn by a third person.⁽¹⁾

For the stat. 6 & 7 Vict. c. 85, which removes the incapacity of witnesses by reason of crime or interest, see *post*, tit. "Common."

Recovery of Interest.—On bills of exchange payable at a day certain, and not carrying interest on the face of them, interest is recoverable from the day on which the bills become due. The general rule at the present day, with respect to the allowance of interest, is much narrower than it was formerly. The modern doctrine is, that interest ought to be allowed in those cases only, where there is a contract for payment of money on a certain day, as on bills of exchange and promissory notes; or where there has been an express promise to pay interest; or

(i) *Thompson v. Morgan*, 3 Campb. 101.

(k) *Early v. Bowman*, 1 B. & Ad. 889.

held to be a good witness to prove any facts, subsequent to the due execution of the note, which destroy the title of the holder. *Baker v. Arnold*, 1 Caines' Rep. 258; *Woodhull v. Holmes*, 10 Johns. Rep. 231; *Warren v. Merry*, 3 Mass. Rep. 27; *Barker v. Prentiss*, 6 Id. 430; *Parker v. Hanson*, 7 Id. 470; 1 Greenl. on Evid. § 385.

In an action by indorsee against drawer, the payee and indorser was holden (*Steele v. Lynch*, 2 Campb. 332,) to be a competent witness to prove that the defendant had acknowledged his liability and promised to pay the bill. In an action by the indorsee against the drawer of a bill of exchange, drawn without consideration, the payee who indorsed it to the plaintiff, in payment of goods, is a competent witness to prove the consideration for the indorsement. *Shuttleworth v. Stephens*, 1 Campb. 407. But in an action by the indorsee against the maker of a promissory note, without original consideration, if the payee has become bankrupt, and obtained his certificate subsequently to the date of the note, he is not a competent witness for the defendant. *Maundrell v. Kennet*, London Sittings in H. T. 1809; Cor. Bayley, J. Ib. n.

The indorser of a negotiable note is not a competent witness in an action between indorser and maker, to prove usury in the transfer of the note by him. *Manning v. Wheatland*, 10 Mass. Rep. 502. And the indorser cannot in a like action be a witness that there was no original consideration for the bill. *Stille v. Lynch*, 2 Dall. Rep. 194. And the rule applies not only to actions upon the note or bill, but to all others where its validity comes collaterally in question. *Deering v. Sawtek*, 4 Greenl. 191. But the indorser of a note not negotiated until after the day of payment, is competent to invalidate it. *Baird v. Cochran*, 4 S. & R. 399. And see *Bank of Montgomery v. Walker*, 9 S. & R. 229; *Lonsdale v. Brown*, 3 W. C. C. R. 404.

A person who indorses a bill of exchange for value, or for collection, and comes into possession of the bill again, is to be considered as the *bonâ fide* holder and proprietor, and entitled to recover in an action upon it, notwithstanding there may be one or more indorsements upon it, subsequent to the one to himself, without producing any receipt or indorsement back from either of the subsequent indorsers, whose names he may either strike out from the bill or not, at his pleasure. *Dugan v. The United States*, 3 Wheat. Rep. 172. Vide also the *Bank of Utica v. Smith*, 18 Johns. Rep. 230; *Norris v. Badger*, 6 Cowen, 449.

(1) In a suit by indorsee against maker, payee is a competent witness for the maker, to show the terms of the assignment. *Stone v. Vance*, 6 Ohio, 248. So also to prove time of indorsement. *Spring v. Lovett*, 11 Pick. 417. So also for a subsequent indorser, to prove he indorsed it for maker's accommodation, and that he fraudulently negotiated it. *Hall v. Hale*, 8 Conn. 336. But payee is not a competent witness for maker if he is the real debtor. *Letson v. Dunham*, 2 Green, 307. Nor is a subsequent indorser a competent witness, without a release, to charge a prior indorser. *Talbot v. Clark*, 8 Pick. 51. Nor to prove maker's hand-writing. *Geoghegan v. Reid*, 2 Whart. 152.

where, from the course of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that interest has been actually made of the money.^(l) Hence upon a mere simple contract of money lent, without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances, whence a contract for interest may be inferred, interest is not allowable.^(m) In a contract for the sale of goods, although a particular time be limited for payment of the *price, yet the vendor is not entitled to interest on the price [*398] from that time.⁽ⁿ⁾ But if at the time of the original contract, the defendant agreed to pay by bill or note, interest is recoverable (as part of the price,) from the time when the bill, if given, would have become due, even in an action for goods sold and delivered,^(o) and if there is some evidence for the jury of such an agreement, that is sufficient to support the verdict.^(p) And in such cases interest will be allowed, although the defendant has not accepted the goods, in an action for not accepting the goods.^(q) Bankers cannot charge interest upon interest upon money advanced by them without an express contract for that purpose. *Dawes v. Pinner*, 2 Campb. 486, n. Bill was drawn at Barbadoes on the 8th of February, 1809, on a house in London, payable to the plaintiff at sixty days' sight: the bill was refused acceptance on the 17th of April, 1809, and was afterwards presented for payment on the 19th of June following. Lord *Ellenborough* left the question, from what period the interest was to be calculated, to the special jury, who said that the holder of the bill was entitled to 10l. per cent. on the principal, as damages, and that interest was to be allowed only from the time when the bill was presented for payment;^(r) but in a subsequent case,^(s) when the holder did not claim any percentage upon the principal as damages, he was allowed interest from the time the bill was dishonoured for non-acceptance. The drawer of a bill which is dishonoured by the acceptor, is not liable to pay interest for the time which elapses between the day whereon the bill becomes due, and the day when the drawer receives notice of the dishonour.^(t)

By stat. 3 & 4 Will. IV. c. 42, s. 28, "Upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue or on any inquisition of damages, may, if they shall think fit,^(u) allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument

(l) Per Lord *Ellenborough*, C. J., in *De Havilland v. Bowerbank*, 1 Campb. 50. See *Hare v. Rickards*, 7 Bingham 254; *Higgins v. Sargent*, 2 B. & C. 349; *Abbott*, C. J.

(m) *Calton v. Bragg*, 15 East, 223; *Shaw v. Picton*, 4 B. & C. 723; *Page v. Newman*, 9 B. & C. 378.

(n) *Gordon v. Swan*, 2 Campb. 429; 12 East, 419.

(o) *Marshall v. Poole*, 13 East, 98, recognized in *Farr v. Ward*, 3 M. & W. 25; *Porter v. Palsgrave*, 2 Campb. 472.

(p) *Davis v. Smyth*, 8 M. & W. 399.

(q) *Boyce v. Warburton*, 2 Campb. 480.

(r) *Gantt v. Mackenzie*, 3 Campb. 51.

(s) *Harrison v. Dickson*, *Ib.* 52, n.

(t) *Walker v. Barnes*, 5 Taunt. 240.

(u) See *Attwood v. Taylor*, 1 M. & Gr. 332; 1 Scott's N. R. 611.

at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law."

Formerly interest was computed from the day on which the principal became due, to the time of commencing the action; but, according to *Robinson v. Bland*, 2 Burr. 1085, interest ought to be carried down to the day on which judgment is signed. It must be [*399] *observed, that in *Blaney v. Hendrick*, 3 Wil. 205; 2 Bl. R. 761, S. C., where it was holden, that in assumpsit on an account stated between merchant and merchant, the jury, on the execution of the writ of inquiry, might give interest from the day the account was stated, the interest was carried down to the time of bringing the action according to Wilson's Report, and down to the time of the inquisition, according to Blackstone's Report. This period for the computation of interest was recognized by *Buller, J.*, in *Frith v. Leroux*, 2 T. R. 58, where that learned judge said, that on debts carrying interest, the jury are *now* directed to give interest in damages up to the day on which judgment may be signed. And when a defendant sued upon a security carrying interest, pays money into court, sufficient to cover the principal with interest down to the commencement of the action, but not to the time of paying in the money, the plaintiff may proceed; and a jury, on trial, is bound(x) to give him damages for the interest accruing between the commencement of the action and the payment into court.(1)

(x) *Kid v. Walker*, 2 B. & Ad. 705.

(1) In this country, by the laws and usages of the different states, the holder of a foreign bill of exchange returned protested, is entitled to recover, besides the principal sum and interest, damages at certain fixed rates. In New York he is entitled to recover the contents of the bill, *at the rate of exchange, or price of bills on the place in which it was drawn, at the time of the return of the dishonored bill, and notice thereof to the drawer*, together with twenty per cent. damages. *Graves v. Dash*, 12 Johns. Rep. 17; *Kenworthy v. Hopkins*, 1 Johns. Cas. 107; *Hendricks v. Franklin*, 4 Johns. Rep. 119; *Weldon v. Buck*, 4 Id. 144; *Thompson v. Robertson*, Ib. 27; *Denston v. Henderson*, 13 Id. 322. In Massachusetts he was entitled to recover ten per cent. damages, but nothing is allowed for re-exchange. *Grimshaw v. Bender*, 6 Mass. Rep. 157; *Barclay v. Minchin*, Ib. 152. But see Rev. Stat. 1837, reducing it to five. If the holder receive part of the money from the acceptor, this diminishes the damages *pro rata*. *Bangor Bank v. Hook*, 5 Greenl. 174. In Pennsylvania, formerly, twenty per cent., in lieu of damages and charges. *Chapman v. Steinmetz*, 1 Dall. Rep. 261; *Kepple v. Carr*, 4 Id. 155. But see late act of May 13, 1850, Purd. Dig. 91. In Rhode Island, the damages are ten per cent. *Brown v. Van Braam*, 3 Dall. Rep. 244. In South Carolina, fifteen per cent., with the difference of exchange. *Winthrop v. Pipoon*, 1 Bay, Rep. 468. In Virginia, fifteen per cent. damages. *Slocum v. Pomeroy*, 6 Cranch. 221.

In New York, the twenty per cent. damages are payable upon a protest for non-acceptance as well as for non-payment. *Weldon v. Buck*, 4 Johns. Rep. 144. But not where the bill is remitted to pay an antecedent debt. *Kenworthy v. Hopkins*, 1 Johns. Cas. 107. In Connecticut, Pennsylvania, Delaware, Louisiana, Alabama, Missouri, and Illinois, the damages upon *foreign* bills are twenty per cent. In Maryland, Virginia, North Carolina, Ohio, Indiana, South Carolina, and Tennessee, they are fifteen per cent. In Rhode Island, Kentucky, and Mississippi, ten per cent. In Maine, the rule seems to be similar to that of Massachusetts, as stated in the text. See Griffith's Law Register. By *foreign* bills is meant those drawn on places out of the United States. Most of the States, also, have made provision for the case of bills drawn upon a place in the United States. By the revised laws of

Upon promissory notes payable upon demand, interest is due only from the time of the demand; but upon promissory notes payable at a certain day, interest is due from that day, though there be no demand; because the person who is to pay is in this case bound to find out the other, and pay it at the day.(y) On a note payable on demand, where there is no proof of any agreement for interest, the plaintiff is only entitled to interest from the day of issuing the writ of summons.(z)(1) Where money due on a balance of accounts is awarded to be paid on a particular day, and at a particular place, if duly demanded there on the day, it carries interest from that day.(a)(1) Where the terms of a promissory note are, that it shall be payable by instalments,(b) and on failure of payment of any instalment the whole is to become due, interest becomes payable from the time of the first default. A promissory note in this form: "July 20th, 1808. I promise for myself and my executors to pay F. H., or her executors, one year after my death, 300*l.*, with legal interest," was holden(c) to bear interest from the date of the note. Under a particular of the plaintiff's demand,(d) stating that the action was brought to recover the amount of a note, interest (although not claimed *eo nomine* in the particular) is recoverable, as arising out of the principal demanded by the particular. The particu-

(y) *Per Cur. Brockett v. Archer*, M. 6 Geo. I.

(z) *Pierce v. Fothergill*, 2 Bingh. N. C. 167.

(a) *Pinhorn v. Tuckington*, 3 Campb. 468. See *Swinford v. Burn*, Gow's N. P. C. 8.

(b) *Blake v. Lawrence*, 4 Esp. N. P. C. 147, *Ellenborough*, C. J.

(c) *Roffey v. Greenwell*, 10 A. & E. 222.

(d) *Blake v. Lawrence*, *ubi sup.*

New York, of 1829, in the case of bills drawn upon Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Pennsylvania, Ohio, Delaware, Maryland, Virginia, or the District of Columbia, the damages are fixed at three per cent. On North Carolina, South Carolina, Georgia, Kentucky, or Tennessee, five per cent. On other states of the Union, or other places on the continent, or in the West Indies, or in *Europe*, ten per cent., which damages are to be in lieu of interest, and all charges incurred previous to notice of non-payment; but the holder will be entitled to interest upon the aggregate amount of the principal sum specified in the bill, and damages from the time of notice of protest and demand of payment. 1 Rev. Statutes, p. 770. In Pennsylvania, by an act passed in 1821, revised and changed in 1850, the damages are fixed at the following rates: Upon any place in the *United States*, excepting Upper and Lower California, New Mexico and Oregon, five per cent.; in those countries, or any place in North America or the islands thereof, except the north-west coast of America and Mexico, in the West India or Bahama Islands, ten per cent.; in Madeira, the Canaries, the Azores, Cape de Verdes, Spanish Main, or Mexico, fifteen per cent.; in *Europe*, ten per cent.; and in other parts of the world, ten and fifteen per cent. These damages are to be in lieu of all charges to the time when notice of protest and demand of payment shall have been made. Purdon's Dig. 91. In *Rouvert v. Patton*, 12 S. & R. 253, it seems to have been held, that if a creditor, who has in his possession goods sufficient to liquidate the greater part of the debt, draws upon his debtor without his permission, who refuses to accept, in consequence of which the creditor has been obliged to pay the ten per cent. damages, he is not entitled to recover them of the drawee. See Chitty on Bills, 687, 12th Am. ed., note; Bayley on Bills, 379, 2d Am. ed.; Story on Bills, § 31.

(1) A note without time of payment is payable on demand and with interest *from date*. *Gaylord v. Van Loan*, 15 Wend. 308. A note "on demand with interest after four months," is payable immediately. *Newman v. Kettelle*, 13 Pick. 418; *Rice v. West*, 2 Fairf. 323. A note "on demand with interest after four months," with the words "on demand" erased, but still legible, is a note at four months. *Hobart v. Dodge*, 1 Fairf. 156. A note executed and dated in New York, payable in New Jersey, is governed as to interest by the laws of the latter state. *Healy v. Gorman*, 3 Green, 328.

lar is now appended to the record, pursuant to a rule of court, and it is not necessary^(e) to prove the delivery of it to defendant.(1)

[*400] *IX. *Of the Nature of a Promissory Note.* p. 400; *Stat. 3 & 4 Ann. c. 9, s. 1, placing Promissory Notes on the footing of Inland Bills of Exchange.* p. 400; *What are negotiable Notes within the Statute.* p. 401; *Of Banker's Notes.* p. 406; *Joint and several Notes.* p. 407; *Consideration.* p. 407; *Stamp.* p. 409.

A promissory note is a promise in writing to pay to A. or order, or to A. or bearer, a sum of money, either at sight, or at a certain time after sight, or after date, or on demand. It having been holden, in the case of *Clerk v. Martin*, Salk. 129, and in other cases, that the *payee*, and in *Buller v. Crips*, 6 Mod. 29, that the indorsee of a promissory note, payable to order, could not maintain an action against the maker thereof, such note not being within the custom of merchants; it was for the purpose of encouraging trade and commerce, by permitting promissory notes to be negotiated in like manner as inland bills of exchange, enacted, by stat. 3 & 4 Ann. c. 9, s. 1,(2) "That all notes(3) in writing, made and signed(4) by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant or trader,(5) usually intrusted by them to sign such notes for them, whereby such person, &c., or their servant or agent, promise to pay to any other person or persons, body politic or corporate, or order or bearer, the money mentioned in such note,

[*401] shall be construed to *be, by virtue thereof, due and payable to such person, &c., to whom the same is made payable: and

(e) *Macarthy v. Smith*, 8 Bingh. 145.

(1) A tender by the indorser of a note on the day next after it has become due is not sufficient, without a tender of interest. *City Bank v. Cutter*, 3 Pick. 414.

(2) See *Bowie v. Duval*, 1 Gill & John. 175.

(3) In *Pollard v. Herricks*, 3 Bos. & Pul. 335, an action was brought on a promissory note made at Paris, and payable there or in London. The plaintiff recovered, and no objection was made on the ground of its being a foreign note. In *Houriet v. Morris*, 3 Campb. 303, an action was brought on a promissory note made at Paris, and the plaintiff recovered. The place of date was not mentioned in the declaration; but Lord *Ellenborough* held the omission to be immaterial. And in *Milne v. Graham*, 1 B. & C. 192, it was expressly determined that this statute extends to notes made in a foreign country. The note on which the question was raised, was made at Dundee, in Scotland. See also *Bentley v. Northouse*, M. & Malk. 66, S. P. per Lord *Tenderden*, C. J., in an action by indorsee against maker of a promissory note made in Scotland. And in *De la Choumatté v. Bank of England*, 2 B. & Ad. 385, it was holden, that a promissory note payable to bearer made in England was transferable by delivery at Paris.

(4) Declaration that defendant made a note, *et manu sua propria scripsit*. It was objected, that since this statute, plaintiff should have averred that defendant *signed* the note; but the court held it to be well enough, because laid to be written with his own hand. *Taylor v. Dobbins*, 1 Str. 399, S. P. on demurrer. *Elliott v. Cooper*, Lord Raym. 1376.

(5) The cases enumerated here are instances only. Per Lord *Lyndhurst*, C. B., *Dickenson v. Teague*, 4 Tyrw. 453.

also such note, payable to any person, &c., or order, shall be assignable or indorsable over in the same manner as inland bills of exchange are, or may be, by the custom of merchants; and the person, &c., to whom the money is *payable* may maintain an action for the same in *such manner as he might upon any inland bills of exchange*, made according to the custom of merchants; and the person, &c., to whom such note is *indorsed* or assigned, may maintain an action, either against the person, &c., who or whose servant or agent signed such note, or against any of the persons who indorsed the same, *as in cases of inland bills of exchange*, and the plaintiff shall recover damages and costs of suit; and in case of nonsuit or verdict against plaintiff, defendant shall recover costs.”(1)

The foregoing statute being a remedial law, and made for the encouragement of trade and commerce, the courts have construed it liberally. Hence a note promising to *account with* J. S. or order, has been construed as a promise to *pay* J. S. or order, and within the meaning of the statute.(f) So a promissory note, payable to B.(g) (omitting the words “or order,”) three months after date, was holden a good note within the statute; and it was adjudged, that it might be declared on as such by the payee. So where the promise was by A.(h) to pay so much to B. for a debt due from C. to B., it was holden, that it was within the statute, being an absolute promise, and every way as negotiable as if it had been generally for value received. So where the note was in this form,(i) “I do acknowledge that Sir A. C. has delivered to me all the bonds and notes, for which 400*l.* were paid to him on account of Col. S., and that Sir A. delivered to me Major G.’s receipt, and bill on me for 10*l.*; which 10*l.* and 15*l.* 5*s.* balance due to Sir A. I am still indebted and do promise to pay.” On demurrer to the declaration, the note was adjudged good. So where the instrument(k) was, “Received of A. B. 100*l.*, which I promise to pay on demand, with lawful interest.” So where the note set forth in the declaration was,(l) “I do acknowledge myself to be indebted to A. in

(f) *Morice v. Lea*, 8 Mod. 362; 1 Str. 629; Lord Raym. 1396, 7.

(g) *Smith v. Kendall*, 6 T. R. 123; S. P. per *Hardwicke*, C. J., *Cunningham Bills of Ex.* 127. See also *Moor v. Pain*, Ca. Temp. Hardw. 288, where *Hardwicke*, C. J., said this point had been ruled often.

(h) *Popplewell v. Wilson*, B. R. Str. 264, on error from C. B. See *Ridout v. Bristow*, 1 Tyrw. 91.

(i) *Chadwick v. Allen*, Str. 706.

(k) *Greene v. Davies*, 4 B. & C. 235.

(l) *Casborne v. Dutton*, Scacc. M. 1 Geo. II. MSS.

(1) If a note is not negotiable, the suit must be in name of payee. *Matlack v. Hendrickson*, 1 Green, 263. In Indiana, a note without words of assignment is negotiable by statute. *Richer v. Spencer*, 3 Blackf. 405. *McClelland v. Quail*, 3 Id. 459; *Bullitt v. Scribner*, 1 Id. 14. In Mississippi by statute the assignees of notes stand on the same footing as assignees of open accounts except that they may sue in their own name. *Defrance v. Davis*, Walker, 69. When a note not negotiable is assigned, the maker cannot avail himself of equities against the payee if he has promised to pay the plaintiff. *Wiggin v. Damrell*, 4 New H. R. 69. A note under seal is not negotiable. *Clark v. Man'g Co.*, 15 Wend. 256. The negotiability of a note is not impaired by an assignment of it under seal indorsed, nor by a receipt indorsed for goods received on account. *Ege v. Kyle*, 2 Watts, 222.

£ , to be paid on demand for value received." On demurrer to the declaration, the court, after solemn argument, held, that this was a good note within the statute, the words "*to be paid*" amounting to a promise to pay; observing, that the same words in a lease would amount to a covenant to pay rent.(1) So a promissory note [*402] payable by instalments,(m) is assignable within the *statute, and the maker is entitled to the days of grace upon the falling due of each instalment. So where a promissory note was payable by instalments subject to a condition, that on default being made in payment of the first instalment, the whole amount should become immediately payable; it was holden,(n) that the note was assignable within the statute, and on default being made by the maker in payment of the first instalment, an indorser was liable for the whole amount.

This statute, however, extends to such notes only as contain an *absolute* promise to pay money at all events,(o) (and not a promise depending upon a contingency,) and where the money at the time of the giving the note, becomes due and payable by virtue thereof, (so are the words of the statute,) and not where it becomes due and payable by virtue of a subsequent contingency,(p) which perhaps may never happen; in which case the money would never become payable.(2) Before the statute of Anne, a promise to pay A. or his assigns a sum of money within a certain time after defendant should be lawfully married to E. S., was holden not to be a good note; because to pay money on such a contingency could not be called trading, and therefore not within the custom of merchants.(q)

The following notes have been adjudged not to be negotiable notes within the statute, viz.:

A promise by defendant to pay to plaintiff 26l.(r) within a month after Michaelmas, if the defendant did not pay the 26l. for which the plaintiff stood engaged for his brother I. B. A promise to pay A. B. £ value received,(s) on the death of C. D., provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay it. A promise to pay A., or B. and C., £ value received.(t)(3) A promise to pay money within so many days after the maker of the note should marry.(u) So where the promise was to pay A. F. £

(m) *Oridge v. Sherborne*, 11 M. & W. 374.

(n) *Carlton v. Kenealy*, 12 M. & W. 139.

(o) *Willes*, C. J., in delivering the opinion of the court in *Colehan v. Cooke*, *Willes*, 393.

(p) *Robins v. May*, 3 P. & D. 147; 11 A. & E. 213.

(q) *Pearson v. Garrett*, 4 Mod. 242.

(r) *Appleby v. Biddle*, B. R. H. 3 Geo. I. MS.

(s) *Roberts v. Peake*, 1 Burr. 323.

(t) *Blanckenhagen v. Blundell*, 2 B. & A. 417.

(u) *Beardsley v. Baldwin*, Str. 1151; 7 Mod. 417, 8vo. ed.

(1) "Due A. B. \$325 payable on demand," is a note within the statute. *Kimball v. Huntington*, 10 Wend. 675. The indorser of a note payable to a third person is a maker if he indorse at the time of execution. *Baker v. Briggs*, 8 Pick. 122.

(2) Vide *King v. Rice*, 6 Ohio, 281.

(3) But it may be given in evidence under the money counts if "for value received." *Walrad v. Petrie*, 4 Wend. 575. A note promising to pay A. to the order of B. and C. is within the statute. *Willis v. Green*, 10 Wend. 516. A special promise to assignee of a note not negotiable does not pass to a second assignee. *Hatch v. Spear*, 2 Fairf. 354.

out of the maker's money that should arise from his reversion of £ when sold; the declaration averred the sale of the reversion; yet it was holden, that the note could not be declared on as a negotiable note under the statute, because the money was to be paid only on a contingency.(x) A similar decision was made in *Hill v. Halford*,(y) where a promise was to pay £ , on the sale or produce, immediately when sold, of the White Hart, St. Alban's, Herts, and the goods therein, although it was averred in the declaration, that the house and *goods were sold. In a case where the instrument [*403] acknowledged to have borrowed and received £ in drafts payable to the defendants at a future day, which defendants promise to pay with interest, it was holden that this was a special agreement, and not a promissory note; for the money was not to be paid at all, unless the drafts were honoured.(z)

So where the instrument(a) was—"On demand we promise to pay G. C. or order 1200*l.*, for value received in stock, &c., this being intended to stand against me, the undersigned M. P., as a set-off for that sum left me in my father's will, above my sister Ann's share, signed by T. P. (husband), M. P. (wife)." Where the words were—"September 11, 1839. I undertake to pay to Mr. R. Jarvis, the sum of 6*l.* 4*s.* for a suit of , ordered by Daniel Page. S. W. Wilkins." The court held that this was not a promissory note; but a guarantee for the sale of goods ordered, that the consideration could be collected by necessary inference, and that no stamp was necessary.(b)

Upon an instrument in the common form of a joint and several promissory note, signed by A., B., and C., there was an indorsement, (written as appeared in proof, before B. and C. had signed the note,) stating that the note was taken as a security for all balances, not exceeding the sum specified in the note, which A. might owe to the payee; that the note should be in force for six months, and no money liable to be called for sooner in any case; an action having been brought by the payee against B., the first count stating the note as payable on request, and a second as payable six months after date; Lord *Ellenborough*, C. J., held, that although the instrument possibly might have been considered as a promissory note in the hands of a *bond fide* holder, who had received it as such, yet as between the immediate parties it could only be considered as an agreement, for as to them the indorsement must be incorporated with the body of the note; and consequently an action could not be maintained upon it without an agreement stamp.(c) An instrument, purporting on the face of it to be a promissory note, payable absolutely for the price of the goods, but having an indorsement upon it, (written before the note was signed,) stating that it was given on condition that if any dispute arose about the sale of goods, it would

(x) *Carlos v. Fancourt*, 5 T. R. 482.

(y) 2 Bos. & Pul. 413, (in the Exch. Ch.) on error from B. R.

(z) *Williamson v. Bennett*, 2 Campb. 417.

(a) *Clarke v. Percival*, 2 B. & Ad. 660.

(b) *Jarvis v. Wilkins*, 7 M. & W. 411.

(c) *Leeds v. Lancashire*, 2 Campb. 205, cited by *Littledale*, J., as in point, in *Davies v. Wilkinson*, 10 A. & E. 105; 2 P. & D. 256.

be void, is not a negotiable note.(d) "Received and borrowed of A. B. 30l., which I promise to pay with interest. I also promise to pay *the demands of the sick club at H.*, in part of interest; and the remaining stock and interest to be paid on demand to the said A. B. [*404] Witness my *hand, C. D." This was holden,(e) not to be a promissory note; for the instrument, as far as respected the contingent demand, was not a promissory note, and the transaction was entire.

2. A promissory note must be for the payment of money only.(1) Hence on error from C. B. it was holden,(f) that a note *to deliver up horses and a wharf*, and pay money at a particular day, could not be

(d) *Hartley v. Wilkinson*, 4 M. & S. 25.

(e) *Bolton v. Dugdale*, 4 B. & Ad. 619; *Worley v. Harrison*, 3 A. & E. 669, S. P.

(f) *Martin v. Chauntry*, Str. 1271.

(1) A note payable in cash or specific articles is not negotiable. *Mathews v. Houghton*, 2 Fairf. 377. Or to A. or bearer in *whiskey at trade price*. *Rhodes v. Lindley*, 3 Ohio, 51. Or in "current bank notes." *Gray v. Donahue*, 4 Watts, 400. But see *Morris v. Edwards*, 1 Ohio, 82, *contra*. The holder of a note payable to A. or bearer in cattle, may sue in his own name, but must aver and prove a delivery to him on good consideration. *Byington v. Geddings*, 1 Ohio, 376. But see *Matlack v. Hendrickson*, 1 Green, 263. A note payable in current funds or New York funds, is not negotiable. *Hasbrook v. Palmer*, 2 M'Lean, 10; *Kirkpatrick v. McCullough*, 3 Humph. 171; *Collins v. Lincoln*, 11 Verm. 263; *Thompson v. Slown*, 23 Wend. 71; *Whiteman v. Childress*, 6 Humph. 303; *Fry v. Rousseau*, 3 M'Lean, 106; *Swelland v. Creigh*, 15 Ohio, 118; *Besancon v. Shirley*, 9 Smedes & Marsh. 457; *Cockrill v. Kirkpatrick*, 9 Mis. 697; *White v. Richmond*, 16 Ohio, 5; *Wilburn v. Greer*, 1 Eng. 255; *Ogden v. Slade*, 1 Texas, 13; *Flemming v. Nall*, 1 Texas, 246; *Cherolier v. Buford*, Ib. 503. A bill payable in "currency" is not a bill of exchange. *Farrell v. Kennett*, 7 Miss. 595. So a draft payable in "Arkansas money." *Hawkins v. Watkins*, 5 Pike, 481. So "current rate of exchange to be added." *Philadelphia Bank v. Newkirk*, 2 Miles, 442; see *Little v. Phoenix Bank*, 7 Hill, 359; *Bank of Hamburg v. Johnson*, 3 Rich. 42.

A bill payable in "funds current in the city of New York," was held to be payable in gold and silver, or their equivalent, and was therefore good as a bill of exchange. *Lacy v. Holbrook*, 4 Ala. 88; *Carter v. Penn*, Ib. 140.

A note for a sum certain, payable in cotton, at a fixed price, is a promissory note, and may be declared on as such. *Rankin v. Sanders*, 6 How. Miss. 52.

It will be seen upon an examination of the foregoing cases, that many of them are not so irreconcilable as at first sight they may appear. Many of them construe the words current money, New York funds, Arkansas money, used in bills and notes, to mean lawful gold or silver coin of the United States. In Missouri, current funds is held to mean either coin or notes of the Missouri Bank—a bank authorized by the state; and in Texas, the terms "bank notes," "good bank notes," or "current bank notes," as employed by them, are held to import, in their ordinary acceptance, such bank bills only as are redeemable in gold or silver, or such as are equivalent thereto. A contract for the payment of a certain sum in bank notes, or other currency, may or may not be equivalent to that sum in specie. The extent of the obligation depends on the meaning which usage affixes to the terms at the time the contract was made. Usage gives force and effect to language; and as terms are generally understood in the ordinary transactions of life, so they are to be construed by courts of justice. *Flemming v. Nall*, 1 Texas, 246; *Chitty on Bills*, 182, 12th Am. ed. note (3); *Purd. Dig.* 92, Act of 1850, P. L. 476.

As to bills or notes payable in goods or merchandise, see *Jerome v. Whitney*, 7 Johns. 321; *Thomas v. Roosa*, Ib. 461; *Pray v. Pyickett*, 1 Nott & M'Cord. 254; *Rhodes v. Lindley*, 1 Hamm. Rep. 51; *Atkinson v. Manks*, 1 Cowen, 691; *Lawrence v. Dougherty*, 5 Yerger, 435; *Burns v. Graham*, 4 Cowen, 452; *Wyman v. Winslow*, 2 Fairf. 398; *Bailey v. Simonds*, 6 N. Hamp. 159; *Smith v. Loomis*, 7 Conn. 110. As to bills or notes payable in bank notes, see *Keith v. Jones*, 9 Johns. 120; *Judah v. Harris*, 19 Id. 144; *Leiber v. Goodrich*, 5 Cowen, 136; *Lange v. Kohne*, 1 M'Cord, 115; *Jones v. Fales*, 4 Mass. 245; *McCormick v. Trotter*, 10 Serg. & Rawle, 94; *Digbey v. Durnell*, 5 Yerg. 451; *Gray v. Donahue*, 4 Watts, 400; 3 Kent's Com. 76; *Byles on Bills*, 70, 3d. Am. ed., note.

declared on as a note within the statute. And a similar determination was made, (g) where the promise was to pay 300*l.* to A. or order, in good *East India bonds*. So where the promise was to pay J. S. so much money, (h) or to render the body of J. N. to prison before such a day, the note was holden bad: because the note was not necessarily and originally for the payment of money, but by matter *ex post facto* became a note for payment of money only, viz. the body not being surrendered to prison.

3. It must not be payable out of a particular fund; which may or may not be productive. Statement of the consideration, however, for which a note was made, will not vitiate it. On this principle, (i) a promissory note to pay a sum of money three months after date, for value received of the premises in Rosemary Lane, late in the possession of T. R., was holden a good note within the statute. In the following cases the principle before laid down was recognized, but the notes were adjudged good. A promissory note was given to an infant, (k) payable when he should come of age, viz. on such a day in such a year; this was holden good; for, per *Denison*, J., here is no condition or uncertainty, but it is to be paid certainly and at all events, only the time of payment is postponed. So where plaintiff declared in the first count on a promissory note, (l) dated 27th May, 1732, whereby defendant promised to pay H. D. or order 150 guineas, ten days after the death of his father, John Cooke, for value received, which note, after the death of the father (which was laid to be the 2d April, 1741), was duly indorsed by D. to plaintiff; and in the second count, on a promissory note, dated 15th July, 1732, whereby defendant promised to pay H. D. or order, six weeks after the death of his father, fifty guineas, for value received, the like indorsement laid after the death of the father as before: after a general verdict for plaintiff on both notes, it was insisted for defendant, in arrest of judgment, that these notes were not within the statute 3 & 4 Ann. c. 9. After three arguments, (m) *Willes*, C. J., delivered the opinion of the court in favour of the plaintiff, on the ground that the notes did not depend on any contingency; that there was a certain promise to pay at the time of giving the notes, *and [*405] the money by virtue thereof would become due and payable one time or other, though it was uncertain when that time would come; that there was not any weight in the objection that the maker might have died before his father, in which case the notes would have been of no value, because the same might be said of any note payable at a distant time; that the maker might die worth nothing before the note became payable. He added, that the court thought that the averment of the death of the father before the indorsement did not make any alteration, because they were of opinion, that if the notes were not within the statute *ab initio*, they could not be made so by any subsequent con-

(g) *Moor v. Vanlute*, Bull. N. P. 272.

(h) *Smith v. Boheme*, (reported as to the argument,) in Gilb. R. 93, cited in argument in Lord Raym. 1362, and 1396.

(i) *Burchell v. Slocock*, Lord Raym. 1545, cited by *Kenyon*, C. J., 6 T. R. 124.

(k) *Goss v. Nelson*, 1 Burr. 226.

(l) *Colehan v. Cooke*, *Willes*, 393; affirmed on error, in Str. 1217.

(m) See Str. 1217.

tingency. So where the note was to pay within a certain time after such a ship was paid off ;(n) it was holden good ; because the ship would certainly be paid off one time or other. In Strange's report of this case, 1 Str. p. 24, the opinion of the court is thus given: "The paying off the ship is a thing of a public nature, and this is negotiable as a promissory note." I have stated the case as it was cited by Willes, C. J., delivering the opinion of the court in *Colehan v. Cooke*, Willes, 399. See also Mr. Hume Campbell's argument in *Evans v. Underwood*, 1 Wils. 263, where, in citing this case, he states the opinion of the court to have been that the note was within the statute and negotiable, *because the paying off the ship was morally certain*. The same point was decided by Hardwicke, C. J., in *Lewis v. Orde*, Middx. Sittings, 8 Geo. II. The note was in this form: "I promise to pay J. S. 11*l*. at the payment of the ship Devonshire, for value received."

Willes, C. J., in *Colehan v. Cooke*, Willes, 399, says, "This case was determined on the same reason as *Andrews v. Franklin*, viz. that the ship would certainly be paid off one time or other, which seems to be the true reason;" but in the report of *Lewis v. Orde*, Dict. Trade and Com. 261, copied by Cunningham, p. 127, of Law of Bills and Notes, 2nd ed. 1761, Lord Hardwicke is made to say, "That as to the contingency of the payment, the subsequent act of the payment of the ship makes it certain, and therefore, though not a lien *ab initio*, yet sufficiently so, and within the statute, by the fact happening after;" and in a MS. note, in the possession of the editor, Lord Hardwicke is made to say, "As to the time, this note is certainly within the statute, if it had been made payable at any precise future day; and if it be uncertain at first, but referred to a subsequent fact to make it certain, when that fact happens (as in this case it was averred that the ship Devonshire was paid), it is as much reduced to a certainty as if the day had been mentioned at first. But if the promise is to pay out of any particular fund, it is not a personal lien, and therefore not within the statute." It may be observed, that this reason clashes with the opinion

of the court in *Colehan v. Cooke*, Willes, 399, where it was [*406] said, that if the *notes were not within the statute *ab initio*, they should not be made so by any subsequent contingency; and with the decision in *Carlos v. Fancourt*, 5 T. R. 482, and in *Hill v. Halford*, 2 Bos. & Pul. 413, in which cases the events on which the notes were to become payable were averred in the declarations to have taken place, and yet the notes were holden not to be good. See also *Kingston v. Long*, Bayley, 71; 4 Doug. 9; where it was holden by the court, that if an instrument was not a bill of exchange in its creation, it could never become so afterwards. To the foregoing cases of *Andrews v. Franklin*, and *Lewis v. Orde*, may be added that of *Evans v. Underwood*,(o) where the note was to pay A. or order, 8*l*. upon the receipt of his the said A.'s wages, due from his Majesty's ship the Suffolk, it being in full for his wages and prize-money, and short-allowance money for the said ship; the declaration stated an indorsement by A., and averred that the defendant received the said wages from the said ship. After verdict for plaintiff, on motion in arrest of judgment, the case of

(n) *Andrews v. Franklin*, H. 3 Geo. I. B. R.

(o) 1 Wils. 262.

Andrews v. Franklin was mentioned, which Mr. Ford, for the defendant, said had never been determined. The court said, that they would look into the case, and see whether it had been determined. The reporter adds, that the court inclined to give judgment for the plaintiff; and after looking into the case, did so, *ut audiui*. In *Beardesley v. Baldwin*, E. 15 Geo. II. B. R. M. S., the court said, that as to *Andrews v. Franklin*, if it ever was determined, which they could not find, it must have been decided on the certainty observed in the return of ships, and which must be looked upon as an event in itself not contingent.⁽¹⁾ See further on this subject, *Haussoullier v. Hartsinck*, 7 T. R. 733.⁽²⁾

(1) A written promise to pay a certain sum of money, "provided the ship Mary arrives at an *European* port free from capture," &c. was held not to be negotiable within the statute of Anne. *Coolidge v. Ruggles*, 15 Mass. 387. See *Peay v. Pickett*, 1 Nott & M'C. 254; *Lange v. Kohne*, 1 M'Cord, 115. See note 1, *ante*, p. 404.

(2) A note payable to A. or order, at a day certain, "or when he (the payee) completes the building according to contract," is good within the statute, as being payable absolutely, and negotiable. *Stevens v. Blunt*, 7 Mass. Rep. 240. A note by which A. promised to pay the president, directors, and company of a turnpike road, one hundred and twenty-five dollars, for five shares of the capital stock of said company, in such manner and proportions, and at such time and place as the president, directors, and company should from time to time require, is in effect payable on demand, and a cash note within the statute. *Goshen Turnpike v. Hurin*, 9 Johns. Rep. 217. Vide also *Dutchess Cotton Manufacturing Company v. Davis*, 14 Id. 238. In the Supreme Court of New York, a note payable to A., or bearer, in "*York State bills or specie*," has been held to be a negotiable note within the statute; the bills mentioned being meant bank paper, which are regarded as cash. *Keith v. Jones*, 9 Johns. Rep. 120; *S. P. Judah v. Harris*, 19 Id. 144. See *Leiber v. Goodrich*, 5 Cowen, 186. But a note promising to pay A. B., or order, \$500, "in bank notes of the chartered banks of *Pennsylvania*," has been held not to be negotiable, so as to authorize the assignee to sue in his own name. *M'Cormick v. Trotter*, 10 S. & R. 94. So in Massachusetts, a note for a certain sum, payable to A. or order, "*in foreign bills*," (meaning bills of country banks,) has been held to be not within the statute, and not negotiable. *Jones v. Fales*, 4 Mass. Rep. 245. In New York, the statute of Anne has been re-enacted, (sess. 24, c. 44,) and consequently the English decisions on this head are applicable. So also it is held by the Supreme Court of that state, that a note for a sum payable in lands, for a specific price per acre, cannot be declared on as a promissory note, even between the original parties; but the consideration must be specially set forth and proved, as in other declarations in assumpsit. *Smith v. Smith*, 2 Johns. Rep. 235. But the terms "value received," in a note not within the statute, are held to be *prima facie* evidence of a consideration in such a note, and sufficient to throw the burthen of proof of the contrary on the defendant. *Jerome v. Whitney*, 7 Johns. Rep. 321; *Jackson v. Alexander*, 3 Id. 484. Consequently, such a note is good evidence under the money counts. *Jackson v. Alexander*, *Ib.* But in Massachusetts, the statute of Anne was never enacted; but in practice the provisions of the first section were early adopted, and the form of declaring on negotiable notes resulting from that statute, was extended to notes not negotiable. So that by the law of that state, all cash notes are negotiable, and notes for merchandise may be sued by the payee against the maker, and when indorsed, by the indorsee against his indorser, who may declare on the note as if it were negotiable. Whether this doctrine applies also to notes and bills payable out of a particular fund, has not been decided. But even admitting that such a bill could not be declared on within the statute, yet if the drawee accept to pay it, when the funds come into his hands, this binds him to the payment when he receives the funds, and the payee may recover the amount in an action for money had and received. Chitty on Bills, Am. ed. of 1817, 61, note *t*, p. 141, 12th Am. ed. In Virginia, the statute of Anne has not been re-enacted, and an action on an indorsed note can be maintained by the indorsee only against the maker, or against the immediate indorser to the indorsee. *Harris v. Johnston*, 3 Cranch, 311; *Mandeville v. Riddle*, 1 Id. 290. And the maker must be sued, if solvent, before resort can be had to the indorser. *Yeaton v. Bank of Alexandria*, 5 Id. 49; *Violet v. Patton*, *Ib.* 142; *Dulany v. Hogkind*, 3 Id. 333. But the indorser may recover the amount against a remote indorser by a suit in equity, though not at law. *Riddle v. Mandeville*, 5 Id. 325.

Where an instrument is made in terms so ambiguous as to make it doubtful, whether it be a bill of exchange or a promissory note, the law will allow(*p*) the holder, at his option, as against the maker of the instrument, to treat it either as a promissory note or as a bill of exchange. But where there is an absence of two distinct parties, as drawer and drawee, which circumstances are essential to the constitution of a bill of exchange, the instrument is a promissory note, and is properly declared on as such.(*q*) A note payable to A. or order, on demand, cannot be re-issued(*r*) after payment by the maker.

Bankers' cash notes, or goldsmiths' notes,(*s*) as they were formerly called, goldsmiths at that time being bankers, are promissory notes given by bankers, payable to order or bearer, on demand, and are stated as such in pleading. They are considered as cash, are transferable by delivery, but may be indorsed; in which case they
[*407] *may be declared on as a bill of exchange against indorser.

At present, cash notes are seldom made, except by country bankers; their use having been superseded by the introduction of checks.

Joint and several Notes.(1)—A note beginning, "I promise to pay,"

(*p*) *Edis v. Bury*, 6 B. & C. 433.

(*q*) *Miller v. Thompson*, 3 M. & Gr. 576; 4 Scott's N. R. 204.

(*r*) *Bartrum v. Caddy*, 9 A. & E. 275. See *Beck v. Robley*, *ante*, p. 346.

(*s*) Chitty, p. 239, 2nd ed.

In Pennsylvania, the statute of Anne never seems to have been expressly adopted, but a usage has gradually grown up in that state, of considering promissory notes as negotiable, and of allowing an action to be brought by the holder against the maker and indorser by analogy to the law merchant respecting bills of exchange. But before this usage was firmly established, it seems to have been held that the indorsee of a note took it subject to all equitable considerations to which the same was subject in the hands of the original payee. *M'Collough v. Houston*, 1 Dall. Rep. 441. But this seems now to be overruled. *S. C.* note, *ib.* 444. And it is held, that a bill or note must contain the words "or order," or other words of negotiability, to support an action by the indorser against the acceptor, maker, or indorsers. *Gerrard v. La Coste*, 1 Dall. Rep. 194; *Barriere v. Narsac*, 2 Id. 250; *Camp v. Wallace*, 5 Watts, 482; *Bullock v. Wilcox*, 7 Id. 328; *Louden v. Tiffenay*, 5 W. & S. 367. In Vermont, the state law permits the drawer of a note to set off any demand which he may have had against the payee before notice of the indorsement, and to plead or give in evidence any matter which would equitably discharge him in an action by the payee. 3 Griffith's Law Reg. 24. In Kentucky, the English rule founded upon the statute of Anne is modified in many material respects. 4 Id. 1140. In New Jersey, to prevent a set-off against the holder of claims, existing against the payee, it is necessary that the note should contain the words "without defalcation or discount." Nixon's Digest, 667, ed. 1855. In Pennsylvania, in a very early case, (*M'Collough v. Houston*, 1 Dall. 441, and note to 3d ed.,) it was held, that the indorser of a note took it subject to all equitable considerations existing between the maker and payee; but this case has long since been virtually overruled. By an act of the legislature, passed in 1797, promissory notes bearing date in the city or county of Philadelphia, in which the words, "without defalcation," or, "without set-off," are inserted, are held by the indorsers discharged from any set-off by the drawer or indorser. It has been held, that a note drawn out of the city or county of Philadelphia, in which the words "without defalcation," are inserted, stands upon the same footing. *Lewis v. Reeder*, 9 S. & R. 193. It was said by C. J. *Tilghman*, in that case, (p. 196,) that "the anti-commercial principle set up in the case of *M'Collough v. Houston*, has in most instances been rendered harmless by legislative provision." See Act of May 13, 1850; *Purd. Dig.* 92; *P. L.* 746.

In the other states of the Union the rule upon this subject is substantially the same as in England. See Griffith's Law Register.

(1) On a suit against the survivor of two joint makers of a note, a joint liability must

and signed by two or more persons, is several as well as joint.^(t) I a promissory note appears on the face of it to be the separate note of A. only, it cannot be declared on as the joint note of A. and B., although given to secure a debt for which A. and B. were jointly liable.^(u)

In an action by A. against B., upon a promissory note,^(x) it was stated in the declaration, that B. and another, jointly or severally, promised to pay it. It was holden, that the declaration was good; for *or* was synonymous to *and*. They both promised that they or one of them should pay; consequently both and each were liable *in solidum*. If an action is brought on a joint note,^(y) and some of the persons making the note are not made defendants, advantage can be taken of the omission by plea in abatement only. An action was brought against defendant only, on a joint and several note made by defendant and one Stoddart.^(z) Plea, non assumpsit. Defendant gave in evidence an agreement in writing, entered into by plaintiff with the assignees of Stoddart, then a bankrupt, to receive from them 600*l.* in lieu of 883*l.* actually due from the bankrupt on this note (which was for 100*l.*) and on other transactions; and that defendant was only surety for Stoddart. Defendant obtained a verdict. On motion to set it aside, it was resisted on the part of the defendant, on the ground that the agreement put an end to the plaintiff's recovery on the note; that the principal could not be discharged without discharging the surety also. On the part of the plaintiff it was urged, that it was not the meaning of the agreement that defendant should be discharged. But per Lord *Mansfield*, C. J., "the plaintiff was party to the agreement, and we cannot receive parol evidence to explain it. Whatever might be the intention of the parties,

(t) *March v. Ward*, Peake's N. P. C. 130.

(u) *Siffkin v. Walker and another*, 2 Campb. 308; *Emly v. Lye*, 15 East, 7.

(x) *Rees v. Abbott*, Cowp. 832.

(y) Per *Buller*, J., in *Rees v. Abbott*, Cowp. 832.

(z) *Garrett v. Jull*, B. R. M. 22 Geo. III. MS., cited by *Parke*, J., in *Price v. Edmunds*, 10 B. & C. 582.

be proved. And payment by the deceased debtor defeats the action against the survivor, although he represented, before the transfer to plaintiff, that it was still due. *Mott v. Petrie*, 15 Wend. 317. If one of two joint payees and indorsers of a note for the accommodation of maker, die before it falls due, his representatives are discharged. *Kennedy v. Carpenter*, 2 Whart. 344. Judgment and satisfaction by one of two makers, is payment for both. *Farwell v. Hilliard*, 3 N. H. R. 318. One of two promissors on a joint and several note, is not discharged *at law*, by proving he was a surety, and had been injured by plaintiff's failure to sue the other. *Kerr v. Baker*, Walker, 140. Where A. signed a note on demand with the maker, and at the end of his name wrote "surety for ninety days from date," held, a guarantee from that time only. *Ulmer v. Reed*, 2 Fairf. 293. Payment of interest on a note by one of two joint and several makers, takes it out of the statute of limitations as against a surety. *Sigourney v. Drury*, 14 Pick. 387. Where one of three joint and several makers is sued to judgment, the other two cannot be sued jointly, although the previous recovery is set forth. *Bangor Bank v. Treat*, 6 Greenl. 207. One of two indorsers of a note, who has paid half the amount, is entitled to an assignment on a judgment against the maker, and his surety on a recognizance for stay of execution. *Burns v. Huntingdon Bank*, 1 Penn. R. 395; *Goswiler's case*, 3 Id. 200. A note payable to three, may be indorsed by two to the third and a stranger. *Goddard v. Lyman*, 14 Pick. 268. A joint and several note by two, payable at their dwelling-houses, was presented to both at the barn-yard of one, and no objection made. Held, good demand. *Baldwin v. Farnsworth*, 1 Fairf. 414.

the principal cannot be released without its operating for the benefit of the surety." Rule discharged.

Consideration.(1)—It will be presumed, that the note has been given for a good and valuable consideration until the contrary appear. As between the immediate parties, want or illegality of consideration may be insisted on as a defence.(2) In an action by the payee against the maker of a promissory note for 10*l.*,(a) which had been given by the defendant as an apprentice fee with his son to the plaintiff, to whom the son was bound; it appeared, at the trial, that in the indentures of apprenticeship no mention had been made *of this premium [*408] having been given with the apprentice, nor was there any stamp thereon in proportion to the value, as required by stat. 8 Ann. c. 9, in default of which, by the 39th section of the stat. the indentures are declared to be void. The apprentice remained some part of his time with his master, and then absconded. It was objected, on the part of the defendant, that the indentures being void, the consideration of the note had failed. To this it was answered, that the avoiding of the indentures could not collaterally affect this note; but that at all events it was sufficient, if there were any consideration to sustain it; and here the master had provided board and lodging for some time for the apprentice. But *Lawrence, J.*, was of opinion, that the consideration was entire, and that it had wholly failed. The Court of King's Bench concurred in opinion with the learned judge. But it is otherwise, if the consideration has not(b) wholly failed. In an action by payee of a note expressed to be "in consideration of the payee's care

(a) *Jackson v. Warwick*, 7 T. R. 121.

(b) *Mann v. Lent*, 10 B. & C. 877. See also *Obbard v. Betham*, M. & Malk. 483, and *ante*, p. 174, n.

(1) A note, though expressed to be "for value received," if without consideration, will not support an action by payee. *Raymond v. Sellick*, 10 Conn. 480. An expectation on the part of payee that maker would marry her, is not a sufficient consideration. *Ib.* A note for a patent right which is void, is without consideration. *Dickinson v. Hall*, 14 Pick. 217. But not to a *bonâ fide* holder. *Goddard v. Lyman*, 14 Id. 268. When there are two considerations for note, one good and the other bad, the note may be apportioned. *Parish v. Stone*, *Ib.* 198. Total failure of title to land where there are covenants of *seisin* and warranty, is a good defence to a note between the original parties, or one who takes it after due. *Rice v. Goddard*, *Ib.* 293. Breach of warranty is a good defence on a note given for goods warranted. *Shepherd v. Temple*, 3 N. Hamp. R. 455. But when the note was given in consideration of a deed conveying all the payee's right to land, it is no defence that he had no interest, unless there be fraud. *Perkins v. Bunford*, *Ib.* 522. A note given for purchase of *real estate* held *adversely*, is not void in hands of *bonâ fide* holder. *Vallett v. Parker*, 6 Wend. 615. An outstanding liability as surety is good consideration for a note from principal on demand, and suit lies immediately. *Little v. Little*, 13 Pick. 426. The words "without defalcation," in a sealed note, do not bar defendant from showing want of consideration in a suit by assignee. *Houk v. Foley*, 2 Penn. R. 245. The purchase of a ticket supposed to have drawn a prize, but which, in truth, had drawn a blank, is a good consideration for a note. *Barnum v. Barnum*, 8 Conn. 469. A note void for want of consideration, cannot be enforced by an assignee with notice of it. *Rumsey v. Leek*, 5 Wend. 20. A note by a vestryman for a debt due from the corporation without consideration to himself, is *nudum pactum*. *Rogers v. Waters*, 2 Gill. & J. 64. An indorsement by a third person on a note "I guarantee its ultimate payment," is *nudum pactum*. *Aldridge v. Turner*, 1 Id. 427. Where defendant relies on failure of consideration or fraud, *onus probandi* lies on him. *Towsey v. Shook*, 3 Blackf. 267; *Alloway v. Sebert*, *Ib.* 401.

(2) *Schoonmaker v. Roosa*, 17 Johns. Rep. 601; see *Dunning v. Sayward*, 1 Greenl. 366.

and medical attendance bestowed on the maker;" it was holden, (c) that evidence was admissible to show the consideration to have been medicines furnished and services performed as an apothecary; and if that was proved, that the plaintiff could not recover, without showing that he had obtained his certificate under 55 Geo. III. c. 194, s. 21. (1) Where a note has been given under such circumstances that the payee cannot recover on it, the indorsee must prove that he became so for a valuable consideration; (d) although no notice be given to him to produce such evidence. It is not necessary that the indorsement should be written with ink: it may be with a pencil. (e) (2) In an action by the indorsee against the maker of a promissory note, the defence insisted on was, that the note had been given for hits against defendant in a lottery insurance; *Kenyon*, C. J., was of opinion, that the plaintiff was entitled to recover, observing, that the innocent indorsee of a gaming note, or note given on an usurious contract, could not recover, (f) but in no other case could the innocent indorsee be deprived of his remedy on the note; and that a contrary determination would shake paper credit to the foundation. (g) A person who, at the request of the holder of a note, has put his name upon it, and in consequence thereof has been obliged to pay the contents to a *bonâ fide* holder, *may recover the money paid from any person whose name is [*409] on the note, although he knew that the note was originally given for an illegal consideration, viz. for premiums for the insurance of tickets in the lottery. (h) (3)

Stamp.—Every promissory note must be duly stamped, that is, with a stamp of the proper value and proper denomination. A promissory note, (i) given at the time when the 31 Geo. III. c. 25, was the only statute regulating the stamp duty on promissory notes, was holden not available in law, because it was stamped with a receipt stamp, although

(c) *Blogg v. Pinkers*, 1 Ry. & Moo. 125.

(d) Per three judges, *Heath v. Sansom*, 2 B. & Ad. 297, cited by *Tindal*, C. J., *Bassett v. Dodgin*, 10 Bingh. 43. But *Parke*, J., confines the rule to cases where the note has been obtained by fraud or felony, or duress, which throws suspicion on holder's title. "I am by no means satisfied that the same rule can be applied to *all* cases where the note has been given without consideration. The mere fact of want of consideration between maker and payee, affords no inference that the holder received the note *mala fide*, or without consideration;" and see *Bingham v. Stanley*, 2 Q. B. 117.

(e) *Geary v. Physic*, 5 B. & C. 234.

(f) But see stat. 5 & 6 Will. IV. c. 41, *ante*, p. 342.

(g) *Winstanley v. Bowden*, Middlesex Sittings, after M. T. 41 Geo. III.; B. R. MSS.

(h) *Seddons v. Stratford*, London Sittings after T. T. 34 Geo. III.; *Kenyon*, C. J., *Peake's N. P. C.* 215.

(i) *Chamberlain v. Porter*, 1 Bos. & Pul. N. R. 30.

(1) Where the action is brought, not as between immediate parties, and the plaintiff is a *bonâ fide* holder for a valuable consideration, without notice, such illegal consideration only as makes the note void *ab initio*, viz., gaming and usury, can be alleged in bar to the action. See *Natchez v. Tremble*, Walker, 376; *McCauley v. Mandis*, Ib. 307.

(2) The initials of the name of the holder of a bank check, indorsed on the check, are sufficient to charge him as indorser. *Merchants Bank v. Spicer*, 6 Wend. 443.

(3) A promissory note given on the sale of the chattel fraudulently represented by the vendor to be of great value, when in fact it was of no value, is without consideration and void; and in an action on the note thus given for the price, the defendant may show deceit in the sale, under the general issue. *Sell v. Rood*, 15 Johns. Rep. 230.

it was of equal value with that required for a promissory note. For the amount of the stamp duties on promissory notes, see stat. 55 Geo. III. c. 184. For the statutes(*k*) regulating notes given for a less sum than five pounds, see Chitty on Bills, Appendix, sect. 8, 2nd edit. A bill was, in fact, drawn on the 21st day of December, for 21*l.*, payable two months after date, but on the face of it purported to bear date on the 31st; it was holden(*l*) to require only a stamp of 2*s.* which is imposed by 55 Geo. III. c. 184, on bills for that sum, not exceeding two months after date. The word "date," as there used, means the period of payment expressed on the face of the bill. A promissory note(*m*) of 40*l.*, payable to bearer generally, and therefore, in law, payable on demand, is within the first class of promissory notes in schedule, part 1, to the 55 Geo. III. c. 184, and requires a 5*s.* stamp. A promissory note(*n*) payable to A. B. generally, is not one payable to bearer on demand, and re-issuable within this first class; but a note payable otherwise than to bearer on demand, (not re-issuable,) within class 2. So a promissory note made for payment of 20*l.* to B. on demand.(*o*)

Of the pleadings under the new rules, see *ante*, p. 391.

X. *Of the Time when a note ought to be presented for payment.*

Payment must be demanded within a reasonable time after the note becomes due.(1) Whether a note has been presented for payment within a reasonable time is a question of law, but dependent on facts, *viz.*, the situation of the parties, their places of abode, and the facility of communication between them.(*p*)(2) On promissory notes payable at a certain time after date, or after sight, three days' grace are [*410] allowed: consequently, payment of such notes ought *not to be demanded until the last of the three days, unless it happen to be a Sunday, or a great holiday, in which case payment ought to be

(*k*) 15 Geo. III. c. 51; 17 Geo. III. c. 30; 37 Geo. III. c. 32.

(*l*) *Upstone v. Marchant*, 2 B. & C. 10.

(*m*) *Wells v. Girling*, 8 Taunt. 737.

(*n*) *Cheetham v. Butler*, 5 B. & Ad. 837.

(*o*) *Dixon v. Chambers*, 1 C. M. & R. 845; 5 Tyr. 502; 1 Gale, 14; overruling *Keates v. Whieldon*, 8 B. & C. 7.

(*p*) *Darbishire v. Parker*, 6 East, 3.

(1) A note payable in so many days without more, is payable in so many exclusive of the day of the date. *Leavitt v. Simes*, 3 N. H. R. 14. Statute of limitations runs from date of note payable on demand. *Little v. Blunt*, 9 Pick. 488. See *Taylor v. Young*, 3 Watts, 339.

(2) As to what is diligence, see *Sice v. Cunningham*, 1 Cow. 397; *Shepperd v. Citizens' Insurance Company*, 8 Mis. 272; *Planters' Bank v. Bradford*, 4 Humph. 39; *Brener v. Whitman*, 7 Watts. & Serg. 264; *Rhett v. Roe*, 2 How. U. S. 157; *Carroll v. Upton*, 2 Sandf. Sup. Ct. Rep. 171; *Rawden v. Redfield*, *ib.* 178; *Lambert v. Ghiselin*, 9 How. U. S. 552; *Johnson v. Lewis*, 1 Dana, 182; *Davis v. Howick*, 6 Ham. 55; *Bank of Columbia v. Lawrence*, 1 Peters, 578; *Van Hoesen v. Van Alysten*, 3 Wend. 75; *Nash v. Harrington*, 1 Aiken, 39; *Bronaugh v. Scott*, 5 Call, 78; *Harris v. Robinson*, 4 How. U. S. Rep. 336; *Goodlow v. Godloe*, 6 Sm. & Mar. 255; Chitty on Bills, 221, note, 12 Am. ed.

demanded on the next preceding day. The three days of grace are computed exclusively of the day on which the payment is by the terms of the note to be made. It has not been determined solemnly, whether days of grace are to be allowed on notes payable at sight.^(q) They are not allowed on notes payable on demand.⁽¹⁾ A maker of a promissory note payable by instalments, is entitled to the days of grace upon the falling due of each instalment.^(r) Where a note is made payable at a month or months after date, the computation must be (contrary to the general rule of law) by calendar and not by lunar months. Where a note is in the hands of an indorser, and he demands payment thereof from the maker, who refuses or omits to pay the same, notice of such refusal or default ought to be given by the indorsee himself^(s) to the prior indorser or indorsers (if more than one) within a reasonable time; otherwise the indorsers will be discharged. Action against defendant, as indorser of this note,^(t) "One month after date, I promise to pay Wm. George, or order, the sum of 16*l.*, for value received. John Hopley." Indorsed, Wm. George. This note George had given in payment to the plaintiff; it became due 2nd May, and on the 5th May the plaintiff's banker (after three days' grace) demanded it of Hopley. Hopley desired two or three days' time to pay it in, and so from time to time, which were given him, till 13th May, when he told the banker he could not pay it. On the 14th, Hopley failed, and became a bankrupt. On plaintiff's applying to George for payment, George told him he should have applied before, on Hopley's first refusal, and that he now did not think himself liable to pay it; whereupon this action was brought. Lord *Mansfield*, C. J. "The question is, who is to bear the loss, as Hopley, the drawer, has failed? Now it is so necessary for trade, where a bill of exchange is drawn on one man, and made payable to another, that if the person to whom it is payable, either wilfully or through neglect, omits to call at the time it becomes due, it is the constant course of mercantile custom in the city of London, that he shall bear the loss and not the other. This likewise is the rule on indorsed notes, which are in nature of inland bills of exchange; nothing is so certain as this rule, and great inconvenience would follow from a different mode of proceeding. It has been truly said that the law has not fixed any precise time when the neglect of the indorser shall be said to make him liable; but I remember a case determined, where a bill became due at two o'clock on Saturday afternoon, the person who gave the note became a bankrupt at five o'clock on Monday afternoon; the question was, whether the indorsee *had not [*411] neglected to call for his money; and it was holden, that he

(q) See this question discussed in Chitty's Treatise on Bills, p. 195, 2nd ed.

(r) *Oridge v. Sherborne*, 11 M. & W. 374.

(s) But see *ante*, p. 354.

(t) *Anderson v. George*, London Sitings, after Trin. T. 1757, coram Lord *Mansfield*, C. J., MSS.

(1) Where a note is payable on demand, demand and notice must take place within a reasonable time. *Five months* is an unreasonable delay, where all the parties live in the same city. *Sice v. Cunningham*, 1 Cowen, 397.

had. The present case is not that of neglect: the note is dated on 2nd April, consequently becomes due on 2nd May, but by the custom of the city there are three days of grace; the banker who has the note in his hands, and who in this case, being the plaintiff's agent, is to be considered as one and the same person with the plaintiff, comes on 5th and demands payment; the indorser and all the parties live in town; the banker gives Hopley indulgence to pay it from the 5th to 13th, without giving any notice to the indorser, which if he had done, it would have urged the indorser to get his money. Now here is no neglect of application. The case is still stronger: here is an actual credit given for eight days; and the question is, who gave the credit? We cannot go into any consideration of Hopley's circumstances at the time; they might be very bad; and yet if he had been arrested on 5th May, we cannot say he would have paid the money. I am therefore of opinion, that the loss, (though this is a hard case), ought to be borne by the person who gave the credit." Verdict for the defendant.

Action against the defendant as indorser of a promissory note,^(u) due May 4th, 1805. The plaintiff proved the defendant's indorsement; and, also, that in the year 1807, the defendant being requested to pay the note, he promised that he would, but prayed for further time. There was no evidence of the presentment of the note to the maker, or of any notice of its non-payment being given to the defendant, nor did it appear that when the defendant so promised to pay, he knew of any application for payment having been made to the maker. For the defendant it was contended, that the subsequent promise did not dispense with proof of the presentment and notice, unless made with full knowledge of the laches of the holder. In the cases hitherto decided upon this subject, something appeared which might be considered as a waiver of any irregularity, with regard to the bill or note, which could not be inferred from a mere promise to pay, at a time when the party, without being aware of it, was discharged from his liability. But *Bayley, J.*, held, that where a party to a bill or note, knowing it to be due, and knowing that he was entitled to have it presented when due, to the acceptor or maker, and to receive notice of its dishonour, promises to pay it; this is presumptive evidence of the presentment and notice, and he is bound by the promise so made. Verdict for the plaintiff. But if the drawer or indorser, after being arrested, without acknowledging his liability, merely offers to give a bill by way of compromise for the sum demanded, which offer is rejected, this does not supersede the necessity of notice.^(x)

[*412] *XI. *Of the Declaration.* p. 412. *Pleadings.* p. 412.
Evidence. p. 412. *Conclusion.* p. 414.

The usual remedy on a promissory note is an action of assumpsit.⁽¹⁾

^(u) *Taylor v. Jones*, 2 Campb. 105, and see *Brownell v. Bonney*, 1 Q. B. 39, 4 P. & D. 523.

^(x) *Cumming v. French*, 2 Campb. 106, n.

(1) An action of debt lies by the payee of a note against the maker, where the note is

Under the new rules, concise forms are given, adapted to the different parties, to which the reader is referred.(1)

expressed to be for value received. *Raborg v. Peyton*, 2 Wheat. Rep. 385. So also by indorsee. *Willmarth v. Crawford*, 10 Wend. 341.

(1) The following note is to be found in the former editions, and now retained, as being useful in this country, where the new rules referred to in the text do not prevail.

In the first count of the declaration, the note ought to be set forth accurately, that is, either in the terms in which it was made, or according to the legal effect and operation of those terms; for a variance in any material point, between the statement in the declaration and the note produced in evidence, will be fatal.

As where in an action on a promissory note, (*Gordon v. Austin*, 4 T. R. 611,) made by the firm of Austin, Strobell & Shirtliff, who were declared against by the name of William A., Robert S., and William S., and it was proved that the firm consisted of William A., Daniel S., and William S., it was holden that the variance was fatal.

Formerly it was holden, that where the maker of a promissory note made a memorandum, (*Price v. Mitchell*, 4 Campb. 200; see also *Head v. Sewell*, Holt, N. P. C. 363, in the margin, or at the foot of it, *Sanderson v. Judge*, 2 H. Bl. 509,) that he would pay it at the house of A., as this did not form any part of the contract, it was not necessary to state it in the declaration; but if it formed a part of the body of the note, it must be stated, and it must be averred, that the note was presented for payment at that place, even in an action against the maker. *Sanderson v. Bowes*, 14 East, 500, adjudged on demurrer. See also *Roche v. Campbell*, 3 Campb. N. P. C. 247.

Since the case of *Rowe v. Young*, 2 Brod. & Bingh. 165, it has been holden, (*Sproule v. Legg*, 3 Stark. N. P. C. 156,) that the memorandum at the foot, making the note payable at a particular place, does form part of the contract, and that it is not any variance to allege the note to be so payable.

In cases where several notes have been made by the defendant, and which are due and payable, a count on each note ought to be inserted in the declaration.

To the special count or counts, such of the common counts ought to be added as may be adapted to the circumstances of the case. The giving and receiving of a negotiable note for goods sold without any agreement, is not extinguishment of original cause of action. *Bill v. Porter*, 9 Conn. R. 23; *Silmore v. Bussy*, 3 Fairf. 418; *Hart v. Boller*, 15 S. & R. 162. See *Watkins v. Hill*, 8 Pick. 522. If the note is unpaid and produced, or proved to be lost, unless such is the express agreement. *Glenn v. Smith*, 2 Gill & J. 493. A note not negotiable is no bar to an action on the account for which given. *Trustees v. Kendrick*, 3 Fairf. 381. The acceptance of a note for a precedent debt, suspends the remedy on it until the note reaches maturity. *Glenn v. Smith*, 2 Gill & J. 493; *Okie v. Spencer*, 2 Whart. 253. A note taken by express agreement, in payment of a judgment, extinguishes the precedent debt. *New York State Bank v. Fletcher*, 5 Wend. 85. When a creditor takes his debtor's draft on a third person, and receives from the latter notes payable in six or nine months, he discharges the drawer. *Southwick v. Sax*, 9 Wend. 122. The holder of a bill, who takes it for a precedent debt, stands in the shoes of drawer. *Ontario Bank v. Worthington*, 12 Wend. 593. In Maine, the legal presumption is, that a negotiable instrument, accepted for a precedent debt, is an extinguishment: but it may be rebutted. *Descasillas v. Harris*, 8 Greenl. 298. But not so if made abroad, unless made so by the laws of such country. *Ib.*

Although on a count for money lent, or for money had and received, a promissory note may be given in evidence, (Str. 725,) as affording a presumption that so much money was lent, or had and received; and although the jury, in case such evidence be not rebutted, will conclude against the defendant, yet it is advisable to declare specially on the note; for otherwise, in the case of a judgment by default, the usual reference to the master in B. R. or prothonotary in C. B. cannot be made to compute principal, interest, and costs. *Osborne v. Noad*, 8 T. R. 648.

Where a note is payable to A. or order, and indorsed, the indorser is considered as a warrantor of the note; and, therefore, it is necessary, in an action brought against the indorser, to allege and prove the demand of the maker, adjudged in C. B. E. 4 G. 2, cited by *Lee*, C. J., in 2 Str. 1087, recognized by Lord *Mansfield*, C. J., in 2 Burr. 676, and notice of default or refusal to pay, within a reasonable time, proceeding from the holder himself. *Tindal v. Brown*, 1 T. R. 167.

To an action on a promissory note, any plea may be pleaded which the law permits to be pleaded to actions founded on contract, *e. g.*, accord and satisfaction, coverture, infancy, payment. statute of limitations, set-off, tender, as to which, see *ante*, tit. Assumpsit, s. iv. p. 121, &c. Where a promissory note is revived by a new promise, after

To action of assumpsit by A., B., and C., against D.,^(y) as one of the indorsers of a promissory note drawn by E., in favour of C., D., (and himself) E., then in partnership, and by them indorsed to A., B., and C.: defendant pleaded in bar, that C., one of the plaintiffs, was liable as an indorser, together with D. On special demurrer, the plea was holden to be good; Lord *Eldon*, C. J., observing, that the subject of this plea could not have been pleaded in abatement; because a plea in abatement ought to give a better writ, not to show that the plaintiff could have no action at all. The effect, however, of a judgment for the defendant would be, that if a man made a note to himself and others carrying on business under a particular firm, and the partnership was dissolved, the promissory note could neither be put in suit as such, nor enforced as an equitable agreement, because on a promissory note stamp. Considering, therefore, the quantity of circulating paper in this country, standing under the same circumstances with the note in question, the consequence of such a decision might be highly injurious. However, the case of *Moffat v. Van Millengen*^(z) was unanswerable.

Evidence.—It is a general rule, that to prove the contract the original note must be produced in evidence. This rule is dispensed with in special cases only; as where it can be proved, that the note has been lost or destroyed by the defendant,^(a) or that it is in the hands of the defendant, and *that he has had notice to produce it.*^(b) In

^(y) *Mainwaring v. Newman*, 2 Bos. & Pul. 120.

^(z) 27 Geo. III. B. R. 2 Bos. & Pul. 124, n. (e), cited in *Ross v. Poulton*, 2 B. & Ad. 826.

^(a) Lord Raym. 731.

^(b) 2 Bos. & Pul. 39.

the statute of limitations attaches, it may be transferred, and indorsee may sue in his own name. *Dean v. Hewitt*, 5 Wend. 527; *Little v. Blunt*, 9 Pick. 488. Part payment of a note within six years, takes it out of statute. *Howe v. Thompson*, 2 Fairf. 152; *Clapp v. Ingersoll*, Ib. 83. A note is barred by statute of limitations, although an indenture has been executed by maker, and seven years' stay stipulated for, and executed by plaintiff as well as defendant, the maker. *Harvey v. Toby*, 15 Pick. 99.—As to presumption of payment of bills from lapse of time, see *Hopkirk v. Page*, 2 Brockenb. C. C. R. 20. Payment after suit, on a note, cannot be given in evidence on the general issue, as an answer to the action: but it may perhaps to reduce the damages. *P. Bank v. Brackett*, 4 N. H. R. 557. Where A., shortly before the failure of the drawer, and in anticipation of it, sold the note to a debtor of the drawer, and it was set off against the claim of the assignee of the maker by the purchaser, A. is not liable to the assignee. *Heppard v. Beylard*, 1 Whart. 223. Where a negotiable note was made to plaintiff, and it was agreed that a note of plaintiff's, held by defendant, should be set off, but he had it not with him: Held to be an executory agreement, that did not extinguish the smaller note. *Carey v. Bankroft*, 14 Pick. 315. In a suit by indorsee of a note, on a plea of set-off against payee by a defendant, and an averment that the note belonged to payee, and was transferred to plaintiff to bar the set-off, a replication that the note is plaintiff's property, and not the payee's, without traversing the corrupt transfer, admits that, and the set-off. *Savage v. Davis*, 7 Wend. 223. A debt due from payee may be set off in a suit on a note not negotiable, assigned for valuable consideration. *Sanborn v. Little*, 3 N. H. R. 539. A set-off of a demand against payee, may be made in a suit on a note transferred over-due. So where the plaintiff is not the real owner. *Driggs v. Rockwell*, 11 Wend. 504. Unless the payee at the time of the transfer has demands against defendant, to same or greater amount than the set-off. *Collins v. Allen*, 12 Wend. 356; *Barney v. Norton*, 2 Fairf. 350. Defendant may show, by way of set-off to a note, that he made payments on a contract in which he was concerned with plaintiff. *M'Fadden v. Erwin*, 2 Whart. 37.

these cases a copy of the note, or parol evidence of its contents, may be received.

The remaining evidence necessary to support the action will vary according to the character in which the parties bring the action. In an action by *payee* against the maker, the hand-writing of the maker must be proved by the subscribing witness, if any; if not, by some person who is competent to prove such hand-writing. In an action by *first indorsee* against the maker, the same evidence as in the preceding case, together with proof of the indorsement to the plaintiff, will be necessary. In an action against an indorser, proof of the hand-writing of the maker, or of any indorser prior to the defendant, (except the first,) unless specially alleged in the declaration, is not necessary; but in this case it must be proved that payment was duly demanded of the maker, and that the maker *refused to pay, [*413] or made default therein, and that notice of such refusal or default was given to the defendant within a reasonable time. In action against the *maker* of a note, although the promise be to pay the money at a particular place, it is not necessary to prove a presentment at that place; (c) if the place of payment be mentioned in the margin or at the foot of the note. (d) If a bill be payable or indorsed specially to a firm, evidence must be given that the firm consists of the persons who sue as plaintiffs; *secus*, if the indorsement be in blank. (e) A. being in insolvent circumstances, (f) B. undertook to be a security for a debt owing from A. to C., by indorsing a promissory note made by A. payable to B. at the house of D. The note was accordingly so made and indorsed, with the knowledge of all parties. Just before it became due, B. having been informed that D. had no effects of A. in his hands, desired D. to send the note to him, B., and said he would pay it, B. having then a fund in his hands for that purpose; the note was not presented at D.'s house till three days after it was due. It was holden, that C. could not maintain an action against B. on the note, not having used due diligence in presenting the note as soon as it was due, to D. for payment, and in giving immediate notice to B. of the non-payment by D.; for B. had a right to insist on the strict rule of law respecting the indorser of a note, notwithstanding the particular circumstances of the case. In an action by a second, third, or any subsequent indorsee, against the maker, where the first indorsement is in blank; as the plaintiff is not bound to set forth any indorsement, except the first, but may strike out the others, if he adopts this course, the proof will be the same as in the preceding case; but if all or any of the indorsements, subsequent to the first are set forth, they must be proved. Indorsements of interest are to be presumed (g) to have been written at the time they bear date, until contradicted. (1) The defendant may

(c) *Nicholls v. Bowes*, 2 Campb. 498; *Williams v. Waring*, 10 B. & C. 2.

(d) *Price v. Mitchell*, 4 Campb. 200.

(e) *Ord v. Portal*, 3 Campb. 239.

(f) *Nicholson v. Gouthit*, 2 H. Bl. 609.

(g) *Smith v. Battens*, 1 M. & Rob. 341.

(1) See *Clapp v. Ingersoll*, 2 Fairf. 83.

show either that there was no consideration for the note, or that the consideration has failed.^(h) The defendant cannot give in evidence a parol agreement, entered into when the note was made, that it should be renewed, when it became due;⁽ⁱ⁾ nor a parol agreement that payment shall not be demanded^(k) until after such a time; for this would be incorporating with a written contract an incongruous parol condition, which is contrary to first principles.⁽¹⁾ Where a promissory note, on the face of it, purported to be payable on demand, parol evidence is not admissible to show,^(l) that, at the time of making it, it

was agreed that it should not be payable until after the [*414] *decease of the maker. Where in an action by the indorsee against the maker of a promissory note, payable with interest on demand, the plaintiff having proved that he gave value for it, the defendant tendered evidence of declarations made by the payee, when the note was in his possession, that he (the payee) had not given any consideration for it to the maker; it was holden,^(m) that the evidence was inadmissible, as the payee could not be identified with the plaintiff, and the note could not be treated as over due at the time of the indorsement. So where, in an action by indorsee of A., of a note, against maker, plea, that the note was made without consideration, and indorsed and delivered by A. to W., for the purpose only of its being discounted; that W., in fraud of the maker, (defendant,) and without his consent, indorsed the same, and delivered it to plaintiff, who gave no consideration, and who knew of the want of authority; it was holden,⁽ⁿ⁾ that evidence tendered by defendant of declarations made by W., to prove the fraud, was not admissible; inasmuch as there was not shown any community of interest, neither was any evidence offered, which either directly or indirectly connected the plaintiff with W., or to show want of consideration, or that the note had been taken when over due. Where a promissory note, beginning, "I promise to pay," was signed by one member of a firm for himself and partners; it was holden,^(o) that he was liable to be sued severally upon the note.

On a plea that the defendant did not make the promissory note

(h) Per Tindal, C. J., *Abbott v. Hendricks*, 1 M. & Gr. 794; 2 Scott's N. R. 183, recognizing *Foster v. Jolly*, 1 Cr. M. & R. 703; 5 Tyrwh. 239.

(i) *Hoare v. Graham*, 3 Campb. 57.

(k) *Free v. Hawkins*, 8 Taunt. 92; *Mosley v. Handford*, 10 B. & C. 729, S. P.; *Ransom v. Walker*, 1 Stark. 361; *Foster v. Jolly*, 1 Cr. M. & R. 703; 5 Tyrw. 239.

(l) *Woodbridge v. Spooner*, 3 B. & A. 233.

(m) *Barrough v. White*, 4 B. & C. 325.

(n) *Phillips v. Cole*, 10 A. & E. 106.

(o) *Hall v. Smith*, 1 B. & C. 407.

(1) Parol evidence is not admissible to show that on an indorsement of a note indorser agreed to be liable without demand and notice. *Barry v. Moore*, 3 N. Hamp. R. 132. The maker of a note may show by parol that payee, subsequent to its execution, agreed that payment might be made to a third person. *Low v. Treadwell*, 3 Fairf. 441. A memorandum written on a note payable on demand, "that one-half was payable in twelve months, the balance in twenty-four," may be explained as to its circumstances by parol, by either party. *Heywood v. Perrin*, 10 Pick. 288. The declarations of payee before indorsement, are good evidence of payment against one who received it after due. *Hatch v. Dennis*, 1 Fairf. 244. See *Shirley v. Todd*, 9 Greenl. 83.

mentioned in the declaration, he cannot give in evidence that he was of imbecile mind at the time when he made it. (*p*)

Conclusion.—The limits prescribed to this Abridgment will not permit the insertion of any more cases under this head, nor indeed is it necessary; for although a promissory note, (*q*) while it continues in its original shape, does not bear any resemblance to a bill of exchange, yet when it is indorsed the resemblance begins; for then it is an order by the indorser upon the maker of the note to pay to the indorsee: the indorser is as it were the drawer, the maker of the note the acceptor; and the indorsee the payee. From this resemblance between a bill of exchange and promissory note, it follows that many of the rules which are applicable to bills of exchange, hold also in the case of promissory notes. (*r*) (1) But the indorser does not stand in the situation of maker, relatively to his indorsee. (2) Hence the indorsee cannot declare against his indorser as maker, even where the indorser has indorsed a note not payable or indorsed to him, and where consequently his indorsee cannot sue the original maker. (*s*)

* CHAPTER X.

[*415]

CARRIERS.

- I. OF COMMON CARRIERS, AND THEIR RESPONSIBILITY. p. 415.
- II. OF THE STAT. 11 GEO. IV. AND 1 WILL. IV. c. 68, LIMITING THE RESPONSIBILITY OF CARRIERS BY LAND, AS TO THE LOSS OF PARCELS OF A CERTAIN DESCRIPTION. STAT. 7 GEO. II. c. 15; 53 GEO. III. c. 159. p. 420.
- III. OF THE LIEN OF CARRIERS. p. 425.
- IV. BY WHOM ACTIONS AGAINST COMMON CARRIERS OUGHT TO BE BROUGHT. p. 427.
- V. OF THE DECLARATION. p. 429; AND PLEADING UNDER NEW RULES. p. 433.
- VI. EVIDENCE. p. 433.

(*p*) *Harrison v. Richardson*, 1 M. & Rob. 504, *Abinger*, C. B.

(*q*) Per Lord Mansfield, C. J., *Heylyn v. Adamson*, 2 Burr. 676.

(*r*) See *De Berdt v. Atkinson*, 2 H. Bl. 336; and *ante*, p. 357, and notes.

(*s*) *Gwinnell v. Herbert*, 5 A. & E. 436. See *Burmester v. Hogarth*, 11 M. & W. 97.

(1) The reader will find most of the American authorities and decisions respecting promissory notes under their appropriate heads in the preceding part of this title treating of bills of exchange.

(2) An indorsee, citizen of one state, may sue indorser, citizen of another state, although no action lies there by him against the maker. *Evans v. Gee*, 11 Peters, 81.

I. Of Common Carriers, and their Responsibility.(1)

MASTERS(a)(2) and owners of ships,(3) hoymen, wharfingers,(b)(4) lightermen, barge-owners,(c) proprietors of waggons, stage-coaches, &c., are denominated common carriers; and by the custom of the realm,(d)

(a) *Morse v. Slue*, 2 Lev. 69.

(b) *Maving v. Todd*, 1 Starkie's N. P. C. 72.

(c) *Rich v. Kneeland*, Cro. Jac. 330; Hob. 17, S. C.

(d) 1 Roll. Abr. 2, (C), pl. 1.

(1) The law regulating the responsibility of common carriers, *as to goods*, does not apply to the carriage of negroes. They are rather to be considered as passengers. *Boyce v. Anderson*, 2 Pet. 155. See *Stokes v. Saltonstall*, 13 Id. 181; Ang. on Carriers, § 122.

(2) Masters and owners of vessels, who undertake to carry goods for hire, are liable, as common carriers, whether the transportation be from port to port, within the state or beyond sea, at home or abroad; and they are answerable as well by the marine law as the common law, for all losses not arising from the act of God, inevitable accidents, or such as could not be foreseen or prevented. *Elliot v. Rossell*, 10 Johns. Rep. 1.

In *Aymar v. Astor*, 6 Cowen, 266, however, the Supreme Court of New York held, that masters of vessels transporting goods on the high seas, were not responsible as common carriers according to the above rule. See the remarks by Chancellor Kent, upon this decision, in vol. 2d of his Commentaries, p. 472-3. The owners of a steamboat, carrying not only passengers but light freight and parcels for hire, are common carriers, and answerable for all goods accordingly; and an action for the loss of a packet of bank notes delivered to the captain for carriage, will lie against them. *Allen v. Sewall*, 2 Wend. 327. And an arrangement between the owners of steamboats and their captains, allowing the profits of carrying bank notes as a privilege to the latter, does not discharge the owners unless the shipper contracts with the captain himself, knowing that he receives the goods on his own account. *Ib.*

In Pennsylvania, it is said that the liability of carriers on *land* is the same as in England; but with respect to carriers on the internal rivers, it seems that a different rule prevails. *Gordon v. Little*, 8 S. & R. 533, and see *Bell v. Read*, 4 Binn. 127.

The Supreme Court of the United States, in the case of *Boyce v. Anderson*, 2 Peters's Rep. 150, decided that the law regulating the responsibility of carriers, did not apply to the carriage of human beings, as negro slaves; Chief Justice Marshall, delivering the opinion of the court, said: "The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in the cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried further or applied to new cases." The same doctrine was maintained by the Court of Appeals of South Carolina. *Clark v. M'Donald*, 4 M'Cord, 223.

The English rule appears to prevail in North Carolina, with respect to freighters for hire on navigable rivers. *Williams v. Branson*, Murphy, 417. So in South Carolina, *Harrington v. Lyles*, 2 Nott & M'C. 88; and Virginia, *Murphy v. Staton*, 3 Munf. 239. And so as to the carriers on the western rivers, *Craig v. Childress*, Peck's Tenn. Rep. 270.

In Louisiana, however, it has been held that the owners of a steamboat destroyed by fire, are not liable to the freighters, if it appear that proper diligence was used. *Hunt v. Morris*, 6 Martin's Rep. 676. As to who are common carriers, see Angell on Carriers, §§ 67-123.

(3) The owner of a steamboat, who undertakes to tow a freight boat, is not a common carrier, and is bound to no more than ordinary care. *Caton v. Rumney*, 13 Wend. 387; *Penn. Nav. Co. v. Dandridge*, 8 Gill & Johns. 109; *Alexander v. Greene*, 3 Hill, N. Y. 1; S. C., 7 Id. 533; *Sproul v. Hemingway*, 14 Pick. 1; *Wells v. The Navigation Company*, 1 Comst. 204.

(4) See the note to *Platt v. Hebbard*, 7 Cowen, 502, in which the reporter questions the liability of a wharfinger as a common carrier. In that case it was held, that a person who receives goods for reward into his store, standing upon a wharf, the goods to remain there for the purpose of being forwarded, subject to the bailor's order, is not liable as a common carrier. See *Steenman v. Wilkins*, 7 Watts & Serg. 466. Angell on Carriers, § 66; Edwards on Bailm. 298, &c.

that is, by the common law, are bound(1) to receive and carry the goods of the subject for a reasonable hire or reward,(2) to take *due care of them in their passage, to deliver them(e) safely,(3) [*416]

(e) Per *Popham*, C. J., Owen, 57.

(1) An action on the case will lie against a common carrier for refusing to carry goods after an offer of his hire. *Jackson v. Rogers*, 2 Show. 327; and see *post*, p. 429.

(2) In an action against a common carrier for losing a box by negligence, a motion was made in arrest of judgment, because a particular sum was not mentioned in the declaration to be paid for hire, but a reasonable reward only; the declaration was holden to be well enough, for, perhaps, there was not any agreement for a sum certain, yet as in such case the carrier may maintain a *quantum meruit*, he is equally liable, as where there is an express agreement for a particular sum. *Bastard v. Bastard*, 2 Show. 81. Agreed also in *Lovett v. Hobbs*, Ib. 129.

(3) In *Golden v. Manning and another*, 2 Bl. Rep. 916, where an action was brought against carriers for not delivering goods within a reasonable time, the question was agitated whether it was the duty of carriers to deliver as well as carry goods. The court declined giving any opinion on the general question, conceiving that, under the special circumstances of the case then before them, the defendants were liable, because it appeared that their general course of trade was to deliver goods at the house to which they were directed; that they received a premium and kept a servant for that special purpose; and that they must be understood to have contracted to carry the goods in question, on the same terms, and in the same manner, that they carried the goods of other persons. *Gould*, J., expressed an opinion, that all carriers were bound to give notice of the arrival of goods to the persons to whom they were consigned, whether bound to deliver or not. In *Hyde v. The Trent and Mersey Navigation Company*, 5 T. R. 396, the general question, whether a carrier was bound to deliver the goods to the person to whom they are directed, was again agitated; *Ashurst*, *Buller*, and *Grose*, Js., were of opinion that a carrier was so bound; but *Kenyon*, C. J., seems to have inclined to the contrary opinion. The special circumstances of the case (which see, *post*, p. 417,) rendered it unnecessary for the court to decide the general question. In *Ostrander v. Brown*, 15 Johns. Rep. 39, it was holden, that the defendant could not prove a custom to deliver goods by putting them upon the dock, giving notice to the consignees, who usually had cartmen to convey them to their stores, and that such delivery with notice, was, by custom, considered a good delivery. See *Chickering v. Howler*, 4 Pick. 371.

"Upon the authority of *Garside v. The Proprietors, &c.*, and *Hyde v. The Nav. Co.*, the Supreme Court of Massachusetts decided that the duty of a railway company as common carriers, ceases on the safe deposit of goods in their merchandise depot at the place of destination; and that they are then responsible only as depositaries, without further charge, and consequently, after the goods are so deposited, they are not liable for a loss, unless guilty of negligence in the want of ordinary care in the custody of the goods. *Thomas v. The Boston and Providence Railway Co.*, 10 Metc. 472.

In *Farmers and Mechanics Bank v. Champlain Transportation Co.*, 23 Verm. 186, the plaintiffs, at Burlington, Vermont, delivered to the defendants a package of bank bills, directed to 'Richard Yates, Esq., Cashier, Plattsburg, New York.' The defendants received the package and pay for transportation, and delivered it to the wharfinger at Plattsburg, who placed it in his desk in his counting-room, from which it was stolen. The wharfinger received nothing for taking charge of the package. Plattsburg was an intermediate port at which the defendants' boat merely touched in its passage. The court held, that when a carrier, by steamboat or other vessel, in the due and common course of his business, delivers his goods or parcels into the custody of the wharfinger, upon the wharf, unless there is some special agreement, practice or usage to the contrary, the transit is ended, and his responsibility as carrier ceases.

"In *Gould v. Chapin*, 10 Barbour, 612, the defendants received goods of the plaintiff at New York, to carry to Albany, and deliver to a particular line of canal boats for further transportation. When the goods reached Albany, they were placed on a float belonging to the defendants, and the agent of the line of canal boats was notified of their arrival and requested to take them away. The goods remained on the float three days, and were finally destroyed by fire, without negligence on the part of the defendants, the agent of the line of boats having in the mean time been several times requested to take them away. Held, that the defendants were not responsible for the goods as

and in the same condition as when they were received ;(1) or in default thereof to make compensation to the owner for any loss or damage

common carriers, after placing them on the float and notifying the consignees that they were ready for delivery, but were bound only to the duties of an ordinary bailee for hire, and not therefore liable for the loss.

In *Fisk v. Newton*, 1 Denio, 45, it appeared that the defendants received some kegs of butter for transportation, consigned to a person in the city of New York. When the butter reached New York, the defendants made inquiry for the consignee, but not being able to find him, they deposited the butter with store-house keepers, who were then in good credit. After keeping the butter several months, the depositees sold the butter, and subsequently failed. The owners then brought an action against the transportation company for its value. But the court held, that in such a case the wharf was the place of delivery, and that the consignee, not having called for the goods, and being unknown to the defendants, they discharged their duty by placing the goods in store with a responsible third person, for and on account of the owner, according to the usage of trade under such circumstances, and were consequently no longer responsible for their safety." 1 Eng. Railway and Canal Cases, 569, note by Am. eds.

(1) A common carrier cannot sell the goods intrusted to him, and there is nothing in any alleged usage on the Ohio or Mississippi to alter the rule. *Rapp v. Palmer*, 3 Watts, 178. Nor can a boatman on the canals. *Arnold v. Halenbake*, 5 Wend. 33. Nor can he pledge any part of the goods. *Kitchen v. Vanadar*, 1 Blackf. 356. If a carrier receive goods directed to be carried in a particular manner and position, he is bound so to carry them, and if carried otherwise, and they are lost or damaged, the *onus* is on him to prove that the loss or damage was not owing to his breach of contract. *Hastings v. Pepper*, 11 Pick. 41. If a glass bottle filled with oil of cloves be marked, "Glass—with care—this side up," it is sufficient notice of the nature and value of the contents to charge him with loss occasioned by disregarding the instructions. *Ib.*; *Edwards on Bailm.* 331. A person delivering a package to a carrier for transportation need not state the value unless questioned. But *it seems* if he answer falsely, the carrier is not responsible for loss, unless by his default. *Phillips v. Earle*, 8 Pick. 182. A delivery at the post-office, where the stage was standing, to the agent of defendant, and by his direction, is sufficient. *Ib.*

As to what is meant by the "act of God," Sir *William Jones* considers that an expression more decent and proper than this, and also one more popular and perspicuous, is "inevitable accident." But Lord *Mansfield*, in *Forward v. Pittard*, considers the carrier liable for "inevitable accident;" so that it seems that according to the view of that learned judge, the words "inevitable accident," which are preferred by some to the words "act of God," because more reverent, are not adequate to express the ground of a common carrier's excuse; for accidents arising from human force or fraud, are sometimes "inevitable." Again, in another case, Lord *Mansfield* says the "act of God" is natural necessity, and is distinct from "inevitable accident;" and as examples, he mentions "winds and storms, which arise from natural causes, and a sudden gust of wind." The "act of God," therefore, in its legal sense, and as applied to common carriers, means something in opposition to the act of man; for everything is the "act of God" that happens by his permission, everything by his knowledge. Accident produced by any physical cause which is irresistible; such as a loss by lightning or storms, by the perils of the sea, by an inundation or earthquake, or by sudden death or illness, is mentioned by a learned author as the "act of God." *Angell on Carriers*, § 154; *McHenry v. Railroad Co.*, 4 Harring. 448.

"The term has received a variety of definitions, differing rather in their mode of expression than in the substance of their signification. It is said to be that which is occasioned exclusively by the violence of nature; by that kind of force of the elements which human ability could not have foreseen or prevented; such as lightning, tornado, sudden squall of wind, and the like. Again, it is said to be at least an act of nature which implies an entire exclusion of all human agency, whether of the carrier himself or of third persons. It is called a disaster, with which the agency of man has nothing to do.

"Again, it is defined to be a natural necessity, which could not have been occasioned by the intervention of man, but proceeds from physical causes alone.

"If, therefore, the loss arose exclusively from the violence of nature, the defendants are not liable. But if it were caused by that kind of force of the elements which could have been foreseen or prevented, or by the force of the elements combined with such act of man as could have been avoided, the defendants are liable." Per *Haines, J.*,

which happens while the goods are in their custody, except such loss or damage as arises from the act of God,(1) as storms, tempests, and the like; or of the enemies of the King.(2) Carriers are, generally, answerable for the honesty of their servants; if, however, the plaintiff's own conduct, in full knowledge of the circumstances, be such as to lead to the loss; if he afford undue temptation and facility to the crime of the servant, he can maintain no action(*f*) for a loss thus occasioned by his own fault.(3)

In an action brought against a common carrier by water,(*g*) charging the defendant with negligence; it was holden to be no defence that the ship was tight, when the goods were placed on *board, but that a rat, by gnawing out the oakum, had made [*417] a small hole through which the water gushed; on the ground, that whatever was not excused by law, was to be deemed a negligence in the carrier, and that he was answerable in all events, except where

(*f*) *Bradley v. Waterhouse*, M. & Malk. 154.

(*g*) *Dale v. Hull*, 1 Wils. 281.

N. B. Co. v. Tiers, 4 Zabriskie, 714. "What is or is not an act of God that will excuse a common carrier, for a loss happening in consequence of it is generally a question of law. For the better security of the public, and in consideration of the fact that the owner of the goods is usually unable to prove the cause of the loss, which is commonly known only to the carrier's own servants, who have every inducement to excuse themselves, common carriers are not only subject to the responsibility of taking all reasonable care of goods intrusted to them, but they are liable as insurers, and can only excuse themselves by satisfactory proof of one or the other of two things, namely, an act of God or of public enemies. By the act of God, is meant a natural necessity, which could not have been occasioned by the intervention of man, but proceeds from physical causes alone, such as violence of the winds or seas, lightning, or other natural accident. If the loss happened by the wrongful act or neglect of a third person, the carrier is responsible, and is to seek redress of the wrong doer. If divers causes concur in the loss, the act of God being one, but not the immediate or proximate cause, such act of God does not discharge the carrier. To have this effect, it must be one exclusive of human agency." *Ib.* 4 Zabriskie, 700, per *Elmer*, J. *Mershon v. Hobensack*, 2 Id. 380; Story on Bailments, §§ 25, 511; Edwards on Bailm. 454; 1 Smith's Lead. Cas., note by Am. ed., p. 315, 5th ed.

(1) The plaintiff put goods on board the hoy of the defendant, who was a common carrier: coming through a bridge, *by a sudden gust of wind*, the hoy sunk, and the goods were spoiled. *Pratt*, C. J., held the defendant not answerable, the damage having been occasioned by the act of God. For though the defendant ought not to have ventured to shoot the bridge, if the general bent of the weather had been tempestuous, yet this being only a sudden gust of wind had entirely varied the case. The plaintiff's counsel having offered some evidence, that if the hoy had been in a better condition it would not have sunk, the Chief Justice said that a carrier was not obliged to have a new carriage for every journey; it was sufficient, if he provided one which, without any extraordinary accident, (such as this was,) would probably perform the journey. *Amies v. Stevens*, Str. 128.

(2) A person whose business it is to forward goods, on commission, but who has no interest in the freight of the goods, or the boats in which they are carried, is not liable for loss or damage in their transportation. *Roberts v. Turner*, 12 Johns. Rep. 232.

(3) Where a vessel was sailing up the Hudson, and being near the shore was about making a tack, the wind suddenly failed, and the headway under which she was shot her on the bank; it was holden, that the failure of wind was the act of God, and excused the carrier, there being no negligence on his part. *Colt v. M'Mechen*, 6 Johns. Rep. 160. Where goods laden on deck, are thrown overboard for the preservation of ship and cargo, the carrier is not liable. *Smith v. Wright*, 1 Caines' Rep. 43. If the goods are lost through the act of their owner, the carrier is not liable. *Murphy v. Staton*, 3 Munf. Rep. 239.

the goods were damaged by the act of God or the king's enemies.(1) So where the proprietors of the Trent navigation(*h*) had undertaken to carry goods from Hull to Gainsborough, and the vessel, on board which the goods were placed, drove against an anchor in the River Humber, and sank; it was holden, that the carriers were responsible to the owner of the goods for the damage sustained; although it was proved that the accident was occasioned by the negligence of the persons on board a barge in the river, who had not put a buoy out, to mark the place where the anchor lay: the court observing, that there was a degree of negligence in the master of the vessel also; for his not seeing the buoy ought to have put him upon inquiring more minutely about the anchor; and even if there had not been any actual negligence, yet negligence in law was sufficient.(2)

A common carrier being an insurer, in all cases, (except the two before mentioned,) is responsible for a loss occasioned by accidental fire, provided such loss happens while the goods are remaining in his custody(3) *as a common carrier*. As where the goods intrusted to a common carrier, were consumed by accidental fire(*i*)(4) communicated to a booth where the goods had been deposited by the carrier in the course of the journey; it was holden, that the carrier was liable, although the jury found that the goods were consumed without any actual negligence on the part of the carrier. So where common carriers from [*418] A. to B.(*k*) charged and received for cartage *of goods from a warehouse at B. (where they usually unloaded, but which

(*h*) *Proprietors of the Trent Navigation v. Wood*, 3 Esp. N. P. C. 127.

(*i*) *Forward v. Pittard*, 1 T. R. 27.

(*k*) *Hyde v. Trent and Mersey Navigation*, 5 T. R. 389, recognized in *Galliffe v. Bourne*, 4 Bingh. N. C. 332; *S. C.* in error, 3 M. & Gr. 643; 3 Scott's N. R. 1.

(1) *Lavoroni v. Drury*, 1 Am. Law Reg. 174; *Robertson v. Kennedy*, 2 Dana, 430; *Hart v. Allen*, 2 Watts, 114; *Moses v. Norris*, 4 N. H. R. 304.

(2) Unseaworthiness of a vessel does not render a carrier liable if it could not have contributed in some degree to occasion the loss. *Hart v. Allen*, 2 Watts, 114. Damage from negligence or want of skill is a defence to an action by carrier. *Leech v. Baldwin*, 5 Id. 446.

(3) In an action by the East India Company against a lighterman, on an undertaking to carry for hire on the River Thames, from the ship to the company's warehouses, it appeared that it was the usage of the company, on the unshipping their goods, to put an officer, called a guardian, in the lighter, who, as soon as the lading was taken in, put the company's lock on the hatches, and went with the goods to see them safely delivered at the warehouse. This had been done in the present case, and part of the goods were lost. *Raymond*, C. J., was of opinion, that this differed from the common case; this not being any trust in the defendant, and the goods were not to be considered as having been in his possession, but in the possession of the company's servant, who had hired the lighter to use himself: he thought, therefore, that the action was not maintainable, and the plaintiffs were nonsuited. *East India Company v. Pullen*, Str. 690. It was observed by *Chambre, J.*, in 2 Bos. & Pul. 419, that the foregoing decision proceeded on the usage of the East India Company, who never intrusted the lighterman with their goods, but gave the whole charge of the property to the officer called the guardian. See also *Ackley v. Kellogg*, 8 Cow. 223. Where the bill of lading stipulates that the captain in case of low water may reshipe in other craft, his liability is continued if such reshipment is resorted to. *McGregor v. Kilgore*, 6 Ohio, 361.

(4) The owners of a steamboat are responsible as common carriers for the accidental loss by fire, on her return voyage, of the proceeds in money or goods carried and sold by the master, where the usage is for him to act as *factor* in the sale of such goods in consideration only of the freight. *Harrington v. McShane*, 2 Watts, 443. But *contra*, if there be no such usage. *Taylor v. Wells*, 3 Id. 65.

did not belong to them), to the house of the consignee in B.; it was holden, they were responsible for a loss by an accidental fire while the goods were in that warehouse; although they allowed the profits of the cartage to another person, and that circumstance was known to the consignee. So where to a declaration on a contract by the master of a steam vessel to convey goods from Dublin to London, and to deliver the same at the port of London to plaintiff or his assigns, the defendant pleaded that, after the arrival of the vessel at London defendant caused the goods to be deposited on a wharf, there to remain until they could be delivered to the plaintiff, the wharf being a place where goods from Dublin were accustomed to be landed, and fit and proper for such purposes, and that before a reasonable time for delivery elapsed they were destroyed by an accidental fire, the plea was holden^(l) ill; the court considering, that the defendant was acting, during the whole of the time whilst the goods were in his possession, under the obligation of a common carrier, who is liable for every loss (not specially excepted) except the act of God and the king's enemies. But where the goods are not remaining in the defendant's custody as common carrier,^(m) he is not liable;⁽¹⁾ as where the goods had been carried by the defendant from A. to B. and there deposited in his warehouse, merely for the convenience of the owner, until they could be forwarded by another conveyance, (the owner not paying the defendant any thing for the warehouse-room,) and were consumed by an accidental fire there, it was holden, that the defendant was not liable.⁽²⁾ In *Cairns v. Robins*, 8 M. & W. 258, Lord Abinger, C. B., said, a distinction has been properly drawn between the duties of a carrier and of a warehouseman. But the party may have so large a compensation as a carrier, as to be sufficient also to remunerate him for acting as a warehouseman, as is the case with many of the canal companies; and it is quite consistent with both these characters, that he will for a certain time, until further orders, or for a reasonable time, keep the goods, considering the general remuneration for carrying sufficient to cover the risk.⁽³⁾

(l) *Gatliffe v. Bourne*, 4 Bingh. N. C. 332; *S. C.* in error, 3 M. & Gr. 643; 3 Scott's N. R. 1.

(m) *Garside v. Trent and Mersey Navigation*, 4 T. R. 581.

(1) See *Thomas v. The Boston and Providence Railroad*, 10 Metc. 472; 1 Smith & Bates's Am. Railway Cas. 403; *Norway Plains Railroad v. Boston and Maine Railroad*, 1 Gray, 263; *Stevens v. Boston and Maine Railroad*, Ib. 277.

(2) The liability of a master or owner of a steamboat as *common carrier* ceases whenever, after there has been an opportunity to deliver according to contract, the goods remain in the boat for the accommodation of their owner or consignee; whether it be at his request or by his default, or whether there be an actual tender or only a readiness to deliver. If the property still remains on board without reward, they are liable only for gross neglect. If there was any reward agreed upon, they are liable for ordinary neglect. If there were any special engagement their liability depends on its terms. The proper time for the delivery of *specie* to the consignee is not limited to banking hours, unless there be such special contract or usage proved; and an offer to deliver it during the usual hours of business, reasonable regard being had to its safety and the convenience of consignee, is as good as if in banking hours. *Young v. Smith*, 3 Dana, 92; and see page 415, note.

(3) Where it is the nature and course of a carrier's employment, to carry and deliver the goods, and receive payment for them, and return it to the shippers of the goods; if

If a party brings a parcel to a railway station, (which in this respect is just the same as a coach-office,) knowing at the time that the railway company only carry to a particular place, and if the company receive and book it to another place to which it is directed, *prima facie* they undertake to carry it to another place. Thus where a parcel was delivered at Lancaster, to the Lancaster and Preston Railway Company, directed to a person at Bartlow, in Derbyshire; and the person who brought it to the station offered to pay the carriage, but the bookkeeper said it had better be paid by the person to whom it was directed, on the receipt of it. The company were known to be proprietors [*419] of the line only as far as Preston, where the *railway unites with the North Union, and that afterwards with another, and so on into Derbyshire; the parcel having been lost after it was forwarded for Preston, it was holden, that the Lancaster and Preston Railway Company were liable for its loss.(n)(1)

(n) *Muschamp v. The Lancaster and Preston Junction Railway Co.*, 8 M. & W. 421.

he is robbed of the money he is liable for it, although he has received only the ordinary freight, and no distinct commission for the sale of the goods and bringing back the money be allowed. *Kemp v. Coughtry*, 1 Johns. Rep. 107.

(1) It is a question of much practical importance whether carriers by railroad, who have received merchandise to be taken according to its address to a point beyond the line of the road which receives it, and beyond the point to which their own means of conveyance extends, are liable, as common carriers, for losses which occur beyond that point, or are to be considered as having contracted to carry to the end of their own line, and then employing other connecting lines at its termination as fresh agents to complete the carriage. It is quite clear, that a carrier may contract to transport beyond his own line, and may make connecting lines his agent, and thus become responsible to the owners of merchandise for its loss at any period or any place while it is in transit. Story on Bailm. §. 558; Shelford on Railw. 486; 3d ed. same book, Am. ed. Judge Bennett's notes; Hodges on Railw. 614, 615, notes, 2d ed.; Smith's Mer. Law, 367, 3d ed., notes by Am. eds.; *Fowles v. The Great Western R. R. Co.*, 7 Ex. 698; *Weed v. The Sar. & Schen. R. R.*, 19 Wend. 334; *Muschamp v. The Lancaster, &c.*, 8 M. & W. 421, 2 Eng. Railw. Cases, 444; *Watson v. The Ambergate, &c.*, 3 Eng. Law & Eq. R. 497; *Van Santvoord v. St. John*, 25 Wend. 669; 6 Hill, 157, S. C.; *Farmers and Mechanics Bank v. Champlain Trans. Co.*, 18 Verm. 140, and 23 Id. 209; *Erne v. N. Y. & Erie R. R.*, in New York Marine Court, before Phillips, J., MS.; *Ackley v. Kellog*, 8 Cow. 223; *Hood v. N. Y. & New Haven R. R. Co.*, 22 Conn. 1, 14, 15, 508-512; Edwards on Bailm. 528; *Scotthorn v. The South Staffordshire R. R. Co.*, 8 Exch. 341, 18 Eng. L. & Eq. R. 553; *Crouch v. The London and North-Western R. R. Co.*, 14 C. B. 255; 25 Eng. Law & Eq. R. 287; *Wilcox v. Parmelee*, 3 Sandford, R. 310.

But the case most difficult of solution is, where the shipper delivers his merchandise addressed to a point beyond the route to whose custody it is delivered, and it is received without agreement of any kind, except that which the law creates by the mere delivery and receipt. This question was much discussed in the leading English case of *Muschamp v. The Lancaster, &c.*, cited and commented on by Judge Stroud, 4 Am. Law, 236; *Watson v. The Ambergate, Nottingham, and Boston R. R. Co.*, was the case of certain models or plans of a machine to load colliers, sent by the plaintiff from Grantham to Cardiff to compete for a prize of one hundred guineas, and which arrived too late for the competition, by which the plaintiff lost his chance of success. When the package was delivered to the storing master at Grantham, he said he could take pay only to Nottingham, as he had no rates beyond, and he erased the words "paid to Bristol," and substituted "paid to Nottingham," without the knowledge of the plaintiff. The original direction was left on the package, which was detained at Bristol and did not arrive at Cardiff until the day after the award was made. In the opinions of the court this contract is treated as a contract to carry from Grantham to Cardiff, and the rule laid down by Baron Rolfe held to apply.

The Court of Exchequer, in *Scotthorn v. The South Staffordshire R. R. Co.*, 8 Exch. 341; 18 Eng. L. & Eq. R. 553, affirmed *Muschamp v. The Lancaster, &c.*, and held that where a

If a common carrier be robbed of his goods,^(o) he shall answer the value of them: for *having his hire*, there is an implied undertaking for

(o) 1 Inst. 89, a; *Woodleife v. Curties*, 1 Rol. Ab. 2, (C), pl. 4; *S. P. Covington v. Willan*, Gow's N. P. C. 115.

carrier received goods to carry from one station to another, he was liable for the loss during any part of the transit, though it may happen on the line of railway belonging to another company. And in *Crouch v. The London and North-Western R. R. Co.*, 14 C. B. 255; 25 Eng. Law & Eq. R. 287, the Court of Common Pleas, after elaborate arguments, held, affirming the preceding decisions, that a common carrier, professing to carry to a place which is beyond the realm, was still subject to the common law liability of a carrier for hire, and was bound to perform all the duties assumed and implied by that relation.

The doctrine of the English courts must be considered as settled, that carriers by railroad, who receive merchandise to be transported beyond the line of their own route, without any special agreement, do not limit their liability to their own route only, but are held liable for losses which may occur beyond it, or perhaps, to speak more accurately, they are held liable upon the exact contract made, which is in general, a question of fact, and is to be determined by the finding of a jury; and in the absence of any special agreement, the presumption which arises from bare proof of the delivery of the goods to the carrier addressed to a place beyond the limits of the carrier's own route is, that he undertakes the delivery at that place.

But the rule to be deduced from the American decisions may be stated in the language of Judge *Stroud*, "that when goods are delivered to a carrier, marked for a particular place, but unaccompanied by any other directions for their transportation and delivery except such as might be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usages of the business." *Van Santvoord v. St. John*; *Farmers Bank v. Champ. Trans. Co.*; *Hood v. New York and New Haven R. R.*; *Nutting v. Conn. River R. R.*

In the case of *Hood v. The N. Y. & N. Haven R. R. Co.*, *Ellsworth, J.*, dissented from the English doctrine, and held the following language:

"We are aware that in the cases cited from the English books, it seems to be held that if a railroad company receives at its depot goods marked to be forwarded beyond its own road, and even beyond any other railroad, this is *prima facie* evidence of a contract to carry the goods to the place of destination. We will not say that in these English cases, since there was no evidence on the part of the defendants to disprove the *prima facie* case, the defendants were not rightly subjected in damages for a loss beyond their road. Indeed, the judges intimate that there may have been a partnership throughout the route.

"But if more than this is meant, and that a railroad company, by receiving freight at its depot, became responsible to carry it, as it were, by guaranty or insurance, to the place of destination, at any distance from the road, and that this is an inference which cannot be disproved by showing the facts, as in this case, we are not prepared to give it our assent. We think it an unnatural inference, and a contract not, of course, to be drawn from the fact, that a chartered company of limited extent has taken goods to carry over its road.

"But if we are wrong in this, it does not follow that the doctrine of the English cases, as to *freight*, is to be applied to *passengers*; passengers take care of themselves. And even as to freight, were such a question before us, we believe the true doctrine to be this: where goods are delivered to a carrier, marked for a particular destination, without any directions as to their transportation and delivery, save such as may be inferred from the marks themselves, the carrier is only bound to transport according to the established usage of business in which he is engaged, whether the consignor know of the usage or not. The carrier becomes a mere forwarder of the goods to the end of his own portion of the route, and is then bound to use due diligence in seeking for and handing over the goods to the next carrier."

Van Santvoord v. St. John, 6 Hill, 157, was the case of a box marked "J. Petre, Little Falls, Herkimer Co.;" it was delivered to the Swiftsure line, and the following receipt given: "Rec'd from St. John on board Ontario, one box merchandise, marked J. Petre," &c. This was the contract. The usage to deliver to the next carrier was shown. And the construction of this contract was held to be, that the box had been delivered to the carrier with the intention that he should transport it in the usual and customary way,

the safe custody and delivery. Where a person undertakes to carry goods safely and securely, (p) he will be responsible for the damage they sustain in the carriage through his neglect, though he is not a common carrier, nor has any reward for his labour; and this rule holds, although the plaintiff for greater caution, sends his servant with the goods, who pays a person for guarding them, because he apprehends danger of their being stolen. (q) In *Beauchamp v. Powley*, 1 M. & Rob. 38, a stage-coachman was holden responsible for the loss of a parcel which he had received to carry without reward, it appearing to have been lost through gross negligence on his part. (1) In a special action on the case, wherein the plaintiff declared that whereas the defendant had undertaken to carry a hare for the plaintiff from A. to B., yet the defendant carried the same so negligently, that he lost it by the way, to the damage of the plaintiff of 10*l*. On demurrer to the declaration, it was objected by *Hawkins*, Serjeant, that the plaintiff had not declared, on the general custom of the realm relating to carriers, and, therefore, the defendant must be taken to be a private person; if so, there was not any consideration laid, and consequently the promise was merely *nudum pactum*. 2ndly. The plaintiff had not set forth a delivery of the hare, upon which the promise was made, and for the breach of which promise the action was brought. *Probyn and Reynolds*, (the only judges in court,) as to the first objection, admitted that the defendant must be taken to be a private person; but it was determined in *Coggs v. Bernard*, that a private person was answerable, if he undertook the carriage of goods, for a misfeasance, though there was not any consideration: and the only difference was, that a common carrier was obliged to undertake the carriage of goods, and a private person was

(p) *Coggs v. Bernard*, Lord Raym. 909.

(q) *Robinson v. Dunmore*, 2 Bos. & Pul. 416.

and that the usage of the business must be considered as one of the elements of the contract, and the shipper could not avail himself of his ignorance of this usage, it being his business to inform himself.

In the *Farmers Bank v. The Champ. Trans. Co.*, 18 Verm. 140, *Kelly*, J., commenting on *Van Santvoord v. St. John*, says "the doctrine of that case is in substance this; that where goods are delivered to a carrier marked for a particular place, without any directions as to their transportation and delivery except such as may be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, whether the consignor knew of such usage or not. With the reasoning and authority of that case we are well satisfied. It is founded in good sense, and sustainable upon principle."

In *Nutting v. Conn. River R. R.*, *Metcalf*, J., cites and applies the ruling in *Van Santvoord v. St. John*, 6 Hill, 157, and takes occasion to dissent from the broad doctrine of the Court of Exchequer, in *Muschamp v. The Lancaster, &c.*, and Queen's Bench in *Watson v. The Ambergate, &c.* The courts of New York, Vermont, Connecticut and Massachusetts, have all dissented from this doctrine, and have enunciated the rule stated by Judge *Stroud*, which must now be considered the better and safer opinion, in this country at least. *Jenneson v. Camden and Amboy R. R.*, 4 Am. L. Reg. 238, note.

(1) The proprietor of a stagecoach for passengers is not liable as common carrier for goods sent by it. But if in the practice of carrying them for hire, he is liable. *Beckman v. Shouse*, 5 Rawle, 179. Nor is a steamboat company incorporated for transporting goods, wares, and merchandise, the members of which are individually liable as common carriers, responsible for the loss of a package of bank bills, unless shown to be part of their ordinary business. *Sewall v. Allen*, 6 Wend. 335.

not; but if a private person voluntarily undertook it, he was by law answerable for damage arising from his negligence.(1) As to the second objection, the court said, that the delivery was implied; for it was stated, that the defendant had carried the hare part of the way, which he could not have done without a delivery; and as for the breach of promise, the action was not brought for that, but for the loss of the hare; the promise was only inducement. Accordingly they *gave judgment for the plaintiff. *Hutton v. Osborne*, B. R. [*420] M. 3 Geo. II. MSS.

Coach-owners are not liable for injuries which passengers may sustain from inevitable accidents, as from the oversetting of the coach from the horses taking fright, there not being any negligence in the driver;(r) but otherwise it is, if there be negligence in the driver. A coach-owner is bound to convey his passengers in road-worthy(s) vehicles, and if an accident happen from a defect in construction, the owner is liable, although the defect be out of sight and not discoverable upon ordinary examination.(2) See the duty of coach-owners, fully explained by

(r) *Aston v. Heaven*, 2 Esp. N. P. C. 533.

(s) *Sharp v. Grey*, 9 Bingh. 457; 2 M. & Sc. 620.

(1) See *Thompkins v. Saltmarsh*, 14 S. & R. 275; *Satterlee v. Groat*, 1 Wend. 272.

(2) For injuries to the persons of passengers they are not responsible, if they have done all that human foresight and care can do to insure their safety. *Camb. & A. R. R. Co. v. Burke*, 13 Wend. 611. But the law implies negligence when the injury to a coach passenger was occasioned by the wheel coming off on a plain level road, while the coach was driven at a moderate rate, and it lies on defendant to rebut this inference. *Ware v. Gay*, 11 Pick. 106. "In the case of the *Camb. & A. R. R. Co. v. Burke*, 13 Wend. 626, the court consider that the proprietors of public conveyances are liable at all events for the baggage of passengers; but as to their persons, they are liable only for the want of such care and diligence as is 'characteristic of cautious persons.' Such then is the difference in respect to responsibility between common carriers of goods and chattels and common carriers of the persons of passengers; the former being liable for all damage not occasioned by the act of God, &c., and the latter not being liable for any injuries, unless in case of the want of that circumspection and diligence which is 'characteristic of cautious persons,' where the limbs, lives, and health of human beings are at their control. There are, undoubtedly, certain risks which are incurred by all travellers in public vehicles, for which the proprietors of them are not responsible; and these are casualties which human sagacity cannot foresee, and against which the utmost prudence cannot guard. If, for instance, a gun should be fired so near a stage-coach as to frighten the horses, and they becoming unmanageable, upset the coach and injure a passenger, he is without remedy as against the driver or his employers. But for damage done to goods, in consequence of such an event, in the hands of a common carrier of them, he would be liable. Every wayfarer in a public vehicle must make up his mind to meet the risks incident to the mode of travel he adopts; risks which cannot be avoided by the utmost degree of care and skill in the preparation and management of the means of conveyance. A guaranty to this extent is the only one given for the protection of the wayfarer's person by the proprietors of the line." Angell on Carriers, § 523; *Stokes v. Saltonstall*, 13 Peters, 181; *M'Kinney v. Neal*, 1 M'Lean, 540.

"The minor duties of the carrier of passengers grow out of and are deducible from that general responsibility which binds him to carry safely those whom he takes into his conveyance, as far as human foresight and care will go; that is, for the utmost care and diligence of very cautious persons. This rule is less stringent than that which applies to common carriers of goods, who are in the nature of insurers, answerable for accidents and thefts, and even for losses by robbery; for all losses, in short, which do not fall within the excepted cases of the act of God, or of the public enemy. Passenger carriers do not warrant or insure the safety of passengers; they are not responsible for accidents, but only for want of due care, for the want of the utmost human foresight, and that degree of diligence which characterizes very cautious persons."

Best, C. J., in *Crofts v. Waterhouse*, 3 Bingh. 321. The proprietors of a mail-coach are answerable for an injury sustained by a passenger, through the misconduct of their driver.^(t) A., a stable-keeper, let to B. four horses to draw B.'s carriage from C. to D. The horses were rode by A.'s servants. Through their negligence, the carriage of I. S. sustained an injury. It was holden, that I. S. might maintain an action against A.^(u)(1)

(t) *White v. Boulton*, Peake's N. P. C. 81.

(u) *Sammell v. Wright*, 5 Esp. N. P. C. 268. See *Quarman v. Burnett*, 6 M. & W. 499; *post*, tit. "Master and Servant."

"The rule of responsibility is stated by the Supreme Court of the United States in these terms: 'It is certainly a sound principle that a contract to carry passengers differs from a contract to carry goods. For the goods the carrier is answerable at all events, except the act of God and the public enemy. But although he does not warrant the safety of the passengers at all event, yet his undertaking and liability go to this extent, that he or his agent, if he acts by agent, shall possess competent skill; and that, as far as human care and foresight will go, he will transport them safely.'"*Stokes v. Saltonstall*, 13 Peters, 191; *Edwards on Bailments*, 583, 585; *Hart v. Allen*, 2 Watts, 114, per *Gibson, C. J.*; *Laing v. Colder*, 8 Barr, 479; *New Jersey Rail Road v. Kennard*, 9 Harris, 203.

(1) The proprietors of a steamboat are common carriers, and bound to receive on board all persons to whose character and conduct there is no reasonable objection, if they have suitable accommodations. But they may exclude all persons of bad habits or character, who refuse to obey reasonable regulations, or whose objects are in any way to interfere with their interests. Thus where the proprietors had entered into a contract with the owners of a stage-coach line to carry passengers in connection with and to meet the steamboat, and the plaintiff had been in the habit of coming on board for the purpose of soliciting passengers for a rival line of stages, it was held that if the jury should be of opinion that the contract was reasonable and *bonâ fide*, and not entered into for the purpose of an oppressive monopoly, and that plaintiff's exclusion was a reasonable regulation in order to carry such contract into effect, the proprietors were justified in refusing to take him on board. *Jencks v. Coleman*, 2 Sumner, 221. When two persons have different parts of the same stage line, and the same driver is hired by both for the whole route, they are jointly responsible for his negligence in the carriage of money. *Cobb v. Abbott*, 14 Pick. 289. See *Com. v. Power*, 7 Metcf. 596; *Hall v. Power*, 12 Id. 482; *Angell on Carriers*, § 530; *Graves v. Gamble*, 7 Penn. Law Jour. 270.

Although it is no where expressly laid down that innkeepers are liable to the same extent with common carriers, viz., for all losses except by inevitable accident or by public enemies, yet such seems to be the law. *Metcalf's ed. Yelverton's Rep.* 162, a, note (1.) *Quinton v. Courtney*, 1 Haywood, 40; *Clute v. Wiggins*, 14 Johns. Rep. 175.

The principle exhibited in *Calye's case*, 8 Coke, 32, in regard to the liability of an innkeeper, is well established as a part of the law in this country. An innkeeper is answerable for all losses happening to the goods of travellers becoming his guests; except such losses are caused by the act of God or the public enemies, or by the conduct of the guest himself, or his servant, or the companion whom he brings with him. *Mason v. Thompson*, 9 Pick. 280, 284; *Kisten v. Hildebrand*, 9 B. Monroe, 72, 74; *Thicksteen v. Howard*, 8 Blackf. 535, 537; and he is answerable not only for their safe-keeping but for their well-keeping; liable if they be injured as well as if they be stolen. *Shaw v. Berry*, 31 Maine, 228, in which a misconception by *Story, J.*, of the principal case and of the law of innkeepers, is ably corrected.

To become subject to this extraordinary liability, it is essential that the person should be a common innkeeper; that is to say, should exercise the calling or business of entertaining travellers or transient persons, either together with, or without their horses; and should thereby become bound to receive and entertain all travellers demanding hospitality, unless there be a good excuse for refusing. The keeper of a boarding-house, or a coffee-house, though he may occasionally entertain travellers, does not incur the responsibility of an innkeeper. *Lyon v. Smith*, 1 Morris, 184; *Kisten v. Hildebrand*, 9 B. Monroe, 72, 75. And see *Dansey v. Richardson*, 3 Ellis & Blackburn, 1 Q. B. 144; 77 E. C. L. 143. And it is only in relation to the goods of travellers or wayfarers, becoming his guests, that an innkeeper incurs this liability; the goods of a permanent boarder, at an inn,

II. *Of the Stat. 11 Geo. IV. & 1 Will. IV. c. 68, limiting the Responsibility of Carriers by Land, as to the Loss of Parcels of a certain Description. Stat. 7 Geo. II. c. 15; 53 Geo. III. c. 159.(1)*

On the 23d of July, 1830, an act was passed (11 Geo. IV. & 1 Will.

are not thus protected; *Manning v. Wells*, 9 Humph. 146; *Kisten v. Hildebrand*, 9 B. Monroe; and see *Berkshire Woollen Co. v. Procter*, 7 Cush. 417.

To give rise to this liability in an innkeeper, it is necessary that the traveller should have become, in point of law, his guest. If a traveller comes to an inn and becomes its guest, and leaves his property there, and goes out for a time, intending to return, the innkeeper is liable for goods lost during the guest's absence. *McDonald v. Edgerton*, 5 Barbour S. Ct. 560. And the liability is not altered by the fact that the traveller has made an agreement with the innkeeper for the price of his board, by the week. *Berkshire Woollen Co. v. Procter*, 7 Cushing, 417; 1 Smith's Leading Cases, 307, 5th Am. ed. note.

(1) The general responsibility of common carriers under all circumstances, except those before mentioned, has induced them to make special contracts for the carriage of goods beyond a certain value, and to require a premium in proportion to the risk. In this case, if the premium is not paid, the carrier will not be answerable. A bag sealed was delivered to a carrier, and said to contain 200*l.*, and the carrier gave a receipt for so much, when in fact it contained 400*l.*: the carrier was robbed; it was ruled by *Holt*, C. J. that he should be answerable only for 200*l.*, for his reward extended no further. *Tyle v. Morrice*, Carth. 485. If a box is delivered to a carrier generally, and he accepts it so, he is answerable, though the parties did not inform him that there was money in it, but if the carrier asks, and the owner says, there is not any money, or if the carrier accepts it conditionally provided there is not any money in it, it was holden by *King*, C. J. that the carrier was not liable in either of these cases. *C. B. Titchburn v. White*, London Sitings, Str. 145. That the public may be informed of the nature of these special undertakings, it is usual for carriers, either to insert in the newspapers, or to distribute hand-bills, or to place in a conspicuous situation in the office, or other place appointed for the reception of the goods, an advertisement in the form following: 'Take notice, that the proprietors of coaches, &c., transacting business at this office, will not be accountable for any passenger's luggage, money, plate, jewels, watches, writings, goods, or any package whatever, (if lost or damaged,) above the value of 5*l.*, unless insured and paid for at the time of delivery.' The terms of these notices vary. The provisions of some are of such a nature as to go in discharge of the liability of the carrier entirely, unless the terms of the notice are complied with; see a notice of this kind in *Clay v. Willan*, 1 H. Bl. 298; others limit the responsibility of the carrier to a certain sum, if the conditions are not complied with. See this kind of notice in *Clark v. Gray*, 6 East's R. 564. Under the term "loss" in these notices, a loss by robbery is comprehended. *Covington v. Willan*, Gow's N. P. C. 115. *Dallas*, C. J. 5 Eng. Com. Law Rep. 481.

The validity of these general notices was questioned in a modern case, *Nicholson v. Willan*, 5 East's R. 507. See also *Lyon v. Mills*, 5 Id. 423, where the same point was made, but the court did not give any opinion upon it; and it was insisted, that they were contrary to the policy of the common law; and that it was the duty of the carriers, if the reward was not adequate to the risk, to make special acceptances of the goods in such case, at a rate proportioned to the value of the goods. But by Lord *Ellenborough*, C. J., who delivered the judgment of the court, "considering the length of time during which, and the extent and universality in which the practice of making such special acceptances of goods for carriage by land and water has now prevailed in this kingdom, under the observation and with the allowance of courts of justice, and with the sanction also and countenance of the legislature itself, which is known to have rejected a bill brought in for the purpose of narrowing the carrier's responsibility in certain cases, on the ground of such a measure having been unnecessary, inasmuch as the carriers were deemed fully competent to limit their own responsibility; considering also, that there is no case in the books, in which the right of a carrier thus to limit by special contract his own responsibility has ever been by express decision denied: we cannot do otherwise, than sustain such right in the present instance, however liable to abuse, and productive of inconvenience it may be; leaving to the legislature, if it shall think fit, to apply such a remedy hereafter as the evil may require."

IV. c. 68,) by which the liability of carriers by *land* for hire, for the loss of or injury to parcels of a certain description, has been much

"The following cases will illustrate the manner in which these notices have been construed.

"The defendants, who were proprietors of a coach, (*Clay v. Willan*, 1 H. Bl. 298,) gave notice, 'that cash, plate, jewels, writings, or any such kind of valuable articles, would not be accounted for, if lost, of more than 5*l.* value, unless entered as such, and a penny insurance paid for each pound value.' The plaintiff sent a parcel, consisting of light guineas to go by the defendant's coach: but the person who was employed by the plaintiff to deliver the parcel, although acquainted with the terms on which the defendants carried valuables, paid two shillings only for the parcel, and two-pence for the booking. On the part of the plaintiff, it was insisted, that he was entitled to recover as far as 5*l.* by the terms of the notice: but the court were of opinion, that the fair construction of the notice was, that the defendants were not liable to any extent. *Pigott v. Dunn*, B. R. E. 36 G. 3 S. P. cited by *Lawrence, J.* in *Yate v. Willan*, 2 East's R. 134.

"So where the defendants had given notice, (*Izett v. Mountain*, 4 Id. 371,) that they would not be accountable for any parcels, &c., of more value than 5*l.* unless entered as such, and paid for accordingly; it was holden, that the owner of a parcel above the value of 5*l.* (which had been delivered to the defendants, and lost, but which had not been entered and paid for according to the value,) was not entitled to recover *any thing*.

"A parcel above the value of 5*l.* (*Nicholson v. Willan*, 5 Id. 507) was delivered to the defendants, (who were proprietors of the mail, and of a heavy coach travelling the same road,) and accepted by them to be conveyed by the mail. Notwithstanding this acceptance, the parcel was booked to go by the heavy coach. The parcel was lost, but it did not appear in what manner. At the trial it was proved that the owner had notice of an advertisement placed in the coach office. The parcel in question had not been booked and paid for according to the terms of the notice. On the part of the owner of the parcel it was insisted, that the loss had not been incurred in the course of the defendant's employment as carriers, but had been occasioned by an act of tortious conversion, in direct contravention of the terms on which the goods were delivered to and accepted by the defendants. But it was holden, that the evidence on which this argument was founded, viz. the mere fact of the booking of the goods for a different coach, and a subsequent non-delivery, amounted only to a negligent discharge of duty in their character as carriers, and not to an entire renunciation of that character, and of the duties attached to it, so as to make them guilty of a distinct tortious misfeasance in respect of the goods; and as the goods in question were above the value of 5*l.*, and had not been insured and paid for at the time of the delivery, the defendants were not accountable for the same, and consequently the plaintiffs were not entitled to recover any thing.

"The true construction of the notice is this, that the carrier is not to be protected by the words "lost or damaged," if he divests himself wilfully, or by the acts of his servants, of the charge of the parcel intrusted to his care. Hence, where a parcel exceeding 5*l.* in value, having been delivered to A. and B., common carriers, to be carried by their mail-coach, was accepted by them to be so carried, and was actually put into the mail, and conveyed a short distance; it was then taken out of the mail-coach by a servant of the carriers, and left to be forwarded by another coach of which A. was one of the proprietors, but in which B. had no concern, and the parcel was lost, but it did not appear by what means; it was holden, (*Garnett v. Willan*, 5 B. & A. 53, 7 Eng. Com. Law Rep. 19,) that, notwithstanding the notice, the carriers were responsible. So where a parcel having been sent from Worcester to London, arrived in London, and was taken from the coach office of the defendants in a cart, under the direction of one person only, for the purpose of delivery; the servant left the cart unprotected in the street, while he went to different houses for the purpose of delivering other packages, and the parcel, the subject of the action, was lost out of the cart; the court were of opinion, (*Smith v. Horne*, 3 B. Moore, 18,) that the carrier, notwithstanding his notice, was liable, and that the words, lost or damaged, did not apply to a case of that description. So where a parcel containing country bankers' notes, (*Sleat and others v. Fagg*, 5 B. & A. 342, 7 Eng. Com. Law Rep. 123,) of the value of 1300*l.*, and addressed to their clerk, in order to conceal the nature of its contents, was delivered to the carrier, without any notice of its value, to be carried by a mail-coach, and was accepted by him to be so carried. The parcel was sent by a different coach, and was lost. The carriers had previously given notice that they would not be answerable for any parcel above 5*l.* in value, if lost or damaged, unless an insurance were paid. No insurance had been paid in this case, yet it was

altered. It is entitled "An Act for the more effectual Protection of Mail Contractors, Stage Coach Proprietors, and other common Carriers

holden, that the carrier was responsible for the loss. So where goods were negligently delivered to a person representing himself to be of the same name as the person to whom the goods were addressed. *Duff v. Budd*, 3 Brod. & Bing. 177, 7 Eng. Com. Law Rep. 399.

"It is incumbent on a person who is apprised of the carrier's notice, when he delivers a parcel, to state the value of the contents, for otherwise he will not be entitled to recover, (*Batson v. Donovan*, 4 B. & A. 21, 6 Eng. Com. Law Rep. 333,) unless there has been gross negligence on the part of the carrier.

"A carrier gave notice that he would not be accountable for goods above the value of 20*l.*, unless entered, and an insurance paid, over and above the price charged for carriage, according to their value. The plaintiff caused a parcel of silk, exceeding the value of 20*l.*, to be delivered and booked at the warehouse in London, where the wagon set out, but did not pay anything for insurance. The goods were lost. It was holden, that the plaintiff was not entitled to recover. *Harris v. Packwood*, 3 Taunt. 264.

"An action was brought against the proprietors of a stage coach, (*Gibbon v. Paynton and another*, B. R. E. 2 G. 3, and Bul. N. P. 71, and 4 Burr. 2298,) for not safely carrying 100*l.*, delivered to their book-keeper in a bag, from B. to L.; and on the trial it appeared, that the money was put into a bag, and carried by the plaintiff's servant to the defendant's house, and there delivered to their book-keeper, who did not ask any questions as to the contents of the bag, but took it as a common parcel, and was paid for as such by the servant who did not give him any information about it; the money was lost; and the servant, on his cross-examination, swore that he did not receive any particular instruction about the carriage, but only to deliver the parcel to the book-keeper, and pay what was demanded of him for the carriage; the defendants proved that an advertisement had been put into the country newspaper once every month, for two years together, concerning the carriage of parcels by this stage-coach, with an N. B. at the bottom of it, that the proprietors would not be answerable for any money, plate, jewels, writings, or other valuable goods, unless they were entered as such, and paid for accordingly; and that this paper was taken in at the house where the plaintiff lodged, who was frequently seen with it in his hand and appeared to be reading it. The jury found a verdict for plaintiff. On a motion for a new trial, the court of King's Bench held, that the defendants were not liable to answer for this money; for a carrier is only liable in respect of the reward which he receives; and in the present case there was clear fraud committed by the plaintiff. The plaintiff delivered to the defendant, (*Kenrig v. Egglestone*, Alleyn, 93,) a carrier, a box, telling him only that there was a book and tobacco in the box; whereas, in fact, it contained 100*l.* *Roll*, C. J., was of opinion, that as the carrier had not made a special acceptance, he was answerable; but in respect of the intended cheat to the carrier, he told the jury they might consider him in damages; but the jury gave a verdict for 97*l.* against the carrier, which, (as the reporter adds) *durum videbatur circumstantibus*. Lord Mansfield, C. J., cited this case in *Gibbon v. Paynton*, 4 Burr. 2301, observing, that he should have agreed in opinion with the *circumstantibus*.

"A box, in which there was a large sum of money, was brought to the carrier, who demanded of the owner what was in it; he answered, that it was filled with silk, and such like goods of mean value; upon which the carrier took it and was robbed. Case cited by *Hale*, in *Morse v. Slue*, 1 Vent. 238. And resolved, that he was liable; but if the carrier had told the owner that it was a dangerous time, and if there were money in it, he durst not take charge of it, and the owner had answered as before, this matter would have excused the carrier.

"Lord Mansfield, C. J., in *Gibbon v. Paynton*, 4 Burr. 2301, commenting on the preceding case, and the observations annexed to it, said, that he should have thought the carrier excused, although he had not expressly proposed a caution against being answerable for money; for it was artfully concealed from him that there was any money in the box. And per *Yates*, J., here is a full proof of special acceptance, and a deceit on the part of the plaintiff; for it is not necessary that there should be a personal communication, in order to make a special acceptance. It is incumbent on common carriers to limit their responsibility by a notice given by themselves, that is, by advertisement in a newspaper, handbills, or a board placed in a conspicuous situation in the office appointed for the reception of the goods, with a proper notice painted or written on it, in large character. See *Butler v. Heane*, 2 Campb. N. P. C. 415, and *Clayton v. Hunt*, 3 Id. 27. Where the

for Hire, against the Loss or Injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which

carrier circulates handbills, he will be bound by their contents, and he cannot avail himself of the notice in the office, the terms of which vary from the handbills, and are more advantageous to himself. *Cobden v. Bolten*, 2 Campb. N. P. C. 108. Having taken this precaution, it will be left to the jury to presume that the owners of the goods have had notice of the advertisement, and consequently a personal communication of the terms of the notice in each particular case may be dispensed with. Where the notice is put on a board inlaid in the wall, an examined copy will be sufficient evidence. *Ib.* In cases where the carrier has not given a general notice in the manner above-mentioned, he will not be permitted to avail himself of the general usage as it prevails among other carriers. See Lord *Ellenborough's* opinion on this subject, in *Clark v. Gray*, 4 Esp. N. P. C. 178. A notice suspended at the *termini* of the journey will not attach upon goods delivered at intermediate places, where notices are not affixed. *Gouger v. Jolly*, Holt, N. P. C. 317, *Gibbs*, C. J., who said the same point had been ruled by Lord *Kenyon* and Lord *Ellenborough*. But if it be proved that the principal was apprised of the terms of the notice, that is sufficient, although it cannot be proved that the agent who delivered the parcel in question was so apprised. *Mayhew v. Eames*, 3 B. & C. 601. And the carriers must prove that their employers were apprised of the notice; the best mode of doing this is to deliver to every person bringing a parcel, a printed paper containing the notice; for in one place where it was proved that the party had taken in for three years a newspaper in which the notice had been advertised once a week, the jury still found against the carrier, and the court refused to disturb the verdict. *Rowley v. Horne*, 3 Bingh. 2. The reason of a personal communication is, that each party may know the other's mind, and, therefore, if they know each other's mind in any other matter, that is sufficient. It has been said, however, in one case, (*Beck v. Evans*, B. R. M. T. 53 G. 3, per *Le Blanc*, J., and Lord *Ellenborough*, C. J., 16 East, 247,) that a carrier cannot insist on the terms of the notice not having been complied with in a case where, from the nature and bulk of the commodity, *e. g.*, a pipe of brandy, he must have been apprised that the value exceeded five pounds. But in another case, (*Levy v. Waterhouse*, Devon. Summ. Ass. 1814. And on rule nisi for new trial in Exchequer, see 1 Price, 280, n., the rule was discharged;) *Gibbs*, C. J., ruled that where a party does not enter and pay for his goods as of greater value than 5*l.*, although the carrier may infer from other circumstances that they were of greater value than 5*l.*, still he may take the benefit of the notice; and that mere knowledge that the goods are of greater value than 5*l.*, is not sufficient to deprive the carrier of that benefit. And in *Thorogood v. Marsh and another*, Gow's N. P. C. 105, *Dallas*, C. J., ruled, that the carrier might claim the benefit of his notice, notwithstanding the bulk of the commodity. In *Beck v. Evans*, gross negligence and *non-feasance* were proved on the part of the carrier's servant. And in *Down v. Fromont*, 4 Campb. 40, Lord *Ellenborough* ruled, that unless the appearance of the goods necessarily indicated that they were above the value of 5*l.*, the carrier might avail himself of his notice. N. The payment of the extra charge may be dispensed with, and if so, the notice will be unavailing. *Wilson v. Freeman*, 2 Campb. N. P. 527. And if gross negligence be proved on the part of the carrier, he cannot protect himself by the notice. *Smith v. Horne and others*, 2 Moore, 18; 8 Taunt. 144, S. C.; *Birkett v. Willan*, B. R. H. 59 Geo. 3; 2 B. & A. 365, S. P. An advertisement of the proprietors of a stage-coach, containing the usual clause, 'all baggage at the risk of the owner,' was held not to protect the proprietors of the coach in an action against them for the loss, by the driver, of a parcel containing bank notes: and it was held, that the responsibility is the same, whether the driver is told that the package contains money, or papers as valuable as money. *Dwight v. Brewster*, 1 Pick. 50; *Allen v. Sewall*, 2 Wend. 327." Text and note to former edition.

"It has always been the law of England that the responsibility of the bailee in every kind of bailment could be changed by the agreement of the contracting parties. The liability of the common carrier could always be varied by express agreement, and as a corollary, by notices brought home to the bailor, and a qualified acceptance in accordance therewith, which necessarily entered into and formed a component part of the contract.

"The rule is laid down by Judge *Story*, in his 549th section, as the settled law of England, and his words have been adopted and sanctioned by the English Court of Common Pleas. In delivering the opinion of that court, in *Austin and another v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 21 (C. P.) Law Jour. Reports, 179, 183; 1 Amer. Law Reg. 114, Mr. Justice *Creswell* said: 'Notices of various kinds have, from time to time,

shall not be declared to them by the Owners thereof." Such is the title of the act, and then the preamble recites, "That by reason of the

been published by common carriers, with a view to limit the responsibility cast upon them by common law. At one period there was a disposition in our courts to hold that common carriers could not by their notices shake off that responsibility; but Mr. Justice Story, in his work on Bailments, observes, 'The right of making such qualified acceptances seems to have been asserted in early times.' Lord Coke declared it, in a note to *Southcote's* case, 4 Rep. 83; and it was admitted in *Morse v. Slue*, 1 Vent. 238. It is now fully recognized and settled beyond any reasonable doubt in England. For this he cites a number of authorities, and we think that he has drawn a correct conclusion from them.' "

In *Hale v. The New Jersey Steam Navigation Co.*, 15 Conn. 539, the Supreme Court of Connecticut, in 1843, decided that the contract being made in New York to carry carriages from thence to Boston, the law of New York was the law of the contract, and in ascertaining what the rule was, they followed the decisions so far as regarded public notices, but did not find it necessary to consider what would be the case if there had been a bill of lading containing an express exception of fire, nor what would be the law of Connecticut in such cases. In 1848, the same question, in relation to a bill of lading, came before the Supreme Court of the United States, in *The New Jersey Steam Navigation Company v. The Merchants Bank*, 6 Howard, 334; and Judge Nelson decided that if *Gould v. Hill*, 2 Hill, 623, was the law of New York, it was not the law of the commercial world, and therefore they were not bound to recognize it. This case established the doctrine in conformity with the settled English rule, as stated by Lord Tenterden, (Abbott on Shipping, 321, 380,) that the exception of fire in a bill of lading was a valid one, and *Gould v. Hill*, was thus denied to be law by the highest tribunal in the United States. In *Chippendale v. The Lancashire and Yorkshire Railway Company*, 21 Law J. R. (Q. B.) 21, the court of Kings Bench, following their own decisions in *Shaw v. The York and Midland Railway Company*, 20 Law J. R. (Q. B.) 440, and *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 13 Q. B. 347, decided that a ticket given by the company, and signed by the bailor or his agent, containing the following: "N. B. This ticket is issued subject to the owner undertaking all risks of conveyance whatever, as the company will not be responsible for any injury or damage, however caused, occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles," formed a special contract between the parties, and exempted the company from all risk whatever of damage to the animals during the journey.

A similar decision was made by the Court of Common Pleas, in 21 Law J. R. (C. P.) 129, and by the Court of Exchequer, in *Carr v. The Lancashire and Yorkshire Railway Company*, 21 Law J. Rep. 261, decided on the same day. Baron Parke, a very great authority, said, "Such a contract was made in this case, and the only question is as to the meaning of the contract; according to the old cases there was this limitation upon the construction of carriers' notices, that unless a carrier excluded his liability in express terms, according to the ordinary terms of the notice, he would be responsible for gross negligence. The practice of a carrier protecting himself by notice was put an end to by the carriers' act." Baron Martin said, "This is the case of a special contract which the plaintiff has adopted and assented to. Without doubt at common law a carrier is entitled to make a special contract." Insurers are answerable for gross negligence; and if goods may be insured, others may contract that they will not be answerable for their own gross negligence. "I am to look only at the terms of the notice, and if the carrier had been desirous of preparing a contract by which he would get rid of his liability, in respect of gross negligence, he could not have used more apt words than those that are contained in this notice." "With respect to the argument of inconvenience, the answer is, that we have nothing to do except to carry out this contract; the parties concerned, and not ourselves, are to judge of the inconvenience. If we hold the carriers in this case responsible for gross negligence, we shall place them in the situation of insurers and underwriters."

In *The Great Northern Railway Company v. Morville*, 21 Law J. Rep. (Q. B.) 319, the Queens Bench, in considering a ticket issued by the appellants similar to the one before quoted, and how far it formed a special contract under the circumstances of that particular case, give their construction of the Carriers' Act of 1830. Justice Coleridge, said, "The case shows sufficient to induce us to treat the railway company as common carriers of horses. That brings them within the act of parliament. It is conceded for the respondent that the horse was carried under a contract, but it is said that was a mere contract to be inferred from the notice in the ticket; and it is concluded that as the

frequent practice of bankers and others sending by the public mails, stage-coaches, waggon, vans, and other public conveyances by land,

notice spoken of in section 4 of the Carriers' Act, was only available 'if knowledge of it was brought home to the party sending the goods,' from which knowledge assent was to be inferred, and from that assent a contract; that the legislature clearly intended to distinguish between that sort of contract created by the notice, and the contract mentioned in section 6; but no stress has been laid upon the word 'public,' in the 4th section. Now I think that that word receives a meaning from the preamble, for it is there said that carriers had difficulty in fixing the party with knowledge of notices published by them. It seems to me that section 4 refers to such public notices; whereas section 6 relates to contracts made by the parties when they come together. This case, I think, falls clearly within section 6. The plaintiff comes with his horse to the station, pays for the carriage of it, and the clerk produces the ticket; whether the plaintiff signs it or not is immaterial; if he agrees to the terms set forth in it, he is bound by them."

Mr Justice Erle said, "Whether the plaintiff had signed the paper, or whether the clerk had mentioned the terms, or whether the latter had delivered to the plaintiff a ticket, saying what the terms were, there would have been in each case good evidence of an agreement between the parties." 1 Am. Law Reg. 66, 69, 71.

"That a carrier may, by express contract, restrict his common law liability, is now, I think, a well established rule of law. It is so understood in England; *Alleyn*, 93; *Went*, 190, 238; *Peake's N. P. C.* 150; 4 *Burr.* 2301; 1 *Starkie's R.* 186; *Taunt.* 271; *Wyld v. Pickford*, 18 *Mees. & Welsby*, 443; 4 *Co.* 84; and in Pennsylvania, *Cam. and Am. R. R. v. Baldauf*, 16 *Penn. R.* 67; 5 *Rawle*, 179; *Bingham v. Roger*, 6 *Watts & Serg.* 495. In other states, where the question has arisen whether notice would excuse the liability of the carrier, it seems to have been taken for granted, that a special acceptance would do so; and in *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 *How.* 382, it was so held by the Supreme Court of the United States. For the concurrent opinions of elementary writers in favor of this doctrine, see *Story on Bailm.* § 549; *Chitty on Contr.* 152; 2 *Kent, Com.* 606; *Angell on Carriers*, §§ 39, 220, 221. Upon principle, it seems to me no good reason can be assigned why the parties may not make such a contract as they please. It is not a matter affecting the public interests: no one but the parties can be the losers; and it is only deciding by agreement which shall take the risk of the loss. The law, where there is no special acceptance, imposes the risk upon the carrier. If the owner chooses to relieve him, and assume the risk himself, who else has a right to complain? It is supposed that the extent of the risk will be measured by the amount of compensation; and the latter, it will not be denied, may be regulated by agreement. The right to agree upon the compensation, cannot, without great inconsistency, be separated from the right to define and limit the risk. Parties to such contracts are abundantly competent to contract for themselves. They are among the most shrewd and intelligent business men in the community, and have no need of a special guardianship for their protection. It is enough that the law declares the liability where the parties have said nothing on the subject. But if the parties will be better satisfied to deal on different terms, they ought not to be prevented from doing so." *Dorr v. New Jersey Steam Nav. Co.*, 1 *Kernan*, 492, per *Parker, J.*

"Considerable discussion of this subject may be found in the English books, but the question is there mixed up with the effect of notices and special contracts, in derogation of the carrier's common law liability. The English railway companies receive cattle, making special agreements sometimes, that 'the owner undertakes all risks whatever, and that the company will not be responsible for any injury or damage, however caused;' sometimes (mixing up the matter further with the case of passengers,) making a contract or giving notice that the fare is 'for the use of the railway carriages and locomotive power only, and the company will not be liable for defects in the cars, unless pointed out by the passenger before he gets in, nor for any damage whatever to live stock;' and sometimes making the owner of the stock sign a certificate, that he has 'examined the carriages and is satisfied with their sufficiency.' Hence, in *Shaw v. The York and N. M. R.*, 6 *Eng. Railw. Cas.* 87; *Austin v. The Manchester and S. R.*, 5 *Eng. Law & Eq.* 329; *S. C.*, 11 *Id.* 506; *Carr v. The Lancashire R. Co.*, 14 *Id.* 340; *Chippendale v. The Lancashire R. Co.*, 7 *Id.* 395; *Morville v. The Great Northern R. R.*, 10 *Id.* 366, though the cases were all cases of the carriage of horses or other beasts, the matter of the notices was the chief element of the decision."

"The question however remains, whether live stock are the subjects of the ordinary and implied contracts of common carriers at all. In regard to slaves, who, in some states would come, perhaps, more under the title of live stock than of passengers, the question has been several times decided. Though chattels to some purposes, they are

for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in a small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire, is greatly increased; and through the frequent omission by persons sending *such parcels and packages to notify the [*421] value and nature of the contents thereof, so as to enable such mail contractors, &c., by due diligence to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, &c., with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses; it is then enacted, That no mail contractor, stage-coach proprietor, or other common carrier *by land*, for hire, shall be liable

still human beings; and as they cannot be stowed away like bales of goods, and have the power of locomotion—of running and of avoiding risks—and a measure of intelligence, the common law measure of liability of the carrier of goods, has in certain cases, been held not to apply in all its extents. Thus where slaves carried on a steamboat, have been lost by drowning or escape. *Boyce v. Anderson*, 2 Peters, 151; *Clark v. M'Donald*, 4 M'Cord, 223; *Sill v. The So. Car. Railroad*, 4 Rich. 154; or shot by accident, *M'Clenaghan v. Brock*, 4 Id. 17, the carrier has been discharged, it appearing he had used proper care and diligence in the case. In deciding how far the carriers of live stock are to be charged as common carriers, said the court in *White v. The Winnisimmet Co.*, 1 Cush. 158, regard is to be had to the nature of the thing transported. Carriers of passengers are not common carriers with all the liabilities of such. And the court distinguishes the case of living beings who cannot be put under the absolute control of the carrier, who have the power of locomotion and the opportunity, by their own voluntary act, of exposing themselves to greater hazard as well as guarding against perils, from the case of dead freight. Live stock can in no proper sense be called goods or produce, in the carriage of which the office is defined to consist. The transportation of live stock, for any distance, has sprung up since the introduction of railways. In three or four of the English cases above cited, as also in the last cited American one, where a horse on a boat broke loose and was injured, the owners or their servants accompanied the train or boat; and it is customary, both in England and here, for the owners of live stock transported by railway or steamboats, to provide some special attendant of their own to accompany them. 'There is,' say Messrs. Smith & Bates, 1 Am. Railway Cases, 183, 'no such complete delivery of the property into the custody of the company as to impose upon them all the duties and liabilities of common carriers. It has been decided that the owners of steamboats employed to tow other vessels, are not common carriers, on the ground that there is not that delivery of the vessels or their cargoes which the law requires to fasten upon carriers their common law liabilities; *Caton v. Rumney*, 13 Wend. 387; *Alexander v. Greene*, 3 Hill, 9; *Wells v. The Steam Nav. Co.*, 2 Coms. 204. These cases are somewhat analogous to those of the transportation of cattle on a railway, as respects the care and custody of the property; for though the conductors of a train have a more complete possession of the cattle in their charge than the managers of a towboat have over the vessels committed to their care, it seems, nevertheless, to fall short of the exclusive control which carriers usually have over the ordinary articles of transport.' The feeding and other care which cattle require, are duties which the common law never imposed on the common carrier; and in the nature of things the common carrier, while answering against all injuries or losses from external sources, cannot be answerable for the nature of the beast intrusted to him, who may kill himself or others in the place or pen with him, or be lost under circumstances where dead freight would be perfectly safe. Without, therefore, too much narrowing the liability of the carrier of live stock, and affirming that he is probably liable for the performance of all that the law, irrespective of any contract of his, would impose upon him, and is liable probably as a common carrier except in regard to those risks specially springing from the character of living animals, we may safely say that his liability is limited by the nature of the subject, and that it is not, in all respects, so extensive as that of the common carriers of dead freight." 1 Smith's Leading Cases, 331, 332, 5 Am. ed., note by Wallace.

for the loss of, or injury to, any article of property of the descriptions following: (that is to say,) gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs(*x*) or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire, or to accompany the person of any passenger in any mail or stage-coach, or other public conveyance, when the value of such property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail-contractor, &c., or to their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such property shall have been declared by the persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package." By the second section, common carriers, upon delivery of such parcels exceeding the value of ten pounds, and so declared as aforesaid, may demand an increased rate of charge, which is to be notified by a notice in legible characters affixed in the office; and persons sending parcels are to be bound by such notice, without further proof of the same having come to their knowledge. The third section directs that carriers shall, if required, give a receipt for the parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and carriers who do not give such receipt, when required, or affix the proper notice, are not entitled to the benefit of this act. By the fourth section, carriers cannot by a notice limit their liability at common [*422] law to answer for the loss of any articles in respect *whereof they are not entitled to the benefit of this act. By the fifth section, every office of such common carrier shall be deemed a receiving-house, (*y*) and any one proprietor shall be liable to be sued, and no action shall abate for want of joining any co-proprietor. Special contracts are not to be affected by this act. (*z*) Parties entitled to damages for parcels lost or damaged, may recover the extra charges for insurance. (*a*) This act (*b*) does not protect any such common carrier from liability to answer for loss or injury arising from the felonious act of any servant in their employ, nor does it protect any such servant from liability for any loss or injury occasioned by their own personal neglect

(*x*) *Mayhew v. Nelson*, 6 C. & P. 58.

(*y*) *Syms v. Chaplin*, 5 A. & E. 634; 1 Nev. & P. 129.

(*z*) Sect. 6.

(*a*) Sect. 7.

(*b*) Sect. 8.

or misconduct. But common carriers are not to be concluded as to the value of any parcel by the value declared, but the party injured must prove the actual value by the ordinary legal evidence.^(c) Money may be paid into court by the common carrier in the same manner and with the same effect as money paid into court in any other action.^(d)

Although^(e) the foregoing statute in the preamble mentions articles of great value in a small compass, yet the provisions of sect. 1, in its enacting part, are not controlled by those words in the preamble. The terms of that section are general, and it applies to any glass article, if exceeding ten pounds in value. The carriage of glass requires particular attention, and imposes peculiar risk on the carrier. The term "glass" in the act being unlimited, the court would not be justified in saying that it applied to small glasses only, and not to glass of every description. In such a case, therefore, the plaintiff cannot recover, if he does not comply with the terms of the notice in the office, unless he can establish wrongful conduct, so as to take the case out of the protection intended by the statute. Gross negligence has, in many cases, been held to affix a liability on a carrier, to which he would not otherwise have been subject; as where he delivered the article to a wrong person,^(f) or where a mode of conveyance^(g) different from that agreed for was substituted, *viz.*, stage-coach for mail; or where a parcel was left unprotected in a cart^(h) in a street in London, or carried beyond the place of delivery.⁽ⁱ⁾ But in a recent case it has been holden, that as the protection given by the first section of this statute is absolute, and without exception or restriction, if any of the goods enumerated in the first section be sent to a carrier for conveyance without a declaration of the nature and value of such goods, or without paying or engaging to pay an increased charge, according to *section [*423] 2, the carrier is not liable for their loss, though it happen by the gross negligence of his servants.^(k) A carrier receiving goods, undertakes to carry them to the party whose address is upon them; the fact of their coming to him through a series of agents does not prevent his being liable.^(l) Since the new rules, the defence that the value has not been declared, cannot be made available under the general issue.^(m)

In every contract for the carriage of goods,⁽ⁿ⁾ between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board, or employing his vessel or lighter for that purpose, it is a term of the contract, on the part of the carrier or lighterman, *implied by law*, that his vessel is tight and fit for the purpose of employment, for which he offers and

(c) Sect. 9.

(d) Sect. 10.

(e) Per Bayley, B., *Owen v. Burnett*, 4 Tyr. 141; 2 Cr. & M. 353, S. C.

(f) *Birkett v. Willan*, 2 B. & A. 356; *Duff v. Budd*, 3 Brod. & Bingh. 177.

(g) *Garnett v. Willan*, 5 B. & A. 53; *Sleat v. Fagg*, 5 Id. 342.

(h) *Smith v. Horne*, Holt's N. P. C. 643; 8 Taunt. 144.

(i) *Ellis v. Turner*, 8 T. R. 531.

(k) *Hinton v. Libbin*, 2 Q. B. 646; 2 G. & D. 36. See *Wyld v. Pickford*, 8 M. & W. 443.

(l) Per Denman, C. J.; *Syms v. Chaplin*, 5 A. & E. 642; and see *Muschamp v. Lancaster and Preston Junction Railway Company*, 8 M. & W. 421, ante p. 419.

(m) *Syms v. Chaplin*, 5 A. & E. 634; 1 Nev. & P. 129.

(n) *Lyon v. Mells*, 5 East, 428.

holds it forth to the public. And the carrier and lighterman will be responsible for a breach of this implied undertaking, although he should give notice, "that he will not be answerable for *any* loss or damage, unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he will pay 10*l.* *per cent.* on such loss or damage, so as the whole does not exceed the value of the vessel and freight;" because the object of such notice is to limit the responsibility of the carrier in those cases only where *the law* would otherwise have made carriers answerable for the neglect of *others*, and for *accidents* which it might not be within the scope of ordinary care and caution to provide against.(1) In *Ellis v. Turner*, 8 T. R. 531, where a similar notice was given, the owner of the vessel was holden liable for the whole loss upon the special undertaking of the master.(2)

By stat. 7 Geo. II. c. 15, s. 1, reciting, that it had been holden that the owners of vessels were answerable for goods made away with by the masters or mariners, without the knowledge or privity of the owners, whereby merchants were discouraged from adventuring their fortunes as owners of vessels, to the prejudice of trade and navigation, it is enacted, that, "the owners of vessels shall not be liable for any loss or damage, by reason of any embezzlement, secreting, or making away with (by the master or mariners) of any goods shipped on board any vessel, or for any act, matter or thing, damage, or forfeiture, done, occasioned, or incurred by the master or mariners, or any of them, without the privity and knowledge of the owners, further than the value of the vessel with her appurtenances and freight for the voyage, wherein the embezzlement, &c., shall be made."

An action was brought against the owner of a vessel to re-
[*424] cover *the value of a quantity of dollars(o) shipped by the plaintiff on board the defendant's vessel, bound from London for Hamburg. The dollars had been taken during the night, by force, from on board the vessel, by a number of freshwater pirates, as the vessel lay at anchor in the Thames. The defendant relied on the preceding statute, proving that one of the mariners was accessory in the robbery, by giving intelligence. The Court of King's Bench, were of opinion, that this case fell within the words, "any act, matter, or thing, done, occasioned, or incurred, by master or mariners, or any of them," and, consequently, that the defendant was not liable beyond the value of the vessel and freight. The preceding statute afforded a very

(o) *Sutton v. Mitchell*, 1 T. R. 19.

(1) Carriers by land may limit their responsibility by notices clear and explicit, and brought home to the plaintiff or his agent, except against gross negligence, fraud, and want of ordinary care. A notice, "that all *baggage* is at risk of owners," does not apply to goods other than the *trunks*, &c. of passengers. *Beckman v. Chouse*, 5 Rawle, 179; *Bean v. Green*, 3 Fairf. 422. Nor excuse against injury to the baggage from a defect in the vehicles or machinery used in transporting, although there be no actual negligence. *Camden Company v. Burke*, 13 Wend. 611. See note (1,) 420, *ante*.

(2) The measure of damages, where goods are embezzled or lost during the voyage, is the clear net value of goods of like kind and quality at the port of delivery. *Watkinson v. Laughton*, 8 Johns. Rep. 213; Vid. also *Warden v. Greer*, 6 Watts, 424; *McGregor v. Kilgore*, 6 Ohio, 362; Sedgwick on Damages, ch. 12, p. 355, 2d ed.

inadequate protection to the owners of vessels, for they still remained liable for the full amount of goods lost by robbery, embezzlement, &c., *to which the master or mariners were not privy*, and the case of a loss by fire was wholly unprovided for by the statute; to remedy these inconveniences, and for the further encouragement of trade and navigation, the statute 26 Geo. III. c. 86, s. 1, has confined the liability of the owners of vessels for any loss or damage, by reason of any robbery, embezzlement, &c., without the privity of the owners, to the value of the vessel and freight, *although the master or mariners are not concerned in, or privy to, such robbery, embezzlement, &c.* The second section exempts the owners of vessels entirely from answering for any loss by fire. And by the third section, "the owners of vessels shall not be liable to answer for any loss happening to any gold, silver, diamonds, watches, jewels, or precious stones, by reason of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper, at the time of shipping, insert in his bill of lading, or otherwise declare in writing to the master or owner of the vessel, the nature quality and value of such gold, &c." When the goods were described as "1338 hard dollars," this being a coin current at the port of shipment, it was held a sufficient compliance with the act.^(p) The fourth section directs, that the freighters or proprietors shall receive satisfaction in average in proportion to their respective losses, if the value of vessel and amount of freight shall not be sufficient to make them full compensation; and empowers the freighters or proprietors, or any of them on behalf of himself and the other proprietors, or the owners of the vessel, to exhibit a bill in equity for the discovery of the amount of the losses, and also of the value of the vessel and freight, and for an equal distribution and payment thereof among the freighters in proportion to their losses; provided that, where the part-owners of the vessel exhibit the bill, they shall annex an affidavit, negating collusion with any of the defendants; and shall thereby offer to pay the value of the vessel and freight, as the court shall direct, whereupon the court shall ascertain the value, and direct payment thereof, as in the case of bills of interpleader. The foregoing *statute relates only to [*425] ships usually occupied in sea voyages, and not to small craft, lighters and boats concerned in inland navigation.^(q) See further provisions on this subject in stat. 53 Geo. III. c. 159, and *Gale v. Laurie*, 5 B. & C. 156, stat. 6 Geo. IV. c. 125, ss. 53, 5.

The preceding statutes do not affect the liability of masters and mariners.^(r)

III. *Of the Lien of Carriers.*

By the custom of the realm, a common carrier is bound to carry the goods of the subject for a reasonable reward, to be therefore paid, by

(p) *Gibbs v. Potter*, 10 M. & W. 70.

(q) *Hunter v. McGown*, D. P. 1819; 1 Bli. 573.

(r) See 7 Geo. II. c. 15, s. 4; 26 Geo. III. c. 36, s. 5; 53 Geo. III. c. 159, s. 4.

force of which he has a lien(s)(1) as far as the carriage price of the particular goods, but not to any greater extent.(2) Common carriers have in many instances attempted to extend their lien, so as to cover their general balances, or, in other words, they have claimed a general lien. In *Rushforth v. Hadfield*, 6 East, 519, 7 East, 224, it seems to have been admitted by the court, that the lien claimed by a carrier for his general balance, was not founded on the common law, but that such a lien might arise by contract between the owner of the goods and the carrier; and that usage of trade, if general, uniform, and long established, was evidence of such contract.(3) But it was re-

[*426] solved, that, *as general liens were *not to be favoured*, the party who sets up such a claim ought to make out a very strong case, and evidence of a few recent instances of detainer by carriers, for their general balance, would not be sufficient to furnish an inference, that the party who dealt with a carrier, had knowledge of the usage, and so to warrant a conclusion, that he contracted with reference to it, and adopted the general lien into the particular contract.

A carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners, goods having been sent by the carrier addressed to the order of J. S., a mere factor; it was

(s) *Skinner v. Upshaw*, Lord Raym. 752.

(1) The owner of a ship has a lien on the cargo for freight, although the vessel be hired to another, provided he continues in the actual or constructive possession and control of it. But *contra* if he part with the possession to the charterer. *Lander v. Clark*, 1 Hall, 355; See Angell on Carriers, § 357-359; Edwards on Bailm. 547-552.

(2) See *Hartshorne v. Johnson*, 2 Halst. 108.

(3) See *Naylor v. Mangles*, 1 Esp. N. P. C. 109, where it was contended, that a wharfinger had a lien for his general balance; Lord Kenyon, C. J., said, that "liens were either by common law, usage, or agreement. Liens by the common law were given where a party was obliged by law to receive goods, &c., in which case, as the law imposed the burthen, it also gave him the power of retaining for his indemnity. This was the case of inn-keepers; that a lien from usage was a matter of evidence. The usage in the present case had been proved so often, he said, it should be considered as a settled point that wharfingers had the lien contended for." And in *Spears v. Hartly*, 3 Esp. N. P. C. 81, Lord Eldon, C. J. (on the authority of the preceding case) held, that a wharfinger had a lien for his general balance; and further, that, although the balance was of more than six years' standing, the wharfinger might retain the goods by virtue of his general lien, for the debt was not discharged by the operation of the statute of limitations, but the remedy only. See also *Aspinall, Assignee of Howarth, v. Pickford*, 3 Bos. & Pul. 44. n. (a). Trover for goods: the defence was, that the goods were put by Howarth into the hands of the defendant, as a carrier, to be forwarded from Manchester to his warehouse in London, and that the defendant was entitled to retain against the estate for the general balance due from H. for the carriage of the goods. This right was established by evidence of the defendant having before claimed and been allowed to retain for his general balance, both against bankrupt estates and solvent customers, and also by the evidence of a principal carrier on the western road to the same effect, respecting himself. "The onus of making out a right of general lien lies upon the wharfinger. There may be an usage in one place varying from that which prevails in another. When the usage is general and prevails to such an extent, that a party contracting with a wharfinger must be supposed cognizant of it, then he will be bound by the terms of that usage; but then it should be generally known to prevail at that place. If there be any question as to the usage, the wharfinger should protect himself by imposing special terms, and he should give notice to his employer of the extent to which he claims a lien. If he neglects to do so, he cannot insist upon a right of general lien for anything beyond the mere wharfage." Per Cur. *Holderness v. Collinson*, 7 B. & C. 212.

holden, (t) that the carrier had not, as against the real owner, any lien for the balance due from J. S. Query, whether, if the notice had been, that all goods, to whomsoever belonging, should be subject to a lien for any general balance that may be due from the persons to whom they are addressed, he would have any right to retain the goods for the balance due from I. S.? In trover against a carrier, where the question was, whether the goods were rightfully retained by the defendant in satisfaction of a general lien; it was holden, that parol evidence could not be given of the contents of a postable notice in the defendant's office, that all goods carried by the defendant were to be subject to such general lien, but that the notice itself must be produced; and also, that evidence of bill delivered to the plaintiff, containing a similar statement, could not be received without a notice to produce the bills. (u)

As liens at law exist only in cases where the party entitled to them has the possession of the goods; consequently, if a carrier parts with the possession of the goods, after the lien attaches, the lien is gone. (1) An usage of carriers to retain goods, (x) as a lien for a general balance of account between them and the consignees, *does [*427] not affect the right of the consignor to stop the goods *in transitu*. A carrier (y) who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has not any right to detain them against the consignee for a general balance due to him for the carriage of other goods of the same sort, sent by the consignor. If a passenger (z) book himself to go by a particular coach, and leaves his portmanteau, the carrier will have a lien for something, though not for the whole fare. (2)

IV. *By whom Actions against Common Carriers ought to be brought.*

In general the action against a carrier, for the non-delivery or loss of goods, must be brought by the person in whom the legal right of property in the goods in question is vested at the time; for he is the person who has sustained the loss, if any, by the negligence of the carrier, and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured. (a) Hence where a tradesman orders goods to be sent by a carrier, as at the instant when the goods are delivered to the carrier, such delivery operates as a delivery to the purchaser, and the whole property, (subject only to the right of stoppage *in transitu* by the seller,) vests in the purchaser, he alone can maintain an action against the carrier for any

(t) *Wright v. Snell*, 5 B. & A. 350.

(u) *Jones v. Tarleton*, 9 M. & W. 675.

(x) *Oppenheim v. Russell*, 3 Bos. & Pul. 42.

(y) *Butler v. Woolcott*, 2 Bos. & Pul. N. R. 64; and see *Small v. Moates*, 9 Bingh. 574.

(z) *Higgins v. Bretherton*, 5 C. & P. 2.

(a) *Dawes v. Peck*, 8 T. R. 330; 1 Atk. 248, S. P.

(1) A special contract with a carrier does not waive the right of lien, unless inconsistent with it. A credit prolonged beyond the time of parting with the possession by the carrier is inconsistent with such a right. *Pinney v. Wells*, 10 Conn. 104.

(2) One of two or more joint owners of a vessel cannot sue alone for freight, although he is also master. *Robinson v. Cushing*, 2 Fairf. 480.

loss or damage to the goods; and this rule holds as well where the particular carrier is not named by the purchaser,(b)(1) as where he is;(c) and it holds as well in the case of a carrier by water, as where the goods are conveyed by land: but it has in no case been held that the property passed to the consignee by the consignor's mere [*428] delivery to *a carrier, the consignee having given no order whatever for the sending;(d) and where goods are sent to a customer for approval, as until acceptance no property vests in the consignee, the action against the carrier for loss is properly brought by the consignor.(e)

The plaintiff had shipped goods(f) on board the *Mercurius*, of which the defendant was owner, to be carried from London to Tonnigen. The goods, (as appeared by an admission on the part of the plaintiff,) were expressed in the bills of lading, to be shipped by order on account of Hesse and Co. of Hamburg. The ship arrived in the river Eyder, but was prevented from proceeding to Tonnigen by the commander of one of his Majesty's frigates, and ordered to return home. After her return, the captain made an affidavit, that he believed the cargo to be Danish property; whereupon the goods were unloaded and delivered over to the admiralty marshal, and libelled in the Admiralty Court; the plaintiff afterwards recovered them by a proceeding in that court. The action was brought to recover the expenses incurred by the suit in the admiralty. On the part of the defendant it was insisted, that the goods being shipped by order and on account of Hesse and Co., the property vested in them immediately on their being shipped on board the *Mercurius*. *Dawes v. Peck*, and *Dutton v. Solomonson*, were cited. It was also urged, that a recovery by the present plaintiff could not protect the defendant from an action at the suit of Hesse and Co. On the part of the plaintiff it was contended, that there was a distinction between the carrying goods from one part of England to another, and the transporting them beyond sea. That after a delivery of goods to a carrier, to carry them from one part of England to another, the vendor had no property in the goods, but only a right of stopping *in transitu*; and it was admitted, that if the goods were directed to be sent by a carrier, without specifying the carrier, the delivery to the carrier was a delivery to the vendee; but urged that, in the case of

(b) *Dutton v. Solomonson*, 3 Bos. & Pul. 584.

(c) *Dawes v. Peck*, 8 T. R. 330; 1 Atk. 248.

(d) Per Wightman, J., in *Coats v. Chaplin*, 3 Q. B. 483; 2 G. & D. 552, *post*, p. 429.

(e) *Swain v. Shepherd*, 1 M. & Rob. 223, *Parke, J.*; recognized in *Coats v. Chaplin*, *ubi sup.*

(f) *Brown v. Hodgson*, 2 Campb. 36.

(1) Delivery of goods by the vendor, on behalf of the vendee, to a carrier, although not named by the vendee, is a delivery to the vendee. *Dutton v. Solomonson*, 3 Bos. & Pul. 582. And the goods are, immediately upon the delivery to the carrier, at the risk of the vendee, although the carrier is to be paid by the vendor. *King v. Meredith*, 2 Campb. 639. The vendor is not bound to enter and insure the goods with the carrier as above the limited value, without instructions for that purpose. *Cothay v. Tate*, 3 Id. 129. But the delivery to the carrier ought to be in such a manner, as to furnish the purchaser with a remedy over against the carrier, in case of loss. *Buckman v. Levi*, Ib. 414. See also *Clarke v. Hutchins*, 14 East, 475; *Sanderson v. Lamberton*, 6 Binn. 129; *Griffith v. Ingledew*, 6 S. & R. 429.

goods sent abroad, if the goods arrived safe, they were to be paid for; aliter, if they do not arrive. Lord *Ellenborough*, C. J. "They are shipped by order and on account of Hesse and Co. I can recognize no property but that recognized by the bill of lading." Plaintiff nonsuited.

It is observable that in the case of *Davis v. James*, 5 Burr. 2680, it was holden, that the *consignor* might maintain the action; but the ground of that decision was, that the consignor had made himself responsible to the carrier for the price of the carriage. So where, by the bill of lading, the captain was to deliver the goods for the consignor, and in his name to the consignee, and at the time of shipment the consignee had no property in the goods, it was *holden, (g) [*429] that an action against the ship-owners for damage done to the goods, must be brought in the name of the consignor; and that, although the consignee had insured the goods and advanced the premiums of insurance before the arrival of the ship. (1) A laundress sent linen, which she had washed, to the owner, by the carrier, whom she paid. The carrier having lost it, it was holden, (h) that the laundress was entitled to sue the carrier for the loss; for she had a special property, which had not passed from her. The traveller of M., a tradesman residing in London, ordered goods for M., of plaintiff, a manufacturer at Paisley. No order was given as to sending the goods: plaintiff gave them to defendant, a carrier, directed to M., to be taken to him, and also sent an invoice by post to M., who received it. The goods having been lost by defendant's negligence, and not delivered to M., it was holden (i) that defendant was liable to plaintiff. In *Moore v. Wilson*, 1 T. R. 659, where the action was brought by the consignor, and the plaintiff having averred in his declaration, that the hire was to be paid by him, proof that the hire was to be paid by the consignee was holden not to be a variance, on the ground that whatever might be the contract between the vendor and the vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable. Where goods were delivered to a carrier at Exeter, to convey to Falmouth, and there deliver them to an agent, who was to forward them to the consignee abroad; and the carrier detained the goods on the ground of a lien against the agent for his general balance; it was holden, that trover might be maintained against the carrier *at the suit of the consignor*. (k) An action lies against the commander of a ship of war who takes the bullion of a private merchant on board, for not safely keeping and delivering it. (l) So where the master of a store-ship, in the king's service, took in the bullion of a private merchant on freight, from Gibraltar to Woolwich, it was holden, (m) that an action lay against him for the loss of the bullion.

(g) *Sargent v. Morris*, 3 B. & A. 277.

(h) *Freeman v. Birch*, 3 Q. B. 492, n.

(i) *Coats v. Chaplin*, 3 Q. B. 483; 2 G. & D. 552.

(k) *Tagliabue v. Wynn and another*, Cornwall Lent Ass. 1813; Wood, B., MSS.

(l) *Hodgson v. Fullarton*, 4 Taunt. 787.

(m) *Hatchwell v. Cooke*, 6 Taunt. 577.

(1) See *Morse v. Sherdine*, 2 Harr. & M'Hen. 453.

V. *Of the Declaration.* p. 429; and *Pleading under New Rules.* p. 433.

Formerly the declaration in actions against common carriers, stated their employment as common carriers,⁽ⁿ⁾ their liability by the custom of the realm, a delivery to, and acceptance by the defendants of the goods to be carried, for a reasonable hire or reward, concluding with the loss or damage to the goods; but the modern practice [*430] is not to declare in this form, but in assumpsit,⁽¹⁾ and *not to state either the employment of the defendants as common carriers, or the custom of the realm⁽²⁾ as to their liability. This form of declaration has prevailed since the decision of *Dale v. Hall*, M. T. 1750, in which it was settled, that it did not make any difference, whether the plaintiff declared on the custom, or more generally in assumpsit: for, by stating that the defendant carried for hire, it would appear that the defendant was a common carrier, and then the law would raise the promise from the nature of the contract. But although the plaintiff is not bound to allege the custom, yet he must produce sufficient evidence to bring his case within the custom.^(o)

The advantage resulting to the plaintiff from declaring in [*431] *assumpsit is, that he may join the common counts with the special counts in assumpsit, if he has other and distinct^(p) causes of action to which they are applicable. The inconvenience

(n) Herne's Plead. 76. Vid. Ent. 37, 38.

(o) Per Lord Hardwicke, C. J., in *Boucher v. Lawson*, H. 9 Geo. II. B. R. Ca. temp. Hardw. 199.

(p) See new Rules.

(1) It may be observed, however, that where the circumstances of the case require a count in trover to be added, the ancient form of declaration is adhered to, or (what is more usual) a concise form, analogous to the ancient form, and founded on a breach of duty, is adopted. It is worthy of remark, that *Denison, J.*, said, in *Dale v. Hall*, B. R. H. 24 Geo. II. MSS., that where the action was founded on the custom, it was *ex contractu*, and that trover and an action on the custom could not be joined; and in *Boson v. Sandford and another*, Salk. 440, the court held, that an action, charging (see the declaration, 2 Show. 478, and Carth. 158,) the defendants with a breach of their duty as carriers, was not an action *ex delicto*, but *ex quasi contractu*, and on this ground they decided, that the action being brought against two of four part-owners of a ship, could not be sustained, although the defendants had not pleaded this matter in abatement, but had relied on the general issue, not guilty. This case, however, as to the taking advantage of the omission of some of the partners on the general issue, has been overruled, in *Rice v. Shute*, 5 Burr. 2611, and in subsequent cases; and as to the form of the action, *Boson v. Sandford*, was overruled, in *Dickon v. Clifton*. 2 Wils. 319, which was recognized by Lord *Ellenborough*, C. J., delivering the opinion of the court, in *Gossett v. Radnidge*, 3 East, 62. In an action on the case for refusing to carry goods, it is sufficient to aver in the declaration that plaintiff was ready and willing, and then offered to pay defendant for the carriage, &c., and an actual tender is not necessary. *Pickford v. Grand Junction R. R. Co.*, 8 M. & W. 372. See *Jones v. Tarleton*, 9 Id. 675.

(2) "The custom of the realm is the law of the realm, (1 Inst. 115, 6; Hob. 18,) and consequently it need not be set forth in the declaration." Per *Denison, J.*, in *Dale v. Hall*, MSS., and per Lord *Hardwicke*, C. J., in *Boucher v. Lawson*, Ca. temp. Hardw. 199. See also *Hargrave's Co. Litt.* 89, a, n. 7. "It seems not only unnecessary, but even improper, to recite the custom in the declaration, because it tends to confound the distinction between *special* customs, which ought to be pleaded, and the *general* custom of the realm, of which the courts are bound to take notice without pleading."

which arises from declaring in assumpsit is, that it lets in a plea of abatement for want of joining all the parties, and it excludes the right to join a count in trover. If the plaintiff is desirous of avoiding this inconvenience, he may either pursue the ancient method of declaring with a recital of the custom, or he may adopt a more general form, (omitting the recital of the custom,) and allege his gravamen as consisting in a breach of duty arising out of an employment for hire, and may consider that breach of duty as a tortious negligence. But under the new rules, H. T. 4 Will. IV. in actions of tort for misfeasance, several counts for the same injury, varying the description of it, are not allowed. And in the like actions for nonfeasance, several counts founded on various statements of the same duty, are not allowed. Declaring in tort, the plaintiff was permitted to add a count in trover, whereby the defendant was ousted of his plea in abatement, (q) on the ground of not joining all the parties; and further, if the action was brought against several defendants, and some were found guilty, and others acquitted, the plaintiff was, notwithstanding, entitled to judgment against those who had been found guilty. (r) The reader, however, should be apprised, that the doctrine laid down in *Govett v. Radnidge*, was opposed by two decisions in the Court of Common Pleas, viz., first by the case of *Powell v. Layton*, 2 Bos. & Pul. N. R. 365, in which it was determined, that a declaration against a carrier by water, stating, "that he had received goods to carry for freight, but that he had not delivered them according to his duty," was founded in contract; and that to a declaration so framed, the defendant might plead that he was only liable jointly with his partners, and that his partners were not sued; and, secondly, by the case of *Max v. Roberts*, and eight others (s) (1) there the gravamen was alleged as consisting in a breach of duty as ship-owners, arising out of an employment for freight. The plaintiff could not prove all the defendants to be owners; the court were of opinion, that, as the action was founded in contract, it was incumbent on the plaintiff to prove all the defendants to be owners, and having failed in that, he could not recover against those who were proved to be owners. A writ of error was brought, which, having been twice argued in the Court of King's Bench, was adjourned to the Exchequer Chamber, as it was supposed that a decision in this case might settle the question upon which the contrary judgments had been given; but, after argument, the twelve judges were unanimously of opinion, that both the counts of the declaration were so *defective in several material respects, (*perfectly collateral to* . [*432] *the question upon which the determination of the judges was*

(q) *Mitchell v. Tarbutt*, 5 T. R. 649; *Ansell v. Waterhouse*, B. R. Trin. T. 57 Geo. III. 6 M. & S. 385.

(r) *Govett v. Radnidge*, B. R. 3 East, 62; *Cooper v. South*, 4 Taunt. 802; *Bretherton v. Wood*, 3 Brod. & B. 54.

(s) 2 N. R. 454.

(1) See the case of *The Bank of Orange v. Brown*, 3 Wend. 158, where the subject is fully examined and the cases reviewed, and it was held, in an action against certain proprietors of a steamboat, charging them as common carriers, for the loss of property, where the gravamen was alleged to consist in a breach of duty, that a plea in abatement that there were other proprietors, who were jointly liable, was bad.

sought,) that no judgment could be given for the plaintiff upon either of them.(t) But where an action on the case was brought against ten defendants, proprietors of a coach, for the carriage of passengers for hire, for injuries sustained by plaintiff, a passenger, in consequence of negligence in driving, whereby the coach was upset, and the jury found against eight of the defendants, and in favour of the other two; and judgment was entered accordingly in B. R. On error in Exchequer Chamber, the judgment was affirmed,(u) the court observing, that in this case a duty was imposed on the defendants which did not arise by the contract, but by the custom or common law of England.

Trover will not lie against a common carrier for merely *losing* goods entrusted to his care without any actual wrong.(x)(1) The proper form of action is the action on the case before mentioned.(2) Although goods are spoiled by the default of the master of the ship, yet the owners are liable in respect of the freight,(y) if charged on the custom of the realm, or as usually carrying for hire, or upon an express undertaking: but not otherwise.(z) In this case the declaration, (if in *assumpsit*,) ought to be against all the owners; but if one or more are not named as defendants, advantage can be taken of the omission by plea in abatement only.(a) The same rule holds with respect to all common carriers who are partners, or who make a joint contract.(b) A ship was chartered to the commissioners of the navy as an armed vessel, who put on board a commander in the navy and a king's pilot, the master and crew being appointed and paid by the owners. In consequence of the improper *execution of an order given by the [*433] commander, the chartered ship ran foul of another ship. It was holden,(c) that the *owners* of the chartered ship, were liable for the injury which the other ship sustained; for the chartered

(t) *Max v. Roberts*, 12 East, 89. But see *Weall v. King*, 12 East, 452.

(u) *Bretherton and others v. Wood*, Exch. Ch. 3 Brod. & Bingh. 54; 9 Price, 408; 6 Moore, 141; recognized in *Pozzi v. Shipton*, 8 A. & E. 963; 1 P. & D. 4.

(x) *Ross v. Johnson*, 5 Burr. 2825; *Kirkman v. Hargreaves*, (case from Lancaster Sum. Ass. 1800, before Graham, B.,) B. H. R. 41 G. III. MSS. S. P.

(y) *Boson v. Sandford*, Salk. 440; 3 Lev. 258; 1 Show. 29; 2 Show. 478; Skin. 278; 3 Mod. 321; Carth. 58, S. C. See also *Colvin v. Newberry*, 8 B. & C. 166, reversed on error in Exch. Chr. 7 Bingh. 190; 1 Tyrwh. 81.

(z) *Boucher v. Lawson*, Ca. temp. Hardw. 194.

(a) *Rice v. Shute*, 5 Burr. 2611.

(b) But see stat. 1 Will. IV. c. 68, s. 5, ante, p. 422.

(c) *Fletcher v. Braddick*, 2 Bos. & Pul. N. R. 182. See also *Fenton v. City of Dublin Steam Packet Co.*, 8 A. & E. 835; 1 P. & D. 103.

(1) But if the carrier has the goods in his custody, at the time when he refuses to deliver them, this will be evidence of a conversion, Salk. 655. So *trover* will lie against a carrier who delivers goods to a wrong person through mistake. Per *Kenyon*, C. J., *Ford v. Harbottle*, Peake's N. P. C. 49, recognized in *Devereux v. Barclay*, 2 B. & A. 704. The owner of goods on board a vessel, directed the captain not to land them on the wharf, against which the vessel was moored, which the captain promised not to do, but afterwards delivered them to the wharfinger, conceiving that the wharfinger had a lien on the goods for wharfage fees; it was holden, that the owner might maintain *trover* against the captain, who could not prove that any wharfage duty was due. *Syeds v. Hay*, 4 T. R. 260; S. P. *Moses v. Norris*, 4 N. Hamp. R. 304.

(2) Either *case* or *trover* will lie for the non-delivery of goods. *Packard v. Getman*, 6 Cowen, 757.

ship, notwithstanding it had an officer on board, was, with regard to third persons, to be considered as the ship of the owners.

Pleading under new Rules.—In case against a carrier the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purposes for which they were received. R. G. H. T. 4 Will. IV. See *Webb v. Page*, 6 Scott's N. R. 951. All matters in confession and avoidance of actions on the case shall be pleaded specially, as in actions of assumpsit. R. G. H. T. 4 Will. IV.

As to payment of money into court, see *ante*, p. 140, and new rules.

VI. Evidence.

Action against defendants(*d*) as owners of a coach, for the loss of a parcel. To prove the ownership, on the part of the plaintiff, an entry in the book, kept at the proper office in Somerset House, stating the defendants to be licensed as owners of the coach was produced; and it was contended, that as the entry was made in pursuance of stat. 25 Geo. III. c. 51, ss. 50, 51, it must be presumed to be accurate, and was at least *prima facie* evidence; but *Gibbs*, C. J., rejected it, observing that the entry not being signed by the defendants, and nothing being shown to connect them with it, it was no evidence to prove them to be owners of the coach. The inscription(*e*) on a stage-coach of the name of the party is evidence, in an action against him, of ownership, for the statute is not confined to proceedings before magistrates.

A parcel, containing bank-notes, stamps, and a letter, was sent, by a common carrier, from one stamp distributor to another; it was holden,(*f*) in an action against the carrier, that the circumstance of the letter accompanying the stamps was *prima facie* evidence that it related to them, so as to bring the case within the proviso of the 42 Geo. III. c. 81, s. 6.,(*g*) which enacts, "that the prohibition to send letters otherwise than by the post, shall not extend *to letters sent by any common carrier, with and for the purpose of [*434] being delivered with the goods that the letter concerns:" and that the defendant not having proved the letter to relate to any other subject-matter, was liable for the value of the parcel.(1)

Declaration, that for certain hire and reward, defendants undertook to carry goods from London and deliver them safely at Dover. The

(*d*) *Strother v. Willan and others*, 4 Campb. 24. See also *Tinkler v. Walpole*, 14 East, 226; S. P. as to register of a ship.

(*e*) *Barford v. Nelson*, 1 B. & Ad. 571.

(*f*) *Bennett v. Clough*, 1 B. & A. 461.

(*g*) Repealed by stat. 7 Will. IV. & 1 Vict. c. 32; stat. 7 Will. IV. & 1 Vict. c. 33, excepts from the exclusive privilege of the post-office, "letters concerning goods of merchandise sent by common known carriers, to be delivered with the goods which such letters concern, without hire or reward or other profit or advantage for receiving or delivering such letters."

(1) To the same effect upon the construction of the act of Congress, (11 Cong. c. 54,) is the case of *Dwight v. Brewster*, 1 Pick. 50.

contract proved was to carry and deliver safely, (fire and robbery excepted.) It was holden(*h*) that this was a variance.(1) A memorandum by a wharfinger(*i*) of the receipt of goods to be shipped in a particular manner, may be given in evidence to show the terms on which they were received without a stamp, although the value of the goods was above 20*l.*, the wharfage being of a less amount. To sustain an action against the keeper of a booking-office for the loss of a parcel, it is not sufficient merely to show non-delivery of the goods to the consignee;(*k*) and that it had not reached its destination. The office keeper's duty is to deliver to a carrier: and some evidence must be given showing specifically a breach of that duty. By taking charge of a parcel at a booking-office, the office-keeper merely makes himself an agent to book for the stage-coaches; so that he sends the parcel to the proper coach-office, and once delivers it there, he has discharged himself; he has nothing to do with the carriage of the goods.(*l*)(2)

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*CHAPTER XI.

COMMON.

- I. OF RIGHT OF COMMON. p. 435.
- II. OF COMMON OF PASTURE. p. 436; AND HEREIN OF COMMON APPENDANT. p. 437. COMMON APPURTENANT. p. 438. AND COMMON IN GROSS. p. 439.
- III. OF THE INTEREST OF THE OWNER OF THE SOIL, SUBJECT TO RIGHT OF COMMON. p. 440; AND HEREIN OF APPROVEMENT AND INCLOSURE. p. 441.
- IV. OF THE REMEDY FOR DISTURBANCE OF RIGHT OF COMMON. p. 443.
- V. OF SURCHARGES BY COMMONERS. p. 444.
- VI. PLEADINGS; EVIDENCE. p. 445; STAT. 6 & 7 VICT. c. 85. p. 450.

(*h*) *Latham v. Rutley*, 2 B. & C. 20.

(*i*) *Chadwick v. Sills*, 1 Ry. & M. 15, recognized by Abbot, C. J., in *Latham v. Rutley*, *Ib.* 13.

(*k*) *Gilbart v. Dale*, 5 A. & E. 543; 1 Nev. & P. 22.

(*l*) Per Lord Abinger, C. B., in *Muschamp v. Lancaster and Preston Junction Railway Co.*, 8 M. & W. 428, *ante*, p. 419.

(1) On a declaration alleging "that defendants so carelessly managed and conducted their stage-coach that while they were driving and conducting the same it broke down," and thereby injured plaintiff, a passenger, the proof was that the wheel came off, in consequence of the nut that secured it being unfit for its purpose; held, no variance. *Ware v. Gray*, 11 Pick. 106.

(2) A common carrier cannot contradict his bill of lading, except to prove fraud practised upon him. *Warden v. Greer*, 6 Watts, 424. If the goods were injured in the delivery to him, and he knew it, it is not such latent defect as excuses him. *Ib.*

I. *Of Right of Common.*

RIGHT *of Common* is an incorporeal hereditament, or a right (lying in grant,) which certain persons have to take or use in common, a part of the natural produce of land,(1) water,(2) wood,(3) &c., belonging to other persons, who have the permanent or limited interest in the soil, &c. If a person claim by *prescription* any species of *common* in the land of another, and that the owner shall be excluded to have pasture, estovers, or the like; this is a prescription against law.(a) But a person may prescribe for the *several* pasture, and exclude the owner of the soil from feeding his cattle there.(b)

The common over which the right is claimed, generally is situate in the same manor in which the tenements lie, in respect of which the right is claimed; but a person may prescribe for right of common over a waste in one manor, in respect of a tenement lying in *another: but stronger evidence should be given to establish [*436] such a right than in ordinary cases. A person may have two distinct substantial grants of right of common over different wastes, from *different lords*, in respect of the *same* tenements;(c) and immemorial usage is evidence of such distinct grants. If A. has a common by prescription,(d) and takes a lease of the land for twenty years whereby the common is suspended; after the years ended, A. may claim the common generally by prescription; for the suspension was to the possession only, and not to the right, and the inheritance of the common did always remain.(4) Declaration stated that the plaintiff was possessed of a messuage and land, in right of which he was entitled to common for all his commonable cattle levant and couchant, on a common called Bentry Heath, and that defendant had enclosed the same. Plea, N. G. At the trial it appeared that the messuage and land, in respect of which the right of common was claimed, had about fifty years ago vested in the lord by forfeiture, and that he regranted the same as a copyhold with its appurtenances. It was contended that the right of common became extinguished, and the re-grant of it as a copyhold with its appurtenances did not re-create the right of common. But per *Abbott*, C. J., on motion to enter nonsuit, when a copyhold tenement is seized into the hands of the lord, it does not thereby lose its right of common; for that right is annexed to all tenements demised or demisable by copy

(a) 1 Inst. 122, a.

(b) 1 Inst. 122, a; *Hoskins v. Robins*, 2 Saund. 324, recognized in *Jones v. Richard*, 6 A. & E. 530, and in *Welcome v. Upton*, 6 M. & W. 536.

(c) *Hollinshead v. Walton*, 7 East, 485.

(d) 1 Inst. 114, b.

(1) Common of pasture, and common of turbary.

(2) Common of fishery.

(3) Common of estovers.

(4) Title once gained by prescription or custom, cannot be lost by interruption of the possession for ten or twenty years; but by interruption in the right it may; as if a man had a rent or common by prescription, unity of possession of as high and perdurable estate, is an interruption in the right. 1 Inst. 114, b. When a prescription or custom makes a title of inheritance, the party cannot alter or waive the same *in pais*.

of court roll; and while the estate remains in the lord, it continues demisable.(e)

II. *Of Common of Pasture; and herein of Common Appendant.* p. 437;
Common Appurtenant. p. 438; and *Common in Gross.* p. 439.

Common of Pasture is, where one person has, in common with other persons, the right of taking, by the mouths of his cattle, the herbage growing on land of which some other person is the owner. *Common of Pasture* is either common appendant, common appurtenant, or common in gross. With respect to two other kinds of common of pasture, [*437] which are sometimes mentioned in the books, *viz., common of vicinage, and common in gross *sans nombre*, or without stint; it may be observed, that the former cannot, strictly speaking, be a *right* of common,(f) for if it were, it would prevent an enclosure, which it has been always holden that it will not. The truth is, it is only an excuse for a trespass.(g) Where there is a partial enclosure,(h) common by vicinage still continues. As to common in gross *sans nombre*, it has been truly said, that the notion of this species of common, in the latitude in which it was formerly understood, has been exploded long ago,(i)(1) and it cannot have any rational meaning, but in contradistinction to stinted common, where a man has a right to put on the common a certain number of cattle only.

Common Appendant(k) is of common right (and therefore a man need not prescribe for it,(l)(2) for beasts commonable, that is, that serve for the maintenance of the plough, as horses and oxen, and for kine and sheep to manure the land, and is appendant to *ancient arable land* only.(m) It must have existed from time immemorial.(n) It must be claimed in the waste of the lord, not for a certain number of cattle, but for such only as are levant and couchant on the land, and therefore it cannot be severed, not even for a moment, nor turned into common in gross. The reason for common appendant appears to be this:

(e) *Badger v. Ford*, 3 B. & A. 153.

(f) *Musgrave v. Cave*, Willes, 322; 1 Inst. 122, a.

(g) See *Heath v. Elliott*, 4 Bingh. N. C. 388.

(h) *Gullett v. Lopes*, 13 East, 348.

(i) *Bennett v. Reeve*, Willes, 232.

(k) 1 Inst. 122, a; Bro. Abr. Common, 1.

(l) Bro. Abr. Common, pl. 11, 35.

(m) 4 Rep. 37, b; Willes, 322.

(n) 26 H. 4, a.

(1) In *Mellor v. Spateman*, 1 Saund. 346, c. Serj. Wms. edition, *Kelynge*, C. J., said, positively, that there could not be any common in gross *sans nombre*. See also *Benson v. Chester*, 8 T. R. 396, where it was holden, that a claim of a right of common, without stint, as annexed to an ancient messuage, without land, could not be supported, such a right of common not existing in law.

(2) Common appendant must have existed from time immemorial, but it ought not to be claimed by prescription. The proper way of pleading it is, that the party was seised in fee of certain arable land, to which he had common appendant in the locus. See 4 H. 6, 13, a.

that as the tenant would necessarily have occasion for cattle,^(o) not only to plough, but likewise to manure his own land, he must have some place to keep such cattle in, while the corn is growing on his own arable land; and therefore of right (if the lord had any waste) the tenant might put his cattle there, when they could not go on his own arable land; hence it is plain, that levancy and couchancy⁽¹⁾ are incident *to common appendant,^(p) namely, that the [*438] tenant can only have a right of common for such cattle as are levant and couchant on his estate, that is, for such and so many as he has occasion for to plough and manure his land, in proportion to the quantity thereof.⁽²⁾ Common appendant, being of common right, may be apportioned, by alienation of part of the land to which the common is appendant;^(q) and if the land be divided ever so often,^(r) each parcel of land is entitled to common appendant. Although the commoner purchases part of the land in which he is entitled to common, yet the common shall be apportioned,^(s) because common appendant is of common right;^(t) but otherwise it is of common appurtenant.^(u)⁽³⁾

Common Appurtenant is a right of common founded on a grant.^(x) or prescription,^(y) (which supposes a grant,) annexed to the enjoyment of land. This species of common may be granted for all manner of cattle, that is, not only for those which serve for the maintenance of the plough, and to manure the land, but for swine, goats, and the like;^(z) it may be granted for an unlimited number, or for a certain number of cattle. Where common appurtenant is granted for an unlimited number of cattle, the measure of profit which the commoner is to have, is, as in the case of common appendant, levancy and couchancy;^(a) and, consequently, like common appendant, such common appurtenant cannot be converted into common in gross. But common

(o) *Bennett v. Reeve*, Willes, 231.

(p) 1 Roll. Abr. 398, (I) 1.

(q) 1 Inst. 122, a.

(s) 8 Rep. 79, a.

(u) *Ib.*

(y) 1 Inst. 122, a.

(a) 1 Roll. Abr. 398, (I) pl. 1; *Drury v. Kent*, Cro. Jac. 15.

(r) Per Willes, C. J.; Willes, 230, 231.

(t) 1 Inst. 122, a.

(x) Cro. Car. 482.

(z) *Ib.*

(1) Levancy and couchancy mean the possession of such land as will keep the cattle claimed to be commoned during the winter; and as many as the land will maintain during the winter, shall be said to be levant and couchant. Per Buller, J., *Scholes v. Hargreaves*, 5 T. R. 48, 49. But see *Rogers v. Benstead*, *post*, tit. "Evidence," 447, 448.

(2) "It is plain that a person cannot have a right of common appendant for cattle which he borrows, unless he makes use of them all the year to plough or manure his land." Per Willes, C. J., in *Bennett v. Reeve*, Willes, 231, 232.

(3) Common of estovers appurtenant to a farm, cannot be apportioned. If the farm be divided by act of the party amongst several tenants, the right of such common is extinguished, and can be revived only by a new grant. Where it devolves on several by act of the law, as by descent, they cannot enjoy the right in severalty, but may by conveyance vest it one only. *Van Renessellaer v. Radcliff*, 10 Wend. 639. *It seems* that common of pasture is apportionable whether appendant or appurtenant. *Ib.* The right to common of estovers is extinguished by a severance by act of the parties. *Livingston v. Ketchum*, 1 Barb. 592. Where land, to which common of estovers is appurtenant, is divided between the tenants, without any provision in respect to the common of estovers, the right is extinguished as to both tenants. *Ib.* And the separate occupation by the tenants, of distinct portions of the land, for a great number of years, is sufficient to raise the presumption of a division of the land and of the right to estovers. *Ib.*

appurtenant for a certain number of cattle may be granted over, and so become common in gross.

Common appurtenant may be granted at this day,^(b) and may be apportioned^(c) by a conveyance of part of the land to which the right is appurtenant.⁽¹⁾

[*439] *Common appurtenant, as well as common appendant, may become extinct by unity of possession.^(d)⁽²⁾ And where common appurtenant has been extinguished by unity of possession, a new right of common is not created by a deed granting a messuage and land, with all common *thereto belonging*; although the occupiers of the tenement have used the common since the extinguishment. Otherwise, if the language of the deed had been, "all commons *used* therewith."^(e) To an action of trespass defendant pleaded a prescriptive right of common for all his cattle, levant and couchant, upon a messuage *cum pertinentiis*;^(f) on demurrer, it was insisted that the prescription was not good, for the cattle could not be levant and couchant on a messuage. *Holt*, in support of the plea, contended, that a messuage comprehended a curtilage, which might be an acre or more, upon which the cattle might be levant and couchant; the court being of this opinion, adjudged the prescription to be good. In an action on the case for disturbing the plaintiff's right of common,^(g) it appeared that the plaintiff (who claimed the common in respect of a messuage *for all* commonable cattle, levant and couchant,) was the owner of a small house, wherein he carried on the trade of a butcher. The house had neither land, curtilage, nor stable belonging to it, but under the shop-window was a sheep-hold, which would contain four or five sheep at a

(b) *Cowlam v. Slack*, 15 East, 108.

(c) Adjudged, Hob. 235; 1 Inst. 122, a.

(d) *Bradshaw v. Eyr*, Cro. Eliz. 570.

(e) *Clements v. Lambert*, 1 Taunt. 205.

(f) *Scamler v. Johnson*, T. Jon. 227; 2 Show. 248, S. C.

(g) *Scholes v. Hargreaves*, 5 T. R. 46.

(1) This point was determined also, in *Sacheverill v. Porter*, Cro. Car. 482, where a right of common in a waste having been granted to A., (who was seised of lands in S.,) and all his tenants in S., for all commonable cattle, and A. conveyed parcel of the lands in S.; it was holden, that the alienee was entitled to common for all his commonable cattle, levant and couchant, on the parcel of the lands conveyed.

(2) The dominant estate consisted of forty-nine and three quarters acres, whereof the owner conveyed to the owner of the servient thirty acres, and subsequently conveyed the remaining nineteen and three quarters acres to one who afterwards repurchased the thirty acres of the dominant estate which had been so conveyed to the servient owner, and conveyed the whole to the plaintiff; and the plaintiff sold and conveyed away nine and three quarters acres which had not been united to the servient estate, and in said conveyance the plaintiff reserved to himself the right of common of sea-weed and stone, appurtenant to said nine and three quarters acres. Held, that the union of the servient with thirty acres of the dominant estate, did not extinguish the entire right of common, but only so much as was apportionable to thirty acres, and that the residue of the common continued appurtenant to the nineteen and three quarters acres; but that inasmuch as said common could not be severed from the estate to which it was appurtenant and granted over, so neither could it be retained after a conveyance of the estate, and that the plaintiff's reservation of the common appurtenant to the nine and three quarters acres conveyed away by him, was of no effect, and the only common which remained was the common apportionable to the ten acres, part of the nineteen and three quarters which were united with the servient estate. *Hall v. Lawrence*, 2 Rhode Island, 218.

time, but neither horse nor bullock could be kept there: Lord *Kenyon*, C. J., at the trial, on the northern circuit, being of opinion, that levancy and couchancy was not proved, as the plaintiff had not shown, that he was in possession of land whereon the cattle might be levant and couchant, nonsuited the plaintiff. The Court of B. R. afterwards concurred in opinion with the chief justice.

Common of pasture, without land, for a certain number of sheep, may be parcel of a manor,^(h) and demised and demisable by copy of court-roll; and, if it be thus claimed in pleading by the lord of the manor, the plea will be good, although he does not describe the common as common appendant, appurtenant, or in gross, since it must be taken to be common appurtenant; for, not being claimed as incident to arable land, but to the manor, for a certain number of sheep in the soil of another, it cannot be common appendant; nor can it be taken to be common in gross, being stated in the plea to be parcel of a manor; then it must be common appurtenant, the only remaining sort of common.

Common in Gross is so called,⁽ⁱ⁾ because it does not appertain to any land, and it must be by grant or prescription. This species of common may be granted for all manner of cattle, and for an unlimited number, or for a certain number of cattle. If granted *for an unlimited number, it seems that the grantee may [*440] put on any number of cattle, provided he leaves sufficient common for the lord; if granted for a certain number, the enjoyment of the right is of course limited by the number specified in the grant. A corporation may prescribe for common in gross, for cattle *levant and couchant* within the town, but not for common in gross *sans nombre*.^(k) A copyholder who has common in a waste, without the manor of which his copyhold is parcel, has it annexed to the land, and not to his customary estate, and must prescribe in a *que estate* through his lord, for him and all his customary tenants thereof. And such common without the manor is not extinct by enfranchisement of the copyhold, though there be no words of re-grant. And after enfranchisement, the feoffee must prescribe in a *que estate* of his lord for himself, and his customary tenants, till the time of the enfranchisement, and since that time for the feoffee and his heirs, as appurtenant to the enfranchised tenement.^(l)

III. *Of the Interest of the Owner of the Soil subject to Right of Common; and herein of Approvement and Inclosure.*

In land subject to a right of common, the right of the lord or owner of the soil⁽¹⁾ ought to be so exercised as not to injure the right of

(h) *Musgrave v. Cave*, Willes, 319.

(k) *Mellor v. Spateman*, 1 Saund. 343.

(i) 1 Inst. 122, a.

(l) *Barwick v. Matthews*, 5 Taunt. 365.

(1) The customary tenants of a manor may allege a custom to have the sole and several pasture in the soil of the lord for *the whole year*, and thereby exclude the lord.

common. But the right of the commoners may be subservient to the right of the lord in the soil,^(m) so that the lord may dig claypits there, or empower others to do so, without leaving sufficient herbage for the commoners, if it can be proved that such a right has been constantly exercised by the lord. So the lord may,⁽ⁿ⁾ with the consent of the homage, grant part of the soil for building, if he has immemorially exercised such right. The immemorial exercise of such right by the lord is evidence that he reserved that right to himself, when he granted the right of common to the commoners. In like manner, there may be a valid custom in a manor, within the limits of an ancient forest belonging to the crown, for the lord, with the assent of the homage, to grant parcels of the waste to be holden by copy of court-roll, [*441] and for the grantees *to inclose the same, and to hold them in severalty against the commoners, and in exclusion of their rights.^(o) If a commoner having a right of common for one beast, put on two,^(p) the lord can only distrain the one put on last, unless they were both put on together; and it must be shown in a plea (justifying the taking as a surcharge,) whether they were put on together or separately; and if the latter, which was put on first.⁽¹⁾

By stat. 20 H. 3, c. 4,^(q) lords of woods, wastes, and pastures, in which their tenants have common of pasture, may approve such wastes, &c., provided sufficient pasture, with a sufficient ingress and egress, is left to the tenants. An owner *pur autre vie* of a common may approve under this statute, and 13 Ed. I. st. 1, c. 46; and may erect on the common a house necessary for the beast-keepers, for the care of the cattle, of himself, and other persons having right of common there.^{(r)(2)}

(m) *Bateson v. Green*, 5 T. R. 411.

(n) *Folkard v. Hemmett*, 5 Id. 417, n. (a).

(o) *Boulcott v. Winmill*, 2 Campb. 261.

(p) *Ellis v. Rowles*, Willes, 638.

(q) Extended by stat. 13 Edw. I. stat. 1, c. 46, to improvements by lords against their neighbours—Confirmed by stat. 3 & 4 Edw. VI. c. 3. See also stat. 29 Geo. II. c. 36, amended by stat. 31 Geo. II. c. 41.

(r) *Patrick v. Stubbs*, 9 M. & W. 830.

Hoskins v. Robins, 2 Saund. 324. But even in this case the lord may distrain, for other damage in his soil, the cattle of any who have no right to put in their cattle, although he has not any interest in the soil. Per *Hale*, C. J., *S. C.*, for he has an interest in the mines, trees, bushes, &c. Per Cur. 1 Vent. 164.

(1) In replevin for taking the plaintiff's sheep on Whitemanslie Down, the defendant avowed taking the cattle doing damage to his right of common: the plaintiff in his plea in bar claimed a right of common for himself as tenant of eight acres of land, for two sheep for every acre; the defendant (admitting the right of common claimed by the plaintiff,) replied, that, at the time of the distress, the plaintiff had sixteen sheep on the common, over and above the sixteen that were distrained; that the defendant left the first-mentioned sixteen to use the common, and only distrained the supernumerary sixteen, with which the plaintiff had overcharged it of his own wrong, which were doing damage to the plaintiff. It does not appear that in this case any objection was made to the replication, for not stating, whether the thirty-two sheep were put on together, or separately. Indeed, the only question made was, whether one commoner could distrain the cattle of another commoner, who had surcharged the common, which was determined in the negative; and the plaintiff had judgment. *Hall v. Harding and others*, B. R. E. 9 Geo. III. 4 Burr. 2426; 1 Bl. R. 673, *S. C.*

(2) In the case of *The Trustees of the Western University of Pennsylvania v. Robinson*, 12 S. & R. 33, C. J. *Tilghman*, said, "these statutes are not applicable to Pennsylvania, where the relation of lord and tenant never existed," and he added, that he knew of very

If the lord make a feofment of the waste, &c., the feoffee may approve, leaving a sufficiency of common; and this rule holds, although the lord continues seised of the manor within which the waste lies; for though in the statutes of Merton and Westminster the lord only is mentioned, yet as in those days statutes were not drawn with that fullness of expression with which they are at the present time, the term, "lord of the manor" must be considered as equivalent to "owner of the soil," where they stand in the same predicament. It is not necessary, therefore, that the person approving should be lord of the manor; (s) a seisin in fee of the *waste, &c., is sufficient. [*442] It is worthy of remark, that the statute of Merton does not empower the lord to approve against any other right of common, (t) except that of common of pasture, appendant or appurtenant. It does not extend to common in gross, (u) the words of the statute being *quantum pertinet ad tenementa sua*, nor to common of piscary, of turbary, (x) estovers, and the like, the words used throughout the statute being *pastura et communia pasturæ*. (y) But though the lord cannot approve against common of turbary, yet where there is common of pasture, and common of turbary in the same waste, (z) the common of turbary will not prevent the lord from justifying an inclosure against the common of pasture, if he leaves sufficient; for they are two distinct rights, and the concurrence of these rights in one person will not make any difference. In like manner the lord of the manor, (a) or his grantee, may justify an approvement or inclosure against tenants having common of pasture, although they have a further right of digging sand, &c., if sufficient common of pasture be left. It is, however, observable, (b) that if the inclosure operates as an injury to the other rights, the commoner will be entitled to an action on the case for such injury. By the approvement of part, agreeably to the rule laid down in the statute of Merton, that part is discharged of the common, insomuch, that if the tenant who has the common purchases that part, his common is not extinguished in the residue. (c) If the lord incloses any part, and does not leave sufficient common in the residue, the commoner may break down *the whole* inclosure. (d) But if the common has been inclosed twenty years, the commoner cannot make an entry, and [before the stat. 3 & 4 Will. IV. c. 27,] must have brought an assize of common. (e) A custom for the lord to inclose without limit (f) is bad, as tending to destroy the rights of the commoner altogether, but a custom

(s) *Glover v. Lane*, 3 T. R. 445.

(t) 2 Inst. 87.

(u) 2 Inst. 86.

(x) *Grant v. Gunner*, 1 Taunt. 435.

(y) 2 Inst. 87.

(z) *Fawcett v. Strickland*, Willes, 57; Com. Rep. 578, S. C.

(a) *Shakespeare v. Peppin*, 6 T. R. 741.

(b) Agreed in *Fawcett v. Strickland*, Willes, 57.

(c) 2 Inst. 87.

(d) 2 Inst. 88, recognized in *Arlett v. Ellis and others*, 7 B. & C. 346.

(e) *Creach v. Wilmot*, Derby Summ. Ass. 1752, cited by *Lawrence, J.*, in *Hawke v. Bacon*, 2 Taunt. 160. But see *Tapley v. Wainwright*, 5 B. & Ad. 395; 2 Nev. & M. 697.

(f) *Badger v. Ford*, 3 B. & A. 153.

few instances of rights of common in this country, although the right of common was admitted to be an estate well known to the law.

to inclose, (even as against a common right of turbary,) leaving sufficiency of common, is good; but the onus of proving a sufficiency left lies on the lord.^(g)(1)

By stat. 29 Geo. II. c. 36, the lords and tenants may inclose part of the common for the purpose of planting and preserving trees fit for timber or underwood. And by stat. 31 Geo. II. c. 41, these powers are declared to be vested in tenants-for-life or years determinable on lives. And by stat. 4 & 5 Vict. c. 38, s. 2^(h) a [*443] lord of *a manor may convey any quantity of land not exceeding one acre, as a site for a school for the education of poor persons; and where any portion of waste or commonable land shall be gratuitously conveyed by any lord for such purpose, the rights of all persons in the land are barred by the conveyance. And now, by stat. 7 & 8 Vict. c. 37, s. 3, any deed which shall have been or shall be executed under the powers and for the purpose of the stat. 4 & 5 Vict. c. 38, without any valuable consideration, shall be valid, if otherwise lawful, although the donor shall die within twelve calendar months from the execution thereof. And by sect. 4, the rector, vicar, or perpetual curate of a parish may grant a portion of the glebe or other possessions of his benefice for the purpose of the same act.

IV. Of the Remedy for Disturbance of Right of Common.

Whatever destroys the right of common is a nuisance,⁽ⁱ⁾ and may be abated by the commoner, provided it can be done without interfering with the lord's right to, or interest in, the soil. But if the nuisance cannot be abated, without such interference, the commoner must resort to his action on the case, and have satisfaction in damages. If the right of common be partially injured, the commoner ought not to abate the cause of such injury, more especially if in so doing he must necessarily interfere with the right to the soil. On this principle it was holden, in *Cooper v. Marshall*, 1 Burr. 265, that a commoner could not justify digging up the soil and destroying the coney-burrows erected in the common by the lord, who was entitled to free warren there. So where the lord had planted trees on the common, and the commoner cut them down,^(k) it was holden, that the lord might maintain trespass, and that the commoner could not justify the abatement of the trees.

^(g) *Arlett v. Ellis*, 7 B. & C. 346.

^(h) This statute repealed the stat. 6 & 7 Will. IV. c. 70, which contained similar provisions.

⁽ⁱ⁾ 2 Inst. 88.

^(k) *Kirby v. Sadgrove*, 6 T. R. 483, B. R., confirmed in error in Exch. Ch. 1 Bos. & Pul. 13.

(1) The owner of a manor who grants leases conferring right of common, may appropriate portions of the waste lands if he leaves sufficient for his tenants. But it must be a *bonâ fide* actual appropriation, and not merely by what is called a possession fence. None but a tenant, however, can question the validity of the appropriation. *Van Rensselaer v. Radcliff*, 10 Wend. 639. A lessee entitled to estovers in the lands of his lessor, if the latter make a colorable lease of them to defeat his right, may resort to other lands of the lessor, though more distant and more valuable, though in ordinary cases he has no such right. *Van Rensselaer v. Brice*, 4 Paige, 174.

The usual remedy adopted by commoners is an action on the case for a disturbance of the right of common, which may be maintained either against the lord or the owner of the soil, *(l)* a stranger or a commoner. If the action is brought against the wrong-doer *(m)* title being only inducement, it is not necessary to set it forth; it will be sufficient for the plaintiff to state in his declaration, that he was possessed of a certain quantity of land, &c., and by reason of such possession was entitled to the right, in the exercise of which he was disturbed. The right must be truly stated, for otherwise the variance will be ground of nonsuit. *(n)* In this action the plaintiff *must prove an in- [*444] jury sustained, but an injury in the minutest degree is sufficient; *(o)* e. g. the taking away the manure which has been dropped on the common by the cattle, although the proportion of the damage sustained by the plaintiff be found to amount to a farthing only; *(p)* for if, where the injury was small, a commoner could not maintain an action, a mere wrongdoer might by repeated torts in course of time establish evidence *(q)* of a right of common. If, to an action on the case by a commoner for injuring his right of common, *(r)* the defendant plead, that he dug turves under a license from the lord, he should add, that "sufficient common was left for the commoner;" and if he do not, the plaintiff is not obliged to reply, that there was not sufficient common left; because it is the gist of the action, and set forth in the declaration. Case for disturbing the plaintiff's right of common by turning on cattle on divers days and times; defendant pleaded a right of common in himself and justified turning on the cattle, being his own commonable cattle levant and couchant on his land; plaintiff must new assign, *(s)* if he intends to prove a surcharge.

V. Of Surcharges by Commoners.

Formerly, if one of the commoners had surcharged the common, *(t)* that is, had put more cattle into the common than he was entitled to, the commoner who was aggrieved might sue out a writ of admeasurement of pasture, and by that suit the common was admeasured in respect of all the commoners, as well those who had not surcharged as those who had surcharged it; and the person who brought the action. An action on the case has been substituted in the place of this writ of admeasurement, as a more easy and speedy remedy; and it has been holden, that this action may be maintained by one commoner

(l) *Hassard v. Cantrell*, Lutw. 101.

(m) *Strode v. Byrt*, 4 Mod. 418. See also *Greenhow v. Ilsey*, Willes, 621.

(n) *Beadsworth v. Torkington*, 1 Q. B. 782; 1 G. & D. 482. See *Brunton v. Hall*, 1 Q. B. 792; 1 G. & D. 207.

(o) Per Lord *Ellenborough*, C. J., *Lidgold v. Butler*, Middlesex Sittings after Trin., 48 Geo. III. B. R. MSS.

(p) *Pindar v. Wadsworth*, 2 East's R. 154. See cases cited by *Taunton*, J., in *Marzetti v. Williams*, 1 B. & Ad. 426, and *Blofeld v. Payne*, 4 B. & Ad. 410.

(q) See *Patrick v. Greenway*, 1 Wms. Saunders, p. 346, b. n. (2).

(r) *Greenhow v. Ilsey*, Willes, 619.

(s) *Bowen v. Jenkin*, 2 Nev. & P. 87; 6 A. & E. 911, S. C.

(t) F. N. B. 125, B.

against another for a surcharge,^(u) although the plaintiff himself has been guilty of a surcharge. In the declaration, it is not necessary for the plaintiff to set forth the defendant's right of common, and show in what manner he has exceeded that right,^(x) by putting in a greater number or an improper species of cattle; but the disturbance may be alleged generally⁽¹⁾ thus, "that the defendant wrongfully, [*445] and injuriously *ate up and depastured the grass on the common with divers sheep and lambs, to wit, 200 sheep and 200 lambs." Neither is it necessary that the plaintiff should state that he was exercising his right of common at the time of the surcharge.^(y)

VI. *Pleadings—Evidence*; Stat. 6 & 7 Vict. c. 85, p. 450.

To an action of trespass *quare clausum fregit*, the defendant may plead a right of common of pasture, of common of turbary, and of common of estovers. Under the new rules,^(z) these are considered as distinct, and are to be allowed. But pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed.

By stat. 2 & 3 Will. IV. c. 71,^(a) entitled "An Act for shortening the Time of Prescription in Certain Cases," after reciting, that the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," is now by the law of England, in many cases, considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed, is sometimes defeated by showing the commencement of such enjoyment, which is, in many cases, productive of inconvenience and injustice: it is by sect. 1, enacted, "That no claim which may be lawfully made at the common law by custom, prescription, or grant, to any right of common or other profit or benefit, to be taken and enjoyed from or upon any land of the king, his heirs, or successors, or any land, being parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters as are herein specially provided for, and except tithes, rents, and services, shall, where such right, profit, or benefit, shall have been actually taken and enjoyed by any person claiming right thereto, without interruption,^(b) for the full period of thirty years, be defeated or destroyed by showing *only* that such right, profit, or

(u) *Hobson v. Todd*, 4 T. R. 71.

(x) *Atkinson v. Teasdale*, 3 Wils. 278; 2 Bl. R. 817, S. C.

(y) *Wells v. Walling*, 2 Bl. R. 1233.

(z) R. G. H. T. 4 Will. IV.

(a) See further on the subject of this statute, *post*, tit. "Nuisance."

(b) "Interruption," not intermission. See *Carr v. Foster*, 3 Q. B. 581; 2 G. & D. 753, and *post*, p. 447.

(1) It seems, from *Smith v. Feverel*, 2 Mod. 6, and from a dictum of the court in *Hasard v. Cantrell*, Lutw. 107, that in an action against the *lord* it is necessary to show a particular surcharge.

benefit, was first taken or enjoyed at any time prior to such period of thirty years, but such claim may be defeated in any other way by which the same is now liable to be defeated: and when such right, profit, or benefit, shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing."

*By section 4, each of the respective periods of years here- [*446] inbefore mentioned, shall be deemed to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and no act or other matter shall be deemed to be an interruption, within the meaning of the statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof, and of the party making or authorizing the same to be made.

Section 6 enacts, That no presumption shall be made in favour of any claim, on proof of the right having been exercised for a less period than that prescribed by the act in the particular case. But this provision is meant only to encounter presumptions, from an exercise of the right during such an imperfect period, that it was exercised in older times. The effect of this clause is, that a claimant, proving enjoyment for less than the specified time, shall not, on that ground, carry back his right to a period before that which his proof extends to.(c)

By the seventh section, the time during which any disability exists, *e. g.* infancy, non-compos, coverture, or tenancy for life, or during which any action shall have been pending, and diligently prosecuted, until abated by the death of any party, shall be excluded in the computation of the periods, except only where the claim is declared to be absolute.

Under this statute, a plea of enjoyment of right of common for thirty years before the commencement of the suit is sufficient,(d) without saying for thirty years *next* before. Taking the 4th(e) and 5th sections together, it is clear that an averment of enjoyment for thirty years next before *the times when*, &c., is not in conformity with the act. The period mentioned in the act is thirty years next before some suit or action in which the claim shall be brought into question. Generally speaking, that would be next before the commencement of the suit in which the pleading takes place: and according to the express words of the statute, and the decision in *Wright v. Williams*,(f) the only correct averment is, "next before the commencement of this (or possibly some other) suit."(g)

Before the passing of this act, a prescriptive claim was a claim of

(c) Per Lord Denman, C. J., in *Carr v. Foster*, 3 Q. B. 587; 2 G. & D. 753.

(d) *Jones v. Price*, 3 Bingh. N. C. 52; 3 S. C. 376.

(e) See *supra*, and see s. 5, *post*, p. 449.

(f) 1 M. & W. 77.

(g) Per Lord Denman, C. J., delivering judgment of court in *Richards v. Fry*, 7 A. & E. 698.

immemorial right; the evidence of it was such as a party might be able to give in such a case; and the jury were to draw their inference from such proof as could be produced. Now, the burden of establishing an immemorial right is withdrawn, and the proof is [*447] *limited to a thirty years enjoyment, but that enjoyment must be proved to the full extent; therefore proof of a thirty years enjoyment of common of pasture is not complete, if proof be given of an enjoyment for twenty-eight years immediately preceding an action in which the right is disputed, and it appear that twenty-eight years back the enjoyment was interrupted, but that the right was exercised before the interruption: and the party disputing the right is not bound to show that such interruption was adverse; it lies upon the party prescribing, under the statute, to prove thirty years uninterrupted enjoyment.^(h) But "the interruption" which defeats a prescriptive right under this statute, is an adverse obstruction, not a mere discontinuance of uses by the claimant himself. Hence, in a case under section 1 of the statute, where proof was given of a right enjoyed at the time of action brought, and thirty years before, but disused during a part of the intermediate time; it was holden,⁽ⁱ⁾ to be a question for the jury, whether the right had ceased, or was still substantially enjoyed. Thus, where a commoner had ceased to use the common during two years of the thirty, having no commonable cattle at the time, but had used it before and after; it was holden, that the jury were justified in finding a continued enjoyment of the right during thirty years.^(k)

Trespass for entering plaintiff's close with cows and sheep, and destroying his grass:^(l) as to sheep, plea not guilty, and issue thereon: as to cows, defendant justified, and prescribed for common, for all cattle (except sheep) *levant and couchant* on defendant's messuage, and one acre of land; the issue was on the levancy and couchancy: the evidence on the first issue was, that defendant's sheep were seen at several times depasturing in *locus in quo*, and that at such time the defendant's shepherd was with them: Mr. Gatward, (recorder of Cambridge,) for the defendant, insisted, that as it did not appear that defendant had knowledge or consented, that his sheep should feed there, and had a servant to take care of them, the shepherd, and not the defendant, was the trespasser, and that the action could not be maintained against the master:^(m) per Lord *Raymond*, C. J. "The action lies against the master; his sheep did the trespass; he has his remedy against the servant." As to the second issue, the evidence was, that defendant was seised of a copyhold messuage, and one acre of pasture land; that he foddered eight or nine cows in the yard of the said messuage with hay brought from another farm about two miles off. Lord *Raymond*, C. J. "These cows cannot be *levant and couchant* upon

(h) *Bailey v. Appleyard*, 8 A. & E. 161.

(i) *Carr v. Foster and others*, 3 Q. B. 581; 2 G. & D. 753.

(k) *S. C.*

(l) *Rogers v. Benstead*, Cambr. Sum. Ass. 1727, cor. Lord *Raymond*, C. J., MSS. Serjt. Leeds. See the comment of *Bayley*, J., delivering the opinion of the court in *Cheesman v. Hardham*, 1 B. & A. 711, 2.

(m) 2 R. A.

the one acre; for I am clear that levancy and couchancy is a stint of *common in contradistinction to common sans nombre, [*448] and signifies only so many as the messuage or farm will by its produce maintain; and it was so resolved in the case of the town of Derby.(n) I know there are cases which say, that foddering in a yard makes a levancy and couchancy, but then the meaning is, foddering with stubble, &c., produced from the messuage or land itself, to which the yard belongs; for example, if an acre of land will produce only so much hay, &c., as will maintain but one cow, the occupier shall not put two on the common, because he fodders them in the yard with the produce of other land; for, by the same rule, he might put 1,000 of his own, or of other persons, and deprive the other commoners of the benefit of common."

Trespass for impounding plaintiff's colt and three fillies.(o) Defendant set out his right to a messuage, with the appurtenants, to which the defendant had a right of common belonging in the *loc. in quo*, and that defendant took the cattle damage feasant; plaintiff replies, that he is possessed of a copyhold messuage in Drayton, and prescribes for a right of common in the *loc. in quo*, for all commonable cattle, levant and couchant on the said messuage, at all times of the year. Defendant *protestando*, that plaintiff has not such right, traverses the levancy and couchancy of the beasts taken, and issue thereon. Per *Lee*, C. J. "The *protestando* is not part of the issue, and need not be proved." It appearing by the evidence, that the messuage was only a yard where the horses were foddered, and one acre of orchard, with the produce of which the plaintiff could not maintain the colt and three fillies, and for that reason he foddered them with hay and straw from other land hired by him; per *Lee*, C. J. These beasts cannot be levant and couchant on this yard, though they are foddered there, unless they can be foddered with the produce of the messuage; and so it was determined by Lord *Raymond*, in *Rogers v. Benstead*, at Cambridge, 1727, after much consideration, that levancy and couchancy signify what the produce of the estate will bear, and is a stint of common with respect to other commoners; and I know no difference as to this, whether the common is for the whole year, or for half a year only." Lord *Raymond*, in the above case, cited 1 Ventr. —. The foddering cattle in a yard is said to be evidence of levancy and couchancy, Salk. 169: but it must be foddering with the produce of the ground belonging to the messuage. Plaintiff nonsuited. N. There may be common appurtenant to a messuage with appurtenants: but not to a messuage only.

"The rule now is, that such cattle only are to be holden levant and couchant upon the inclosed land, as that land will keep during the winter. It has been argued, that the rule includes such as the land will keep during the whole or any part of the year; but that *is not so; The real question is, has this defendant turned [*449] more cattle on the common than the winter eatage of his

(n) *Mellor v. Spateman*, 1 Saund. 343, 1 Mod. 7.

(o) *Fulcher v. Scales*, Norfolk Sum. Ass. 1738, MSS. Serjt. Leeds.

ancient tenement, together with the hay and produce obtained from it during the summer, is capable of maintaining.(p)

By R. G. H. T. 4 Will. IV., where, in an action of trespass, *quare clausum fregit*, the defendant pleads a right of common of pasture for divers kinds of cattle, *ex. gr.* horses, sheep, oxen, and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found; and for the plaintiff, in respect of the trespasses which shall not be so justified. And in all actions in which such right of common as aforesaid, or other similar right, is so pleaded, that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively. And by stat. 2 & 3 Will. IV. c. 71, s. 5, in all actions upon the case, and other pleadings, wherein the party claiming may now allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all and every the matters mentioned in this act, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and in all pleadings to actions of trespass, and in all other pleadings wherein, before the passing this act, [*viz.* before 11th August, 1832, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof *as of right*, by the occupiers of the tenement, in respect whereof the same is claimed, for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.(q)

To a declaration(r) in trespass, for breaking and entering two closes of the plaintiff, the defendant pleaded that the said closes were, from time immemorial, parcels of a waste, and that he, the defendant, had a prescriptive right of common in the waste, and because the closes were wrongfully separated from the residue of the waste, he broke [*450] down the gates. Replication, that the said closes were *not wrongfully separated from the residue of the waste, but continually for twenty years and more, and before the first time, when, &c., had been and were separated and divided, and inclosed from the residue of the waste, and occupied and enjoyed during that time in severalty. The rejoinder traversed this averment, and issue was joined thereon. It was holden, that the allegation in the replication, that "the said closes had been inclosed from the residue of the waste, and enjoyed in

(p) Per Parke, B., in *Whitlock v. Hutchinson*, 2 M. & Rob. 205.

(q) See *England v. Wall*, 10 M. & W. 699.

(r) *Tapley v. Wainwright*, 5 B. & Ad. 395; 2 N. & M. 697.

severalty," was divisible, and satisfied by proof, that any part of the closes in which the trespasses were committed had been so inclosed for that period, and that the plaintiff might therefore recover, *pro tanto*.

A plaintiff in trespass was the occupier of a farm, called Tyr Adam, situate within a manor adjoining a mountain, and claimed to be exclusive owner of that part of the mountain next adjoining his farm. The question being, whether he was exclusive owner of the soil, or had a right of common only over that part of the mountain, the defendant, in order to show that the plaintiff had not the right of soil, produced from the rolls of the manor an instrument, purporting to be a presentment in the year 1759, wherein the jurors, after reciting that they were sworn to view such part of the waste land as lieth within the lordship, as was claimed by A. B., to belong to his tenement called Tyr Adam, upon their oaths said, that they had considered the claim and the evidence, and presented that all the said lands within the said boundaries were part and parcel of the common called K., and that neither the said A. B. nor the tenants or occupiers of the tenement called Tyr Adam, had any right to the same, or any greater right than such as the other freehold tenants of the lordship had for their commonable cattle. It was holden,^(s) that this instrument was not admissible in evidence; first, not as a presentment, because the homage had no right to decide the claim made by an individual to the freehold, they being interested; nor as an award, because there was no mutual submission, either express or implied; nor as evidence of reputation, because it was made *post litem motam*.

Questions have frequently arisen respecting the competency of persons interested in a common as witnesses to establish the right, and for the decisions in these cases the reader is referred to former editions of this work; but now, by stat. 6 & 7 Vict. c. 85, s. 1, (22nd August, 1843,) it is enacted, that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer or person having by law or by consent of parties authority to hear, receive, *and examine evidence; [*451] but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation, in those cases wherein affirmation is by law receivable; notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: provided that this act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in

(s) *Richards v. Bassett*, 10 B. & C. 657.

whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively: provided, also, that this act shall not repeal any provision in stat. 7 Will. IV. & 1 Vict. c. 26, "The Act for the Amendment of the Laws with respect to Wills." By section 3, this act is not to affect any action commenced before the passing of the act.(1)

[*452]

*CHAPTER XII.

CONSEQUENTIAL DAMAGES.(2)

OF ACTIONS ON THE CASE FOR CONSEQUENTIAL DAMAGES, AND HEREIN
OF THE GENERAL RULE FOR DISTINGUISHING ACTIONS OF TRESPASS VI ET ARMIS FROM ACTIONS OF TRESPASS ON THE CASE.

A QUESTION frequently arises respecting the form of action which should be adopted by a person who has sustained an injury: that is, whether the proper remedy is by action of trespass *vi et armis*, or trespass on the case; and as, in order to avoid confusion, the judges have at all times been anxious that the boundaries of actions should be preserved,(a) it may be proper to remark, that the true distinction,(3) (and

(a) 3 Wils. 411; 1 Bos. & Pul. 476.

(1) In a statute for protecting a beach from damage, a clause, that any person having "a legal title in any part thereof," shall be compensated for injury sustained under its provisions, covers an injury to a right of common in it. *Thomas v. Marshfield*, 10 Pick. 364. A grant of right of common to the inhabitants for the time being (not incorporated), of a certain territory, includes only such persons as were inhabitants at the time of the grant. *Ib.* Land was given "for the use of a parish for highways, &c., and also to accommodate the neighbors that live bordering on it, &c., to remain unfenced forever, never to be disposed of to any other use without consent of every freeholder in the parish." And the parish granted land "bounded all round by the land given to the parish for particular uses," as above. Held, an implied covenant that the common land should remain open, unless enclosed with the consent of every freeholder. *Emerson v. Wiley*, *Ib.* 300. In trespass against such grantee for passing over the common land, the *onus* is on plaintiff to show it was inclosed with such consent. *Ib.*

(2) See Sedgwick on Damages, 79-92, 2d ed.

(3) Where a direct injury arises from the act, and there are also consequential damages, the party has his election to bring *case* or *trespass*. *M'Allister v. Hammond*, 6 Cowen, 342. The plaintiff, an *American* sailor, declared against the defendant (his captain,) that in a foreign port he placed him forcibly on board a *French* ship, to be conveyed in that vessel, under French colors, towards France; and that, by reason of sailing under such colors, &c., the vessel was captured by a British ship, Great Britain being then at war with France, and the plaintiff being found on board such vessel, was treated as an enemy, &c., and confined for a long time, by reason of which he was damaged, &c. Held, that *case*, and not *trespass*, was the proper form of action. *Cotteral v. Cummins*, 6 S. & R. 348; and see *Allison v. Rheam*, 3 Id. 142; *Berry v. Hamill*, 12 Id. 210; *Wales v. Ford*, 3 Halst. 267; *Lippincott v. Smith*, 1 South. 95; *Shaver v. White*, 6 Munf. 113; *Haney v.*

which seems to be now settled,)(b) is, that if the injury be occasioned by the act of the defendant at the time, or the defendant be the immediate cause of the injury, trespass *vi et armis* is the proper remedy;(1)

(b) *Leamie v. Bray*, 3 East. 593.

Townsend, 1 M'Cord, 207; *Goddard v. Wagner*, Ib. 100; *Wickliffe v. Saunders*, 6 Monroe, 296.

"The actions of trespass *vi et armis*, and trespass on the case, are as well distinguished in principle as any other two actions in the law.

"Physical force, however slight, against the person or possession of another, is in itself, and essentially, without regard to the motive, unlawful, and is the gist or *gravamen* of the action of trespass *vi et armis*. The criterion of trespass is force directly applied." C. J. Tilghman, in *Smith v. Rutherford*, 2 Serg. & Rawle, 358.

"Trespass on the case is a general remedy to recover compensation for damages which have resulted from the fraudulent conduct of another; and any conduct is in law deemed a fraud, and actionable within the scope of this remedy; which, though not unlawful in itself, yet, by its natural and ordinary consequences, injures any right of the plaintiff, without fault in him, and is not done in the exercise or lawful pursuit of the defendant's rights; for the law always presumes that a man has intended that which is the natural or reasonable result of his conduct, and which might and ought to have been foreseen by him. Through all the phases this action assumes, its gist still is fraud; and though it lies to recover damage occasioned by a material or physical *tort*, yet the fraud, or tortious act itself, is not the gist of the action, as it is in trespass *vi et armis*, but the negligence, carelessness, or other fraudulent conduct of the defendant by which the *tort* was occasioned.

"That force is the gist of trespass, and fraud upon the whole case between the parties at the time of suit brought the gist of case, is shown by the pleadings; for in the former action under the general issue, the office of which in all actions is to traverse that which is the *gravamen* or substantial matter in the declaration, only the force and the defendant's property can be denied, but in the latter action, under the same general issue, evidence of excuse, justification, or satisfaction may be given. *Gilchrist v. Bale*, 8 Watts, 335, 358.

"There is, therefore, an essential and legal difference in the ground of the two actions; but the choice between them may often be determined by the nature and extent of the compensation sought. If the act of force itself, be made the gist of the action, that is to say, if trespass be brought, of course no more can be recovered than the equivalent of the injury which the act in itself and at once was; or in other words, the damage involved in the act at the time of its taking place, though perhaps subsequently developed, 'immediate or obviously probable consequence.' *Avery v. Ray, et al.* 1 Mass. 12; *Robinson v. Stokely*, 3 Watts, 270; *Spiglmoyer v. Walter*, 3 Watts & Serg. 540; *Sampson v. Cory*, 15 Mass. 493. See *Laing v. Colden*, 8 Barr, 479, 481; and *Burdick v. Worrall*, 4 Barb. S. C. 597, 598. But if compensation is sought for some damage entirely collateral, the fraudulent conduct of the defendant on the whole case must be made the ground of the action; that is, the action must be case.

"If there be force, but not negligence, that is, if the force be wilful, trespass is the only remedy. If there be force and also negligence, that is, if the forcible act proceed from negligence, the force may be made the *gravamen* of the action, and then it must be trespass. *Guille v. Swan*, 19 Johns. 38. Or the negligence may be made the gist, and then it must be case; and this is the point decided in *Williams v. Holland*; *Blin v. Campbell*, 14 Johns. 432; *Percival v. Hickey*, 18 Id. 257; *McAllister v. Hammond*, 6 Cow. 342; *Dalton v. Fairrir*, 3 N. Hamp. 465; *Saffin v. Wilcox*, 18 Verm. 605; *Knott v. Digges*, 6 Harris & Johns. 230; *Johnston v. Castleman and Ormsby*, 2 Dana, (Kentucky,) 377. Where, therefore, the injury is immediate, and is attributable to the defendant's negligence, trespass and case are used as concurrent remedies. *Jordan v. Wyatt*, 4 Grat. 151, 158; *Schuer v. Veeder*, 7 Blackf. 342. But in some of the states it has been decided that under such circumstances, trespass is alone the proper action. *Taylor v. Rainbow*, 2 Henning & Munf. 423; *Gates and others v. Miles*, 3 Conn. 64; *Case and Davis v. Monk*, 2 Hamm. Ohio, 169; *Waldron v. Hopper*, Coxe, 339; *Barnes v. Hurd*, 11 Mass. 57." 1 Smith's Lead. Cas. 478, 4th Am. ed., note by Wallace.

(1) "Looking into all the cases from the Year Book, in the 21 H. 7, 28, a, down to the latest decisions on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it

but where the injury is not direct and immediate on the act done, but consequential only, there the remedy is by action on the case.(c)

The following case will illustrate the rule here laid down:—

On the evening of the fair-day at Milborne Port, in Somersetshire,(d) the defendant threw a lighted squib from the street into the market-house; the squib fell upon the stall or standing of B.; C., in order to protect himself and the wares of B. from injury, took up the squib, and threw it across the market-house, when it fell upon the standing of D., who, to save his wares, threw the squib to another part of the market-house; the squib struck the plaintiff in the face, when [*453] the combustible matter bursting put out *one of his eyes: an action of trespass *vi et armis*, having been brought, it was urged, on the part of the defendant, that it would not lie, and that a proper remedy was an action on the case; a verdict was found for the plaintiff, subject to the opinion of the court, as to the form of action.(1) *Nares*, J., was of opinion that trespass *vi et armis* was the proper form of action, the act being illegal, at common law, from the probable consequence of injury resulting from it, and by stat. 9 & 10 Will. III. c. 7, as a nuisance. *Blackstone*, J., was of a different opinion, conceiving that the lawfulness or unlawfulness of the original act was not the true criterion;(2) that the settled distinction was, that where the injury was immediate, trespass *vi et armis* would lie; where consequential only, it must be an action on the case: in the present case, the original act was as against B. a trespass, not as against C. or the plaintiff: the tortious act was complete when the squib lay at rest upon B.'s stall; B. or any by-stander had a right to protect himself by removing the squib, but should have taken care to do it in such a manner as not to endamage

(c) *Reynolds v. Clarke*, Lord Raym. 1399; Str. 634, S. C. See also *Morgan v. Hughes*, 2 T. R. 231, and *Kenyon*, C. J., in *Day v. Edwards*, 5 T. R. 649, S. P., and in *Ogle v. Barnes*, 8 T. R. 190, 191; *Taylor v. Rainbow*, 2 Hen. & Mun. 423; *Cotterel v. Cummins*, 6 S. & R. 348. The words *contra pacem* seem alone universally to distinguish trespass from case; for in case, where the *causa causans*, or original cause of injury is forcible, the words *vi et armis* may be used descriptively, and by way of inducement. So it is laid down in 3 Reeves's His. Eng. Law, 244, on the authority of a decision in 12 Hen. 4, 3. Et vide, *Woodward v. Walton*, 2 N. R. 476.

(d) *Scott v. Shepherd*, 2 Bl. R. 892; 3 Wils. 403, S. C.

happen accidentally, or by misfortune, yet he is answerable in trespass." Per *Gross*, J., in *Leame v. Bray*, 3 East, 600; and see the observations of *Tindal*, C. J., in *Williams v. Holland*, 10 Bingh. 116. See also *McFarland v. Smith*, Walker, 172; *Case v. Marsh*, 1 Ohio, 341; *Fisk v. Framingham*, 12 Pick. 68; *Rappelyea v. Huise*, 7 Halst. 257.

(1) I have stated this case very fully, on account of the important doctrine contained in the arguments of the judges, more especially in that of *Blackstone*, J., which is frequently cited on this subject. With respect to the decision of the court in *Scott v. Shepherd*, it is to be observed, that Lord *Ellenborough*, C. J., in *Leame v. Bray*, 3 East's R. 596, said, that it went to the limit of the law.

(2) So *Lawrence*, J. "In actions of trespass the distinction has not turned either on the lawfulness of the act, whence the injury happened, or the design of the party doing it to commit an injury; but, as mentioned by *Blackstone*, J., in the case of *Scott v. Shepherd*, on the difference between injuries *direct and immediate*, or *mediate and consequential*; in the one instance, the remedy is by trespass; in the other, case." 3 East, 601. "If one turning round suddenly, were to knock another down, whom he did not see, without intending it, no doubt the action must be trespass." Per *Lawrence*, J., *Ib.* 597. "Where a man shoots an arrow at a mark, and wounds another, although it be against his will, he shall be called a trespasser." Per *Read*, C. J., of the Common Pleas, 21 H. 7, 28, a.

others. He added, that this was not like the case of diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree, because in those cases the original motion, the *vis impressa*, was continued, though diverted, but here the instrument of mischief was at rest, until a new impetus and a new direction was given to it, not once only, but by two rational agents successively; that, in strictness of law, trespass *vi et armis* would lie against D. the immediate actor; for inevitable necessity only would excuse a trespass, and D. had exceeded the bounds of self-defence, and had not used sufficient circumspection in the act of removing the danger from himself; *throwing a squib *across* the market-house, instead of [*454] brushing it down or throwing it out of the open sides into the street, was an unnecessary and an incautious act. *Gould, J.*, was of opinion that trespass *vi et armis* was maintainable; that the defendant might be considered in the same light as if *he* had thrown the squib in the plaintiff's face. The terror impressed on C. and D. excited self-defence, and deprived them of the power of reflection; what they did was therefore the inevitable consequence of the defendant's unlawful act; they acted from necessity, and the defendant imposed that necessity on them: *de Grey, C. J.*, was of the same opinion, agreeing with *Blackstone, J.*, as to the principles he had laid down, but differing from him in the application of those principles to the present case. The question was, whether the injury was received by the plaintiff by force from the defendant, or whether the injury resulted from a new force of another. He considered all that was done, subsequently to the original throwing, as a continuation of the first force, and the first act, which would continue until the squib was spent by bursting. Any innocent person was justifiable in removing the danger from himself to another; the blame lighted on the first thrower; the new direction and new force flowed out of the first force, and was not a new trespass; C. and D. were not free agents, but acting under a compulsive necessity for their own safety and self-preservation. The several acts of throwing the squib must be considered as one single act, namely, the act of the defendant; the same as if it had been a cracker which had bounded and rebounded again and again before it struck out the plaintiff's eye.

The distinction between trespass *vi et armis*,^(e) and trespass on the case, may be further illustrated by the example usually put, of a man's throwing a log into the common highway; if at the time of the log being thrown it should strike any person, such person may maintain trespass *vi et armis*: but if, after it is thrown, and is lodged on the ground, any person passing along the highway should receive any injury by falling against or over it, there the remedy is by action on the case.

The defendant driving his carriage on the wrong side of a road,^(f) (which was wide enough to admit of two carriages to pass conveniently,) by accident drove against the plaintiff's curricule, the night being so dark that the parties could not see each other: it was holden, that the

(e) *Fortescue, J.*, 1 Str. 636, cited by *Kenyon, C. J.*, in *Day v. Edwards*, 5 T. R. 649. Per *Le Blanc, J.*, in *Leame v. Bray*, 3 East, 602.

(f) *Leame v. Bray*, 3 East, 593.

injury which the plaintiff had sustained, having been immediate from the act of driving by the defendant, the proper remedy was trespass *vi et armis*. But, as was truly observed by *Le Blanc, J.*, if the defendant had simply placed his carriage in the road, and the [*455] plaintiff had run against it in the dark, *the injury would not have been direct, but in consequence only of the defendant's previous improper act: and then the proper form of action would have been that of an action on the case. The true criterion seems to be, according to what Lord C. J. *de Grey* says, in *Scott v. Shepherd*, whether the plaintiff received an injury *by force* from the defendant. "If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis* according to all the cases both ancient and modern. It is immaterial whether the injury be wilful or not." Per Lord *Ellenborough, C. J.*, 3 East, 599. It was observed by *Le Blanc, J.*, that in "actions for running down vessels at sea, difficulties may occur, because the *force* which occasions the injury is not so immediate from the act of the person steering. The immediate agents of the force are the winds and waves, and the personal act of the party rather consists in putting the vessel in the way to be so acted upon. In *Ogle v. Barnes and another*, 8 T. R. 188, where an action on the case was brought, and the declaration alleged negligence and unskilfulness in the defendant's management of a ship, by reason whereof she run foul of the plaintiff's with great force and violence: on motion in arrest of judgment, after verdict for the plaintiff, on the ground of the action having been *case*, when it ought to have been *trespass*, *Grose, J.*, said, that the jury having found a verdict for the plaintiff, they must consider that the complaint set forth in the declaration was proved; and for such an injury an action on the case was the proper remedy. *Lawrence, J.*, observed, that the negligent and improvident management of the defendant's ship did not imply that any act was done by them; after having been guilty of the negligence which led to the mischief, they might have done every thing in their power to avoid the mischief, and then the running against the plaintiff's vessel might have been owing to the wind and tide. See further on this point, *Turner v. Hawkins*, 1 Bos. & Pul. 472.

The plaintiff declared against the defendant, for driving his cart against the plaintiff's horse with force and violence,^(g) alleging it to have been done "by and through the mere negligence, inattention, and want of proper care" of the defendant. On demurrer to this declaration, as not being in trespass, it was holden that it was good. Sir *James Mansfield, C. J.*, observed, at the close of the decision, that it was not to be considered that the case of *Leame v. Bray* was overturned by the present; at the same time he might say thus much, that upon a proper case it might be fit that the decision of the court of King's Bench, in *Leame v. Bray*, should be reconsidered. In an [*456] action of *trespass*,^(h) where the *plaintiff declared that the defendant with force and arms drove a vessel, whereof the

(g) *Rogers v. Imbleton*, 2 Bos. & Pul. N. R. 117.

(h) *Huggett v. Montgomery*, 2 Bos. & Pul. N. R. 446.

said defendant was the commander, against and over a certain boat of the plaintiff, and sunk her, *damno, &c., contra pacem, &c.*; it appeared, that the defendant was master and owner of the vessel by which the injury to the plaintiff's boat was committed; but that he, though on board at the time, did not give the order which caused the accident, but the pilot did; that it was nine o'clock at night, in the month of September, when the accident happened; that the vessel would not obey her rudder; and that it was owing to no design or wilful act of any person on board. Sir *J. Mansfield*, C. J., left it to the jury to say whether the accident was owing to the mere force of the wind, or to negligence. The jury were of opinion that the accident arose from negligence, and gave a verdict for the plaintiff. On motion to set aside this verdict, and enter a nonsuit, on the ground that the action should have been an action on the case, and not trespass, the court were of opinion that trespass could not be maintained against the defendant; and said, the case differed from the preceding case of *Leame v. Bray*, because here the defendant, though on board the vessel, did not give the order which occasioned the accident, but the pilot did; whereas in *Leame v. Bray*, the defendant was driving the carriage which injured the plaintiff's carriage. The court, at the same time, intimated doubts as to the authority of *Leame v. Bray*; and *Chambre*, J., observed, that in cases of this kind it would be difficult to sustain the proposition, that a master could be liable to an action of trespass for a negligent act done by his servant in the course of his employment, for which the servant himself would also be liable in that form of action.

In a subsequent case of *Covell v. Laming*, 1 Campb. 497, which was *trespass* for running defendant's ship against plaintiff's, it appeared that, at the time of the accident, the defendant was on board his ship, at the helm, but that there was a desire on the part of the defendant to steer clear of the plaintiff, and that the accident was to be ascribed to the mere unskilfulness of the defendant. It was contended, that as the act was not wilful, an action on the case was the proper remedy; but, per Lord *Ellenborough*, C. J., "Whether the injury complained of arises directly, or follows consequentially, from the act of the defendant, I consider, as the only just and intelligible criterion of trespass and case; it makes no difference, that here the parties were sailing on ship-board. The winds and waves were only instrumental in carrying her along in the direction which he communicated. The force, therefore, proceeded from him, and the injury which the plaintiff sustained was the immediate effect of that force."(1)

Where the master is sitting by the side of his servant, who is driving,

(1) Where a belligerent cruiser chased a neutral vessel, supposing her to be an enemy, or for the purpose of search, and in coming up with her, through negligence, and not wilfully, run foul of the neutral vessel, which had hove to in the night, by which she was sunk and lost, an action of trespass *vi et armis*, was held to lie, the act being the immediate and direct cause of the injury. *Percival v. Hickey*, 18 Johns. Rep. 257. The opinion of the court in this case will be found very instructive upon the general doctrine as to the distinction between trespass and case, although the decision may be thought very questionable, so far as it goes to establish a concurrent jurisdiction in such a case, between a court of common law and the Instance or Prize Court of Admiralty.

the act of the servant is considered as the act of the [*457] *master; and if the act be immediately injurious to the plaintiff, trespass is the proper remedy.⁽ⁱ⁾ The plaintiff, however, though he may sue in trespass, is not bound to do so in all cases, where the injury done to him results from the immediate force of the defendant. Hence, where the declaration stated that the defendants so carelessly managed their coach and horses, that the coach ran against the plaintiff and broke his leg; the evidence was, that one of the defendants was driving at the time the accident happened, and the jury found that it happened through his *negligent* driving; it was holden,^(k) that the plaintiff might maintain *case* against all the proprietors: *Bayley, J.*, observing, "It is not necessary to say that trespass could not, in this case, have been maintained against the defendant who was driving; no doubt that action lies where an injury is inflicted by the wilful act of the defendant, but it is also clear that *case* will lie where the act is negligent and not wilful."

Where there is a gratuitous permission to use a chattel, as the possession constructively remains in the owner, he may maintain^(l) trespass for an immediate injury to it; but if the owner of a horse lets him to hire for a certain time, during which he is killed by the owner of a cart driving violently against him, the remedy of the owner of the horse against the owner of the cart^(m) is *case*, and not trespass; for this is in the nature of an injury to the plaintiff's reversion.

If the occupier of a house,⁽ⁿ⁾ who has a right to have the rain fall from the eaves of it upon the land of another person, fixes a spout, whereby the rain is discharged in a body upon the land, the proper form of action, by the owner of the land against the occupier of the house for this injury, is an action on the *case*; because the flowing of the water, which constitutes the injury, is not the immediate act of the occupier of the house, but the consequence only of his act, *viz.* the fixing the spout. Building a roof with eaves, which discharge rain water by a spout into adjoining premises, is an injury for which the landlord of such premises may recover,^(o) as reversioner, while they are under demise, if the jury think there is a damage to the reversion.

In an action on the *case*,^(p) for digging so near the gable-end of the house of the plaintiff, let to a tenant, that it fell; Lord *Ellenborough* held, that where, as in the case before the court, a man had built to the extremity of his soil, and had enjoyed his building above twenty years, upon analogy to the rule as to lights, &c., he had acquired a right to a support⁽¹⁾ or as it were of leaning to his neighbour's soil, so that his *neighbour could not dig so near as to remove the support; but that it was otherwise of a house, &c., [*458]

(i) *Chandler v. Broughton*, 1 Cr. & Mee. 29; 3 Tyrw. 220, recognized in *M'Laughlin v. Pryor*, 4 M. & Gr. 48; 4 Scott's N. R. 655, *post*, tit. "Master and Servant."

(k) *Moreton v. Hardern and others*, 4 B. & C. 223.

(l) *Lotan v. Cross*, 2 Campb. 464.

(m) *Hall v. Pickard*, 3 Campb. 187.

(n) *Reynolds v. Clarke*, Lord Raym. 1399; Str. 634, S. C.

(o) *Tucker v. Newman*, 11 A. & E. 40; 3 P. & D. 14.

(p) *Stansell v. Jollard*, B. R. Trin. 43 Geo. III. MS., *Lawrence, J.*

(1) See this subject much discussed, in *M'Guire v. Grant*, 1 Dutcher's N. J. Rep. 356.

newly built. See Comyn's Dig. Action upon the Case for Nuisance, C., who cites 1 Sidf. 167; 2 Roll. Abr. 565, line 5—"If a man build a house and make cellars upon his own soil, whereby a house *newly* built upon the adjoining soil falls down, no action lies." The same point was ruled in *Wyatt v. Harrison*, 3 B. & Ad. 871, consistently with this position in *Rolle*: "It may be true, that if my land adjoins another, and I have not by building increased the weight upon my soil, and my neighbor digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it." Per Lord *Tenterden*, C. J., delivering judgment of the court. See further on this subject, *Dodd v. Holme*, 1 A. & E. 498. "However insufficient or dilapidated the neighboring house may be, a party is not justified, by any negligent act on his own premises, in accelerating the fall." If a party builds a house on his own land, which has previously been excavated for mining purposes, he does not acquire a right to the support for the house from the adjoining land of another, at least until twenty years have elapsed since the house first stood on excavated land, and was in part supported by the adjoining land, so that a grant by the owner of the adjoining land of such right to support may be inferred; for rights of this sort have their origin in grant only.(q) The mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice(r) of his intention to the owner of an adjoining wall. Nor if he be ignorant of the existence of the adjoining wall (as where it is underground) is he bound to use extraordinary caution(s) in pulling down his own.

In an action upon the case, the declaration stated, that the plaintiff was master of a ship,(t) which was laden with corn, ready to sail, and that the defendant seized the ship and detained her, *per quod querens impeditus et obstructus fuit in viagio*. An exception was taken to the action, on the ground that it should have been trespass *vi et armis*; and 4 Ed. III. 24, 13 H. VII. 26, and Palm. 47, were cited: *Holt*, C. J., observed, that, in the cases cited, the plaintiff had a property in the thing taken; but here the ship was not the master's, but the owners'. The master declared only as a particular officer, and could recover for his particular loss. He admitted, however, that the master might have brought trespass, and declared upon his possession, which was sufficient to maintain that *action. So where the [*459] plaintiff declared,(u) that he exercised the trade of a wheeler, and was possessed of several tools that related to the trade, viz. an axe, &c., and being so possessed, gained a livelihood, &c., and by the license of the defendant deposited the tools in defendant's house, who had de-

(q) *Partridge v. Scott*, 3 M. & W. 220, recognizing *Wyatt v. Harrison*.

(r) *Chadwick v. Trower*, in error, Exch. Chr. 6 Bingh. N. C. 1; 8 Sc. 1.

(s) *Ib.*

(t) *Pitts v. Gaince*, Salk. 10; Ld. Raym. 558, S. C., recognized, as to the position that the master might have maintained trespass, in *Moore v. Robinson*, 2 B. & Ad. 817.

(u) *Kettle v. Hunt*, Bull. N. P. 78.

tained them two months after request, whereby the plaintiff had lost the benefit of his trade. After verdict a motion was made in arrest of judgment, on the ground, that the plaintiff ought to have brought detinue or trover; but the court held the action well brought: for, if the fact was that the plaintiff had the goods again, detinue was not proper; and though a detainer upon request was evidence of a conversion, yet it was not a conversion; and the damages which he demands in this case being special, the action ought to be special. So where the plaintiff declared, (x) that he was possessed of a close of land and a decoy pond, to which wild fowl used to resort, and the plaintiff, at his own costs, had procured decoy ducks, nets, and other engines, for decoying and taking the wild fowl, and enjoyed the benefit in taking them; yet the defendant, intending to injure plaintiff in his decoy, and to drive away the wild fowl, and deprive him of his profit, discharged guns against the decoy pond, whereby the wild fowl were frightened away and forsook the pond. Upon not guilty pleaded, a verdict was found for the plaintiff, and 20*l.* damages. On motion in arrest of judgment, *Holt*, C. J., observed, that the action was maintainable; that although it was new in its instance, yet it was not new either in the reason or principle of it. For 1st, the using or taking a decoy was lawful; 2dly, this employment of his ground, to that use, was profitable to the plaintiff, as was the skill and management of that employment. As to the first, every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken, is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and to destroy them for the use of mankind, as to kill and destroy wild fowl or tame cattle. Then when a man useth his art or his skill to take them, to sell and dispose of for his profit, this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. The C. J. added, that it had been objected, that the nature of the wild fowl was not stated; but this was not necessary; for the action was not brought to recover damage for the loss of the fowl, but for the disturbance.

In a special action on the case, (y) the declaration stated, that plaintiff's wife, unlawfully and against his consent, went away from him, and continued apart from him a long time, and that, [*460] during her *absence, a large estate, real and personal, having been devised for her separate use, she thereupon was desirous of being reconciled, and of cohabiting with plaintiff, her husband; but that the defendant persuaded and enticed her to continue apart from the plaintiff, which she accordingly did until her death; *whereby the plaintiff lost the comfort and society of his wife, and her assistance in his domestic affairs, and the profit and advantage of her fortune.*(1)

(x) *Keeble v. Heckeringill*, 11 East, 574, n. from Holt's MS.; Holt's Rep. 14, 17, 19; 11 Mod. 74, 130; 3 Salk. 9; Bull. N. P. 79, S. C., cited in *Carrington v. Taylor*, 11 East, 574, and 2 Campb. 258, S. C.

(y) *Winmore v. Greenbank*, Willes, 577.

(1) In *Turner v. Estes*, 3 Mass. Rep. 317, it was holden that a son-in-law might lawfully

After verdict for the plaintiff, with 3000*l.* damages, on motion in arrest of judgment, it was objected, that there was not any precedent of any such action as this. Litt. sect. 108, and 1 Inst. 81, b, were cited; but *Willes*, C. J., said, that the general rule there mentioned was not applicable to the present case; that it would have been so, if there had never been any special action on the case before; that this form of action was introduced for this reason, that the law would never suffer an injury and a damage without a remedy; but there must be new facts in every special action on the case.(1)

allow his wife's mother to remain in his house and support her, if he did not attempt, directly or indirectly, to influence and persuade her not to return to her husband, notwithstanding the husband had forbidden his harboring or maintaining her. There was no evidence in the case that the husband had ever ill treated his wife. A case analogous to the foregoing, is *Hucheson v. Peck*, 5 Johns. Rep. 196. The leading facts were, that plaintiff's wife, who was the daughter of defendant, had gone to her father's house temporarily with her husband's consent, where she had been persuaded by the father to remain against the husband's prohibition. The father used no force to detain her, but told her that if she would remain with him he would do by her as by his other children; but that if she returned to her husband he would disinherit her. There was evidence of the delicacy of the wife's health, and that the house provided by the husband was not perfectly agreeable in situation, or comfortable in condition. The wife had lived happily with her husband until she went home to her father. The jury found a verdict of twelve hundred dollars for the plaintiff. On a motion for a new trial, *Kent*, C. J., delivered the following opinion: "If the defendant did not stand in the relation of father to the plaintiff's wife, I should not, perhaps, be inclined to interfere with the verdict. But that relationship gives the case a new and peculiar interest; this is the first action of the kind I have met with, brought against the father. A father's house is always open to his children; and whether they be married or unmarried, it is still to them a refuge from evil, and a consolation in distress. Natural affection establishes and consecrates this asylum. The father is under even a legal obligation to maintain his children and grandchildren, if he be competent, and they unable to maintain themselves; and according to Lord *Coke*, it is 'nature's profession to assist, maintain, and console the child.' I should require, therefore, more proof to sustain the action against the father than against a stranger. It ought to appear either that he detains the wife against her will, or that he entices her away from her husband from improper motives. Bad or unworthy motives cannot be presumed. They ought to be positively shown, or necessarily deduced from the facts and circumstances detailed. This principle appears to me to preserve, in due dependence upon each other, and to maintain in harmony, the equally strong and sacred interests of the parent and the husband. The *quo animo* ought, then in this case, to have been made the test of inquiry and the rule of decision. The judge told the jury, that if the defendant was not actuated by improper motives, it would go very far in mitigation of damages. I think the instruction should have gone further, and the jury have been informed, that in such a case the verdict should be for the defendant. I am accordingly of the opinion, that a new trial should be awarded, with costs to abide the event of the suit." A new trial was granted, one judge dissenting.

(1) See *Ashby v. White*, Lord Raym. 957; *Pasley v. Freeman*, 3 T. R. 51; and *Chapman v. Pickersgill*, 2 Wils. 146; which last case was an action on the case for falsely and maliciously suing out a commission of bankrupt against the plaintiff: *Pratt*, C. J., (in answer to the objection of novelty,) said, that this was urged in *Ashby v. White*, but he did not wish ever to hear it again; that this was an action for a *tort*; *torts* were infinitely various, not limited or confined; for there was not any thing in nature which might not be converted into an instrument of mischief; and this of suing out a commission of bankrupt falsely and maliciously was of the most injurious consequence in a trading country. *Dunford's* note, *Willes*, 581. See also *Hargrave's* Co. Lit. 81, b, n. (2).

This action has been holden to lie, for clandestinely putting contraband goods on board a vessel, which occasioned her seizure. *Smith v. Elder*, 3 Johns. Rep. 105. Against a corporation aggregate, for neglect of a corporate duty. *Biddle v. The Proprietors of the Locks and Canals on Merrimack River*, 7 Mass. Rep. 169. By heirs for destruction of title deeds. *Daniels v. Daniels*, *ib.* 135. For discharging a gun carelessly, whereby plaintiff's horse was frightened, and an injury sustained in consequence, although defendant

Case lies for disturbing plaintiff in his office of bell-man.(2) Case lies for maintenance; and if the action which was maintained was

(2) *Jones v. Waters*, 5 Tyrwh. 361.

had no intention or reasonable apprehension of frightening the horse. *Cole v. Fisher*, 9 Mass. Rep. 137; *Tally v. Ayres*, 3 Sneed, 677. In Massachusetts, it has been holden to lie against the selectmen of a town, for rejecting the vote of a qualified elector, although there was no malice, but merely an error in judgment, because the elector would otherwise be shut out from a judicial investigation on account of the difficulty of proving an ill design; but it was observed that a jury should take the circumstances into consideration in awarding damages. *Lincoln v. Hapsgood*, 11 Id. 350. The reverse, however, has been decided in New York, on *certiorari* from a justice's court. *Jenkins v. Waldron*, 11 Johns. Rep. 114. Against an officer for maliciously executing process in an oppressive and unreasonable manner, with an intent to vex, harass, and oppress the party; as where a constable, having a warrant against the plaintiff for a military fine, refused to take property tendered by him, but took and sold his horse, with the avowed intent of hurting his feelings, and otherwise vexing him. *Rogers v. Brewster*, 5 Id. 125. For selling deleterious provisions for domestic use; and the vendor is bound to know at his peril that they are sound and wholesome. *Van Bracklen v. Fonda*, 12 Id. 468; *Emerson v. Brigham*, 10 Mass. Rep. 197. Against an innkeeper for goods stolen from his house, without proving negligence. *Clute v. Wiggins*, 14 Johns. Rep. 175. But it does not lie against the owner of a domestic animal for injuries which it may have committed, unless he had notice that it was accustomed to do mischief. *Vrooman v. Lawyer*, 13 Id. 339. Nor against a person in this state for suborning a witness to swear falsely in a court in another state, whereby judgment was rendered against the defendant in that state, contrary to the truth and justice of the case. *Smith v. Lewis*, 3 Id. 157. Nor against a turnpike company, for an injury occasioned by the fall of a bridge, where the accident did not arise from neglect, or a want of ordinary skill or care on the part of the company. *Townsend v. The President and Co. of the Susquehanna Turnpike Company*, 6 Id. 90. Nor against a master of a vessel, for running his vessel against and injuring another, the defendant himself being ashore and a pilot on board. *Snell v. Rich*, 1 Id. 305. Nor against a person who sets fire to his own fallow ground, as he may lawfully do, and it communicates to and fires the woodland of his neighbor, there being no negligence or misconduct. *Clark v. Foot*, 8 Id. 421. Nor for carelessly leaving maple syrup in one's unenclosed wood, whereby the plaintiff's cow, being suffered to run at large, and having strayed there, is killed in drinking it. *Bush v. Brainard*, 1 Cowen, 78. An action on the case in nature of a writ of conspiracy, will lie in cases where the writ of conspiracy at common law, was not maintainable. *Jones v. Baker*, 7 Id. 445. Case lies against a postmaster for unlawfully refusing to deliver to a vendor of lottery tickets, the prize list sent to him by the manager, and delivering it to another, who availed himself of the information by purchasing of plaintiff a prize ticket; and the measure of damages is the net amount of the prize. *Bishop v. Williams*, 2 Fairf. 495. Against a third person, for surreptitiously withdrawing a deed left with town clerk for record. *Hine v. Robbins*, 8 Conn. 342. Against the moderator of a town meeting, for refusing plaintiff's vote, and without proof of malice. *Osgood v. Bradley*, 7 Greenl. 411. Against the master for unauthorized act of servant. *Johnson v. Castleman*, 2 Dana, 379. Against owner of a dog for an injury by him in his master's absence. *Dilts v. Kinney*, 3 Green's R. 130. Against a bank for refusing certificate of stock. *Hussey v. Manufac. and Mechanics' Bank*, 10 Pick. 415; and the measure of damages is its value at the time of refusal, with interest till judgment. *Ib.* Against a bank for neglecting to give notice to indorser of a note deposited for collection by one who had received it of plaintiff as collateral security, and had deposited it without mentioning plaintiff's name. *Bank of Utica v. McKinster*, 11 Wend. 473; *S. C.* 9 Id. 46. Against a person who fattens hogs on shares, and after notice to plaintiff to attend to a division, and take his away, turns them loose on the street. *Sheldon v. Skinner*, 4 Id. 525. Against one who sells adulterated sperm oil as genuine, whether the false representation is made to plaintiff or his agent. *Raymond v. Howland*, 12 Id. 176. For a false certificate of character, knowingly given by defendant, of a third person, who obtains credit by means of it. *Williams v. Wood*, 14 Id. 126. For a false and fraudulent return of a justice on an appeal, quashed in consequence of it. *Millard v. Jenkins*, 9 Id. 298. For refusing a transcript on appeal. *Leffingwell v. Flint*, 1 Ohio, 134. Or corruptly refusing to take security on appeal. *Tompkins v. Sands*, 8 Wend. 462. By sheriff against commissioners, where he has been mulcted for an escape for want of a jail. *Comm'rs of Brown Co. v. Batt*, 1 Ohio, 451. For digging a ditch round plaintiff's land. *Bryon v.*

against two, they may join ; the declaration need not charge the maintenance to be *contra formam statuti*, it being a wrongful act at common

Bordino, 2 Green's R. 472. For an injury to reversionary interest in land. *Lienow v. Ritchie*, 8 Pick. 235; *Brown v. Dinsmoor*, 3 N. Hamp. R. 103. Or personal property. *M'Farland v. Smith*, Walker, 172; *Hall v. Snowhill*, 2 Green's R. 8; *Ayer v. Bartlett*, 9 Pick. 156. By four of five tenants in common of a mill, jointly against the fifth, for his negligence, by means of which the mill was burnt. *Chesley v. Thompson*, 3 N. Hamp. R. 9. Where three tenants in common of a lot, constructed a basin communicating with a public canal, and laid out six lots, of equal size, fronting on the basin, and each took two of them, with the privilege of erecting warehouses extending to the basin, held, that each might use the water of the basin by laying a canal boat in front of his neighbor's lot, when not occupied, but that for a permanent obstruction, as by erecting a pier extending into the basin, case would lie. *Beach v. Child*, 13 Wend. 343. Case lies against two persons for conspiring with a third to defraud his creditors, by taking an assignment of his property, and aiding him to leave the state, although plaintiff's debt was not due at the time; and the measure of damages is the amount of property covered, not the debt. *Mott v. Danforth*, 6 Watts, 304. But not if there is no conspiracy charged. *Lamb v. Stone*, 11 Pick. 531. Case lies for fraudulently conveying land incumbered, as free from incumbrances. *Dimmick v. Lockwood*, 10 Wend. 142. Where a wrong is effected through the medium of legal process, the action should be case, and not trespass. *Watson v. Watson*, 9 Conn. 140. Case does not lie against the owner of unenclosed land for cutting a tree thereon and setting it on fire, in consequence of which it fell on plaintiff's horse and killed him. *Durham v. Musselman*, 2 Blackf. 96. Nor the owner of a plantation, who unlawfully permits a party of negroes to assemble and frolic there, when the patrol, in attempting to disperse them, shot one belonging to the plaintiff. *Bosworth v. Brand*, 1 Dana, 377. Nor the owner of the upper story of a house, for not repairing the roof at the suit of the owner of the lower story. *Chesebrough v. Green*, 10 Conn. 319. Nor the owners of a brig, towed by a steamboat, for an injury to plaintiff's vessel, by collision occasioned by the negligence of the crew of the boat over whom they had no control. *Sproul v. Hemmingway*, 14 Pick. 1. Nor against one who erected a dam at the outlet of a pond, which backed the water, but not so high as to injure plaintiff's bridge at the head of the pond, and afterwards by great rains and violent winds the waters were thrown on the bridge and it was destroyed, although had not the dam been there, the storm might not have caused the injury. *China v. Southwick*, 3 Fairf. 238. Nor for injury occasioned by repairing a dam owned in common, if ordinary care is used. *Boynston v. Rees*, 9 Pick. 528. Nor for injury suffered in using a machine for cleansing the bottoms of vessels, if owing to a want of care in the plaintiff himself. *Buckle v. Dry Dock Co.*, 2 Hall, 151. Nor for injuries occasioned by the erecting of a pier, under an act of assembly. *Lansing v. Smith*, 4 Wend. 10. If the act prescribe the remedy. *Calking v. Baldwin*, 4 Id. 667; *Woods v. Nashua Co.*, 4 N. H. R. 527. Nor for obstructing lights, unless ancient, or the right has been acquired by grant or occupation and acquiescence. *Mahan v. Brown*, 13 Wend. 261. Nor for opening windows on the privacy of another. *Ib.* Nor for overflowing land by means of a dam erected by defendant before the plaintiff acquired his interest, unless defendant is in possession, or is proved to be the landlord of the premises on which the dam is erected. *Blunt v. Aiken*, 15 Wend. 522. Nor against one who did not erect it for its continuance without a previous request to abate it. *Pearson v. Glean*, 2 Green, 36. Nor by a justice of the peace against a minor whom he has married, and another, for maliciously conspiring to induce him to perform the ceremony, whereby he was subjected to a penalty. *Cummins v. Scott*, 6 Watts, 519. Where case is brought for fraud in the breach of a contract, the gist of the action is the fraud at the time of the breach, and if the plaintiff cannot show that, no subsequent damages will enable him to maintain it. *Cutler v. Cox*, 2 Blackf. 178. Where an act complained of is innocent of itself, and injurious only from the circumstances under which it is done, those circumstances should be specially set forth in the declaration. Thus, a declaration stating that defendant being possessed of a dwelling house and yard contiguous, in the vicinity of a public highway, unlawfully placed on the same a quantity of fish, brine, &c., in divers open vessels, &c., and so negligently conducted, &c., that plaintiff's cattle entered and ate, and swallowed said fish, &c., so that they died, is bad on demurrer. *Hess v. Hupton*, 7 Ohio, 217. In case against an officer for loss of property attached in consequence of his negligence, the true measure of damages is its value at the time it would have been sold on execution. *Weld v. Green*, 1 Fairf. 20. In case for public nuisance, it is not sufficient special damage that a tenant has refused to pay his rent, or threatened to quit in consequence of it. *Baker v. Boston*, 12 Pick. 184.

law ; and the statutes which relate to maintenance are only declaratory of the common law, with additional penalties ; nor need it state that the defendant was not interested in the action ; if he was, he must plead that in his defence.(a) After an exchange of livings between two incumbents, an action on the case lies at the suit of one against the other, as his successor, for dilapidations.(b)

(a) *Pechell v. Watson*, 8 M. & W. 691, decided on authority of *Barratt v. Collins*, 10 Moore, 446.

(b) *Downes v. Craig*, 9 M. & W. 166.

After verdict for plaintiff in an action of tort, it will be presumed no damages were given for matters of aggravation not proper to be taken into consideration. *Richards v. Farnham*, 13 Pick. 459.

A parent is entitled to this action to recover damages for the seduction of his daughter. But as the parent's right of action springs from an actual or supposed loss of the daughter's services, it is requisite that the relation of master and servant should exist, i. e. that the daughter should either reside in her father's family, or be under his direction and control. *Parker v. Meek*, 3 Sneed, 29. The law on this subject is laid down in *Martin v. Paine*, 9 Johns. Rep. 387, which was an action by a parent for the seduction of his daughter, who was a minor, while residing with her uncle. Mr. Justice *Spencer* delivered the following opinion of the court, denying a motion for a new trial.

"The case of *Dean v. Peel*, 5 East, 49, is against the action. It was there held that the daughter being in the service of another, and having no *animus revertendi*, the relationship of master and servant did not exist. In the present case, the father had made no contract hiring out his daughter, and the relation of master and servant did exist, from the legal control he had over her services ; and although she had no intention of returning, that did not terminate the relation, because her volition could not affect his rights. That is the only case which has ever denied the right of the father to maintain an action for debauching his daughter whilst under age ; and I consider it as a departure from all former decisions on the subject. It has frequently been decided that where the daughter was more than twenty-one years of age there must exist some kind of service ; but the slightest acts have been held to constitute the relation of master and servant, in such a case. In *Bennet v. Alcott*, 2 Term. Rep. 166, the daughter was thirty years of age, and *Buller, J.*, held that even milking cows was sufficient. But where the daughter was over twenty-one, and in the service of another, as in *Postlethwaite v. Parks*, 3 Burr. 1878, the action is not maintainable. In *Johnson v. McAdam*, cited by *Topping*, in *Dean v. Peel*, *Wilson, J.*, said that where the daughter was under age, he believed the action was maintainable, though she was not part of the father's family when she was seduced ; but when she was of age, and no part of the father's family, he thought the action was not maintainable. In *Fores v. Wilson*, Peake's N. P. Cas. 55, which was an action for assaulting the maid of the plaintiff, and debauching her, *per quod, &c.*, Lord *Kenyon* held that there must subsist some relation of master and servant, yet a very slight relation was sufficient, as it had been determined that when daughters of the highest and most opulent families have been seduced, the parent may maintain an action on the supposed relation of master and servant, though every one must know that such a child cannot be treated as a menial servant.

"Put the case of a gentleman's daughter at a boarding school, debauched and gotten with child, on what principle can the father maintain the action, but on the supposed relation of master and servant, arising from the power possessed by the father to require menial services ; for in such a case, there is no actual existing service constituting the relation of master and servant. Would it not be monstrous to contend that, for such an injury, the law affords no redress ? The case supposed is perfectly analogous to the one before us : here the father merely permitted his daughter to remain with her aunt ; he had not divested himself of his power to reclaim her services, nor of his liability to maintain and provide for her. She was his servant *de jure*, though not *de facto*, at the time of the injury, and being his servant *de jure*, the defendant has done an act which has deprived the father of his daughter's services, and which he might have exacted but for that injury. We are of opinion that the action is maintainable under the circumstances of this case, and, therefore, deny the motion for a new trial." Motion denied. See *ante*, p. 8, note.

*CHAPTER XIII.

COVENANT.(1)

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(1) See 1 Archb. N. P. 353-392, 3d Am. ed.; 2 Steph. N. P. 1057-1172.

I. *Of the Action for Breach of Covenant.*

COVENANTS are of two kinds :

1. Express.
2. Implied, or covenants in law.

An express covenant is an agreement entered into by deed indented or deed poll, between two or more persons, for the performance of certain acts, or for the forbearance to do certain acts.(1)

An implied covenant, or covenant in law, is an agreement raised by implication of law between two or more persons in a deed indented or deed poll, from certain technical expressions used therein.(2)

For the violation of agreements of this kind(3) the law has provided a remedy by action of covenant, wherein the party injured may recover damages(4) in proportion to the loss sustained. A party bringing covenant on a deed poll must be named therein;(a) for where, upon oyer of the deed poll, it appeared, that the defendant promised to do a certain act, without saying that he promised the plaintiff, it was holden, that an action would not lie.(5) Covenant will lie on letters [*463] patent, although there is not any counterpart *sealed by the lessee who is to be charged.(b) If A., for a valuable consideration, promises, by deed, not to do a certain act, an action of covenant may be maintained, for the breach of such promise:(6) but an

(a) *Greene v. Horne*, Salk. 197; Comb. 219, S. C.

(b) *Bret v. Cumberland*, Cro. Jac. 399, 521, fully stated, *post*, p. 474.

(1) A covenant to pay the debt of another is not within the statute of frauds, which does not apply to writings under seal. A covenant of itself imports a consideration. *Livingston v. Tremper*, 4 Johns. Rep. 415.

(2) The doctrine of the common law, that certain words, as *dedi, concessi*, &c., of themselves import covenants, is abrogated by the revised Statutes, in New York. *Kinney v. Watts*, 14 Wend. 38.

(3) In F. N. B. 4to. ed. 343, A, it is said that in London a man shall have a writ of covenant without a deed, for covenant broken; and it is so said by Vavasor, Serjt., in 22 Edw. IV. 2, a, cited in Comyn's Dig. London, N. 1, who refers to Priv. Lon. 149, in support of the same position.

(4) Where it is necessary to enforce the performance of any agreement in specie, as the conveyance of land, execution of deeds, &c., or what is termed a specific performance, application must be made to a court of equity; for in the action of covenant damages only for the non-performance can be recovered.

(5) A covenant made by A. as the agent of B. will support an action in the name of the former, although he has no interest in the subject of it. *Wheelwright v. Beers*, 2 Hall, 391. On a contract under seal *inter partes*, no one but a party to the instrument can sue. *Spencer v. Field*, 10 Wend. 87. *Smith v. Emery*, 7 Halst. 53. Covenant does not lie against lessee for rent on a lease sealed only by lessor, although lessee has actually entered into possession under the lease. *Trustees v. Spencer*, 7 Ohio, 151. A covenant of seisin with a blank as to the name of the person seised is not a covenant of the seisin of the grantor. *Day v. Brown*, 1 Ohio, 444.

(6) Covenant is the proper action on a writing obligatory for payment of a certain sum in land office money. *Hedges v. Gray*, 1 Black. 216. Or on a writing obligatory payable "in U. States Bank notes," and not debt. *Wilson v. Hickson*, 1 Blackf. 230. *Osborne v. Fulton*, 1 Id. 233. *Harper v. Levy*, 1 Id. 294. But not on the condition of a bond separated from the penal part of it. *Huddel v. Worthington*, 1 Ohio, 195. Nor on a bond conditioned for the performance of a marriage contract under a penalty. *Abrams v. Kounts*, 4 Ohio, 214.

action on the case will not lie.(1) As where A. recovered a debt against B., and B. paid the condemnation money to A.,(c) whereupon A. by deed, released all actions, executions, &c., to B., and in the same deed promised to discharge all executions against B. upon the same judgment, and afterwards sued out execution thereon: the court were of opinion, that the promise being by deed, B.'s remedy was by an action of covenant, and not assumpsit.(2) The defendants, by deed of 18th April, 1838, contracted *to employ the plaintiff [*464] in the management of certain chemical works for the term of seven years, from the 30th of June then next, with a proviso, that if a certain process on which the plaintiff was then engaged should not be in operation on the 21st of June, then the defendants should after that day have power to determine the contract by notice in writing. On the 9th of August a second agreement in writing, not under seal, was entered into between the parties, whereby the time for bringing the process into operation was extended to 21st of December, 1838. The plaintiff having brought assumpsit upon the second agreement, for a breach of stipulations contained in the deed; it was holden, that the action could not be maintained, the second agreement being merely an

(c) *Bennus v. Guyldey*, Cro. Jac. 505; *S. C.* and *S. P.*, by the name of *Bemish v. Hildersley*, said to have been adjudged, 1 R. A. 517, (A) pl. 3.

(1) See *Stearns v. Bennett*, 1 Pick. 443.

(2) Although it is a general rule that assumpsit will not lie, where there is a remedy of a higher nature, (*Bulstrode v. Gilburn*, Str. 1037; *Baber v. Harris*, 9 A. & E. 532; 1 P. & D. 360,) yet there are some exceptions to this rule; as where two persons entered into articles of partnership for a term of years, and the deed contained a covenant to account yearly, and to adjust and make a final settlement at the expiration of the partnership; and they dissolved the partnership before the years were expired, and accounted together, and struck a balance, which was in favor of the plaintiff, including several items not connected with the partnership, and the defendant promised to pay it: it was holden, that assumpsit would lie on such express promise. And *Buller, J.*, observed, that if no other articles had been introduced into the account, but those relating to the partnership, he should still have been of opinion, that assumpsit might have been maintained; for the question then would have been, whether a previous partnership being dissolved, and an account settled, was or was not in point of law, a sufficient consideration for a promise. He had no difficulty in saying, that it was. *Foster v. Allanson*, 2 T. R. 479. See *Rackstraw v. Imber*, Holt's N. P. C. 368; and *Fromont v. Coupland*, 2 Bingh. 170. A stronger exception, however, to the general rule above mentioned, will be found in the case of *Nurse v. Craig*, ante, p. 295. In *Burnett v. Lynch*, 8 D. & R. 368, 5 B. & C. 589, (recognized by *Park and Gaselee, Js.*, in *Hancock v. Caffyn*, 8 Bingh. 368,) it was holden, that case (not covenant) lay by the assignor against the assignee of a lease assigned by deed poll upon his implied duty to perform the covenant in the original lease, although the assignor had by the assignment, parted with all his interest; and although assumpsit might lie, that case was the better form of action for the injury sustained by the assignor, in consequence of the assignee's breaches of covenant. Where a plaintiff advanced money upon the security of a mortgage, which contained no covenant for the payment of money advanced by the plaintiff, but merely gave the plaintiff the security of the mortgaged premises: it was holden, that the advance being made at the request of the defendants, raised a contract by parol for the repayment, which was not merged in a security of a higher nature. Per. Lord Denman, C. J., delivering judgment of the court in *Yates v. Aston*, 4 Q. B. 196; in which the cases of *Burnett v. Lynch* and *Baber v. Harris* were recognized. An action of covenant cannot be maintained on a sealed instrument, modified or enlarged by parol. *Vicary v. Moore*, 2 Watts, 451; *Spangler v. Springer*, 10 Harris, 454. Or extended beyond its term by parol indorsement. *Luciani v. Am. P. I. Co.*, 2 Whart. 167. Where a bond for performance of certain matters is enlarged in time by a parol agreement, the only remedy is on the parol agreement. *Ford v. Campbell*, 6 Halst. 372.

agreement for the extension of the time mentioned in the deed, and not an agreement incorporating that deed, which was still in force.(d)

An action of covenant has been holden not within the statute 3 & 4 Will. & Ma. c. 14,(e) which makes the devisee chargeable jointly with the heir for the debts of his testator in respect of lands devised to him: the remedy there given is confined to the action of debt.(1) But now by stat. 11 Geo. IV. & 1 Will. IV. c. 47, s. 3, in the cases mentioned in that act (which see, *post*, tit. "Debt," VI.) creditors may maintain debt or covenant against the heirs and devisees, or devisees of such devisees, jointly. And by the 4th section, if there is not any heir-at-law, the creditor may bring debt or covenant against the devisee solely.

II. Of the Exposition of Covenants.

Covenants are to be construed according to the obvious intention of the parties(f)(2) as collected from the whole context of the instrument, *ex antecedentibus et consequentibus*(3) and according to the reasonable sense of the words.(4) If there be any ambiguity, then such construction shall be made as is most strong against the covenantor;(5) [*465] for he might have expressed himself more clearly.(6) *It is

(d) *Gwynne v. Davy*, 1 M. & Gr. 857; 2 Scott's N. R. 29.

(e) *Wilson v. Knubley*, 7 East, 128. But this statute is repealed by stat. 11 Geo. IV. & 1 Will. IV. c. 47, s. 1, except as to persons who died before 16 July, 1830.

(f) Plowd. 329, cited by *Ellenborough, C. J., Iggulden v. May*, 7 East, 241.

(1) Upon a covenant to repair and keep in repair, an action may be maintained pending the term, if the premises are out of repair. A covenant by lessee to leave the premises in good repair cannot be sued on till the expiration of the term. *Aliter* of a covenant to keep them in repair during the term, and to yield them up in like condition at its end. *Schieffelin v. Carpenter*, 15 Wend. 400. A covenant to plant apple-trees on the demised premises and to replace those destroyed, so as always to preserve a certain number during the term, is a continuing covenant, and the receipt of rent after a breach does not prevent a re-entry for a subsequent failure. *Bleeker v. Smith*, 13 Wend. 530.

(2) A covenant may relate to the time of its actual execution or a different date, according to the intent of the parties. *Buller v. Elliston*, 4 Dana, 87. A covenant by lessee to pay all taxes and assessments, embraces an assessment for opening a place which takes part of the premises. *Astor v. Miller*, 2 Paige, 68. A covenant to convey may operate as a conveyance. *Emery v. Hitchcock*, 12 Wend. 156. A covenant to warrant and defend, as executors are by law bound to do, is not a personal covenant. *Day v. Brown*, 1 Ohio, 444. A covenant on assigning a balance of account that it is correct as "defendant believes," is a valid covenant, and if he knows at the time that it is not, he is liable. *Dow v. Ferino*, 12 Pick. 521. Covenant to deliver goods between 1st and 15th of November does not bind to a delivery till the 15th. *Estill v. Jenkins*, 4 Dana, 78. Where there is a penalty as liquidated damages for each day a work is delayed beyond a stipulated time, it was held that there was no covenant to finish absolutely within the period. *Fairham v. Ross*, 2 Hall, 167. A covenant by defendant to support plaintiff and wife with every thing necessary and comfortable in sickness and health during their lives, with several subordinate provisions as to their rights in defendant's family, binds him to support them at his dwelling-house only. But if taken sick when absent, defendant is liable for medical services. Held also, defendant was not bound to supply a conveyance to and from church. *Scott v. Hull*, 8 Conn. 296.

(3) See *Knickerbocker v. Killmore*, 9 Johns. Rep. 106.

(4) See *Davis v. Lyman*, 6 Conn. 252; *Ludlow v. McCrea*, 1 Wend. 228.

(5) See the opinion of Sir J. Mansfield, C. J., in *Flint v. Brandon*, 1 Bos. & Pul. N. R. 78.

(6) In like manner, where the words of the grant are doubtful, they are to be con-

immaterial in what part of a deed any particular covenant is inserted; (g) for, in the construction of it, the whole deed must be taken into consideration, in order to discover the meaning of the parties; as where in an indenture of a lease of a colliery, (h) two lessees covenanted *jointly and severally in manner following, viz. &c.*, here followed a number of covenants in respect to working of the colliery, wherein the lessees covenanted jointly and severally; then followed a covenant, that the moneys appearing to be due should be accounted for and paid by the lessees, their executors, &c., (not saying, "and each of them;") it was holden by the court (*absente Kenyon*, C. J.) that the general words, at the beginning of the covenants by the lessees, "jointly and severally, &c., in the manner following," according to the general rules of construction, extended to all the subsequent covenants on the part of the lessees throughout the deed, there not being anything in the nature of the subject to restrain those words to the former part of the lease. In conformity to the rules before laid down for the construction of covenants, and in support of the apparent intention of the parties, covenants in large and general terms have been frequently narrowed and confined: (1) As where A. leased a manor to B. for years, excepting all woods, great trees, timber trees, and underwood, (i) &c., and covenanted with the lessee, that he might take fire-bote, *super dicta præmissa*; it was holden, that the lessee could not take fire-bote in a close of wood, parcel of the manor, because, by the exception of the wood, the soil thereof was excepted; and the words *super præmissa* should be intended of such things only as were demised. It was admitted, however, that, by the covenant, the lessee was entitled to take wood upon the other lands, for though the wood was excepted, yet the land was demised.

The defendant sold the plaintiff a lease (k) for years of a manor, and entered into a bond, with a condition that *he would not do, nor had done*, any act to disturb the plaintiff, *but* that the plaintiff should hold and enjoy without the disturbance of the vendor, *or any other person*: it was holden, that the condition was confined to acts done or to be done by the vendor, on the ground of the latter words being referable to the former. (2)

(g) Per Buller, J., 5 T. R. 526.

(h) *Duke of Northumberland v. Ward Errington*, 5 T. R. 522; *Copland v. Laporte and Reynolds*, 3 A. & E. 517, S. P.

(i) *Cage v. Paxlin*, 1 Leon. 116, cited by *Ellenborough*, C. J., 7 East, 241.

(k) *Broughton v. Conway*, Moore, 58, cited by Lord *Ellenborough*, C. J., in *Gale v. Reed*, 8 East, 89. To this class of cases where general covenants have been holden to be qualified, may be added that of *Milner v. Horton*, M'Clel. 647, although its authority has been somewhat shaken in *Smith v. Compton*, 3 B. & Ad. 199.

strued in favor of the grantee. This general principle has been applied to the construction of leases; hence it has been holden, that under a lease for fourteen or seven years, the lessee only has the option of determining it at the end of the first seven years. *Doe d. Webb v. Dixon*, 9 East, 15, in which the authority of *Dann v. Spurrer*, 3 Bos. & Pul. 399, 442, was recognized.

(1) See *Miller v. Heller*, 7 Serg. & R. 40; *Cole v. Hawes*, 2 Johns. Cas. 203.

(2) See also *Browning v. Wright*, 2 Bos. & Pul. 13; *Foord v. Wilson*, 2 Moore, O. P. 592; 8 Taunt. 543, S. C. To this class of cases where general covenants have been

[*466] *Where A. by indenture, (1) in consideration of a certain sum, in nature of a fine, and of a yearly rent, demised land

(1) *Iggulden v. May*, 7 East, 237, affirmed on error, in Exch. Chr., 2 Bos. & Pul. N. R. 449.

holden to be qualified, may be added that of *Milner v. Horton*, M'Clel. 647; although its authority has been somewhat shaken in *Smith v. Compton*, 3 B. & Ad. 189. So where in covenant against the executors of J. W., the declaration stated, that J. W., by indenture, granted land, &c., to the plaintiff in fee, and warranted the land, &c., *against himself and his heirs*, and covenanted that he was, *notwithstanding any act by him done to the contrary*, lawfully and absolutely seised in fee simple, *and that he had a good right, full power, and lawful and absolute authority to convey*; and assigned a breach, that J. W. *had not* at the time of making the said indenture, nor at any time before or since, good right, full power, and lawful and absolute authority to convey or assure the premises to the plaintiff in manner aforesaid. The defendants prayed oyer of the indenture, (by which it appeared that J. W. covenanted for himself, his heirs, executors, and administrators, to make a cartway, and that the plaintiff should quietly enjoy without interruption, from himself or any person claiming under him, and lastly, that he, his heirs, or assigns, and all persons claiming under him, should make further assurance, and then demurred; (after argument,) it was holden, that the words "that he had a good right, full power, and lawful and absolute authority to convey," were either part of the preceding special covenant "that he was notwithstanding any act by him done to the contrary, lawfully and absolutely seised in fee;" or if not, that they were qualified and restrained by all the other special covenants *to the acts of himself and his heirs*. A covenant of special warranty does not estop grantor from setting up a subsequently acquired title. *Comstock v. Smith*, 13 Pick. 116.

Covenant for quiet enjoyment during a term, "without the let, suit, interruption, &c., of J. M. his executors, administrators, or assigns, or any of them, *or any other person or persons* whomsoever, having or claiming any estate or right in the premises, and that free and clear, and freely and clearly discharged, or otherwise, by J. M. his heirs, executors, or administrators, defended, kept harmless, and indemnified from all former gifts, grants, &c., made or suffered by J. M., or by their or either of their acts, means, default, procurement, consent, or privity," preceded by a covenant that the lease was a good lease, notwithstanding any act of J. M., and followed by a covenant for further assurance by J. M., his executors, administrators, and all persons whomsoever claiming, during the residue of the term, any estate in the premises under him or them; it was holden, (*Nind v. Marshall*, 1 Brod. & Bingh. 319,) *Park, J., dissentiente*, that the covenant for quiet enjoyment extended only against the acts of the covenantor and those claiming under him, and not against the acts of all the world. But where releasors covenanted, (*Howell v. Richards*, 11 East, 633; see also *Barton v. Fitzgerald*, 15 Id. 539; *Gainsford v. Griffith*, 1 Saund. 51; *Hesse v. Stevenson*, 8 B. & P. 568; *Belcher v. Sikes*, 8 B. & C. 185; *Smith v. Compton*, 3 B. & Ad. 189,) that, notwithstanding any act, &c., by them done to the contrary, they were seised of the land in fee; *and also*, that they, notwithstanding any such matter or thing as aforesaid, had good right to grant the premises; *and likewise*, that the releasee should quietly enjoy the same without the lawful let or disturbance of the releasors, or their heirs or assigns, *or for or by any other person*; and that the releasee should be indemnified by the releasors and their heirs, against all other titles, charges, and incumbrances, except the chief rent payable to the lord of the fee; it was holden, that the general words of the covenant *for quiet enjoyment*, were not, in necessary construction, to be restrained by the language of the antecedent covenants *for title and right to convey*; although those antecedent covenants were certainly covenants of a limited kind, and provided only against the acts of the releasors; Lord *Ellenborough, C. J.*, (who delivered the opinion of the court,) observing, "that the covenant *for title*, and the covenant *for right to convey*, are indeed what is somewhat improperly called synonymous covenants; they are, however, connected covenants, generally of the same import and effect, and directed to one and the same object; and the qualifying language of the one may, therefore, properly enough, be considered as virtually transferred to and included in the other of them. But the covenant for quiet enjoyment is of a materially different import, and directed to a distinct object. The covenant for title is an assurance to the purchaser, that the grantor has the very estate in quantity and quality which he purports to convey, viz., in this case an indefeasible estate in fee simple. The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbances thereupon. For the purpose of this covenant, and the indemnity it

for twenty-one years, and covenanted, at the end of eighteen years of the term, or before, on request of the lessee, to grant a new lease of the premises "for the like fine, for the like term of twenty-one years, at the like yearly rent, with *all* covenants as in that indenture were contained;" it was holden, that this covenant was satisfied by a tender of a new lease for twenty-one years, containing *all* the former covenants, except the covenant for future renewal.

In covenant, (m) the plaintiff declared upon an indenture, whereby the defendant demised to the plaintiff, for a term of years, certain parts of a messuage then lately parted off from the part occupied by the defendant, with certain easements belonging to the same, and a portion of an adjoining yard; and the defendant covenanted that he would permit the lessee (the plaintiff,) to have the use of the pump in the said yard jointly with the defendant, *whilst the same should remain there*, paying half the expenses of keeping it in repair. The plaintiff assigned for breach, that during the continuance of the lease, the defendant, without reasonable cause, and in order to injure the plaintiff, took away the pump, although plaintiff was willing to have paid half the expenses of keeping the same in repair. On demurrer, it was holden, that the breach was ill assigned; for the use(1) of the pump was not a specific subject of the demise; and by the introduction of the words, "*whilst the same should remain there*," it appeared that the lessor meant to reserve to himself the liberty of removing the pump, from whatever capricious or unreasonable motive he might do so; and that it was

(m) *Rhodes v. Bullard*, 7 East, 116.

affords, it is immaterial in what respects, and by what means, or by whose acts, the eviction of the grantee or his heir takes place; if he be lawfully evicted, the grantor, by such his covenant, stipulates to indemnify him at all events. And it is perfectly consistent with reason and good sense, that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of title which he purports to convey, than for quiet enjoyment. The C. J. added, that he did not find any case in which it is held that the covenant for quiet enjoyment is all one with the covenant for title, or parcel of that covenant, or in necessary construction to be governed by it, otherwise than as, according to the general rules for the construction of deeds, every deed, (as was said by *Hobart*, C. J., *Winch. Rep.* 93; *Sir George Trenchard v. Hoskins*,) is to be construed according to the "intention of the parties, and the intent ought to be adjudged of the several parts of the deed, as a general issue out of the evidence; and the intent ought to be picked out of every part, and not out of one word only." Consistently, therefore, with that case, and with every other that I am aware of, we are warranted in giving effect to the general words of the covenant for quiet enjoyment; and which are entitled to more weight in this case, inasmuch as they immediately follow and enlarge the special words of covenant against disturbances by the grantors themselves; and to restrain the generality of these words, thus immediately preceded by express words of a narrower import, would be a much stronger thing than to restrain words of like generality by an implied qualification arising out of another covenant where no such general words occurred. The person using the general words, could not forget that he had immediately before used special words of a narrower extent. If the covenant containing both the special and general words stood by itself, there would be no pretence for refusing effect to the larger words; and if this could not be done in favor of express words of a narrower import in the same covenant, I cannot possibly understand upon what ground it should be done in favor of implied words of narrower import, which occur in another separate covenant, addressed, as has been before said, to a distinct object."

(1) The demise of the use of a thing, is the demise of the thing itself. *Pomfret v. Bicroft*, 1 Saund. 321.

not inconsistent with the stipulation, that the lessee should pay half the expenses of repair, whilst the pump remained on the demised premises.(1)

Where(n) a lessee of a house and garden for a term of years covenanted with the lessor not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business, &c., without the license of the lessor, &c., and afterwards without the license of the lessor assigned the lease to a schoolmaster, who carried on his business in the house and premises; it was holden, that the assignment was a breach of this covenant. But where

the covenant(o) was not to exercise particular trades or businesses specified, "or any offensive trade," it *was holden, [*467] that it was not a trade to use the house as a lunatic asylum: the word trade in this covenant being applicable only to a business conducted by buying and selling. Where in covenant(p) for the further yearly rent stipulated for in case of converting pasture into tillage, the defendant pleaded, that the plaintiff accepted the original rent, as and for the rent due, without demanding the additional rent; it was holden, that the right of the plaintiff to recover a sum of money as stipulated damages and as additional rent, was not waived by receiving the sum due for the original rent; aliter, if it were a forfeiture.(2)

Covenant lies(q) for rent reserved by indenture, and accruing before a re-entry for a forfeiture, notwithstanding the lessor has re-entered, and under such re-entry is to have the premises again, "as if the indenture had never been made;" or in other words, re-entry for breach of covenant is no bar to covenant for rent accrued before the re-entry.(3)

(n) *Doe d. Bish v. Keeling*, 1 M. & S. 95.

(o) *Doe d. Wetherell v. Bird*, 2 A. & E. 161.

(p) *Denton v. Richmond*, 3 Tyrw. 630; 1 Cr. & M. 734. See *Astley v. Weldon*, 2 Bos. & Pul. 350.

(q) *Hartshorne v. Watson*, 4 Bingh. N. C. 178.

(1) A covenant to convey so many acres out of a larger tract, provided so much is unsold and free of claims, allows the grantor to select it where he will. *Johnson v. Tool*, 1 Dana, 480.

(2) A covenant by a mortgagee, that for five years he will not seek any other remedy or satisfaction than against the mortgaged premises, is broken by a suit on the accompanying bond. *Houstons v. Wonans*, 5 Wend. 163. Where one granted all the timber on his land, and warranted that grantee should have seven years to remove it, a sale of the land without reservation or notice to a third person, is no breach, if vendee is not molested. *Safford v. Annis*, 7 Greenl. 168.

(3) A covenant to execute and deliver a good and sufficient deed, means an operative conveyance, or one that transfers a good and sufficient title to the lands conveyed. The conveyance of a title admitted to be doubtful, is not a good performance. *Clute v. Robinson*, 2 Johns. Rep. 595. A covenant to convey the title, means the legal estate in fee, free and clear of all valid claims, liens, and incumbrances whatsoever. *Jones v. Gardner*, 10 Id. 266. A covenant that the grantor has an indefeasible estate in fee simple, is said by the Supreme Court of Connecticut to mean that he has a *legal seisin in fee*; and a *seisin in fact*, with a colorable claim to the fee, was maintained not to be sufficient. *Lockwood v. Sturdivant*, 6 Conn. Rep. 373. An action lies on covenant of seisin, in a deed where one conveyed, with covenants of seisin and warranty, land which he had in possession, but to which he claimed no title. *Wheeler v. Hatch*, 3 Fairf. 389. *Bactus v. McKoy*, 3 Ohio, 220. An opposite opinion, however, has been expressed by the Supreme

III. *Of the different Kinds of Covenants:*

1. *Express. p. 467, and herein of Express Covenants running with the Land. p. 472.*
2. *Implied. p. 475.*
3. *Joint and Several. p. 478.*
4. *Void or Illegal. p. 482.*

1. *Of Express Covenants. p. 467, and herein of Express Covenants running with the Land, p. 472.*

There is not any precise form of words necessary to constitute an express covenant; (r) any form of words or mode of expression in a deed, which clearly evinces an agreement, will amount to a covenant, for breach whereof an action of covenant may be maintained. As if it be *agreed* between A. and B., (s) by deed, that B. shall pay to A. a sum of money for his lands on a certain day; these words amount to a covenant by A. to convey the lands to B. on that day. So if lessee for years covenant to repair, (t) "provided always, and it is *agreed*, that the lessor shall find great timber;" *this word [*468] *agreed* will make a covenant on the part of the lessor to find great timber. Secus, if the word *agreed* had been omitted. (u) So if A. lease to B. on *condition* (x) that he shall acquit the lessor of charges, ordinary and extraordinary, and shall keep and leave the houses at the end of the term in as good a plight as he found them; if he does not leave them in good repair, an action of covenant lies. (1) So where covenant was brought on a writing sealed, (y) whereby the defendant's testator *acknowledged himself to be accountable* to the plaintiff for all such moneys as should be charged by plaintiff on A. *to be paid to B.*; and alleged, that he the plaintiff charged a certain sum of money on A. to be paid to B., and that the defendant's testator had not paid it; it was objected, that covenant did not lie, and that the proper form of action was an action of account; but it was holden, that covenant would lie in this case, and on any words, in a deed purporting to

(r) Moor. 135.

(s) *Pordage v. Cole*, 1 Saund. 319; 2 Lev. 274; T. Raym. 183, S. C.; *Mattock v. Kinglake*, 10 A. & E. 50; 2 P. & D. 346, S. P.

(t) 1 Rol. Abr. 518, (C.) pl. 2.

(u) *Ib.*, pl. 3.

(x) *Ib.* pl. 5, 40 Ed. III. 5, b.

(y) *Bryce v. Carre and others, Executors of J. S.*, 1 Lev. 47.

Court of Massachusetts, in *Manton v. Hobbs*, 2 Mass. Rep. 433; *Twambly v. Henley*, 4 Id. 441, and *Prescott v. Truman*, *Ib.* 627.

In deeds where the seisin forms no part of the description of the lands granted, a covenant of seisin applies to the present seisin as well as to the title. *Thomas v. Perry*, 1 Peters, C. C. Rep. 49. Under a covenant "to sell and convey" land for a price to be paid at a time subsequent to the deed, a tender of a deed of warranty, while the land was mortgaged, is not a fulfilment of the covenant. *Sibley v. Spring*, 3 Fairf. 460.

A covenant to cause land to be conveyed by a good and sufficient warranty deed, is not complied with by the mere giving of a deed with warranty, where grantor has no title, or where his title is imperfect. *Everson v. Kirlland*, 4 Paige, 628; *Courcier v. Graham*, 1 Ohio, 164.

(1) But a condition inserted solely for the benefit of the defendant, is not his covenant. *Salisbury v. Phillips*, 10 Johns. Rep. 57.

be an agreement for the payment of money. So in a case of a lease for years *rendering* rent,(z) it was adjudged by the court, (*absente Holt*, C. J.,) that the *render* made a covenant. So where covenant was brought against executrix of assignee of lessee for years(a) by indenture, for rent arrear in the time of the executrix, upon the words *yielding and paying*; it was holden, that the action would lie; and the opinion of the court was, that the words "yielding and paying,"(1) in the indenture, made an express covenant, and were not a bare covenant in law. So in covenant against the assignee of lessee for years, upon an indenture(b) whereby plaintiff demised to the lessee a house, *excepting a room, with free liberty of passage*, through other rooms of the house, unto the room excepted. Lessee assigned the lease; and the assignees stopped the passage, whereupon plaintiff brought this action, declaring for a breach of covenant. Resolved, by the court, [*469] that this exception amounted to *a reservation, upon which covenant would lie; and they compared it to the preceding case of rent reserved, where covenant will lie upon the words of reservation, without any express words of covenant.(2) But it must be clear, that the words are meant to operate as an agreement, and not merely as words of qualification or condition. For where an assignee took from a lessee, leasehold premises by *indenture*, indorsed on the deed, "subject to the payment of the yearly rent and to the performance of the covenants in the lease;" it was holden,(c) that these words did not constitute an agreement for the payment of rent, &c., *during the term*, nor did they render him liable to the lessee for rent which had become due, and the lessee had been obliged to pay to the lessor, after the assignee had assigned over the premises; for the words were words of qualification, and not of contract.

Where the law creates a duty or charge,(d) and the party is disabled from performing it, without any default on his part, and has not any remedy over, the law will excuse him; but where the party, *by his own contract*, imposes on himself a duty or charge, he is bound to make it

(z) *Giles v. Hooper*, Carth. 135.

(a) *Porter v. Sweetnam*, Sty. 406, 431; *Hellier v. Casbard*, 1 Sidf. 266, S. P.

(b) *Bush v. Coles*, Carth. 232; Salk. 196, S. C.

(c) *Wolveridge v. Steward*, in error, Exch. Chr., 3 Tyrw. 637, reversing judgment in C. B., reported 9 Bingh. 60.

(d) *Paradine v. Jane*, Aleyn, 27.

(1) These words, "*yielding and paying*," have sometimes been considered as sufficient to raise a covenant by implication of law only. See a dictum to this effect, 1 Sidf. 447; and *Kenyon*, C. J., so considered them in *Webb v. Russell*, 3 T. R. 402. The same opinion is adopted by Serjeant Williams in his notes to the first volume of *Saunders*, p. 241, b, note 5. But in addition to the authorities in the text, it may be observed, that in *Rolle's Abridgment*, Covenant, (C.) the title of which is, "What words will make an express covenant?" in pl. 10, p. 519, this case is put as an instance of an express covenant: "If a man lease land for years, reserving a rent, an action of covenant lies for the non-payment of the rent; for the *reddendo* of the rent is an agreement for the payment of the rent, which will make a covenant."

(2) B., by a bill of sale, granted and sold a "slave, &c., being of sound wind and limb, and free from all disease." Held, not to be words of description, but a covenant of warranty, as to the soundness of the slave. *Cramer v. Bradshaw*, 10 Johns. Rep. 484.

good, notwithstanding inevitable accident; because he might have provided against it by his own contract.(1) A lease for years was made by indenture,(e) of a meadow bounded on one side by a river; and the lessee covenanted to sustain and repair the banks, to prevent the water from overflowing the meadow, upon pain of forfeiture of a sum of money; afterwards by a sudden and violent flood, the banks were destroyed, and, by the opinion of *Fitzherbert* and *Shelley, Js.*, "The law is, that the lessee is excused from the *penalty, because it is the act of God*, which cannot be resisted; but still he is bound to make and repair the thing in convenient time, *because of his own covenant*." So where the assignee of a reversion brought covenant against lessee of a house for non-payment of a year's rent;(f) defendant prayed oyer of the lease, which contained *a covenant on the part of the de- [*470] fendant *to repair* the house during the term, except it should be destroyed by fire; and then pleaded, that before any part of the rent in question became due, the premises were destroyed by fire, against the will of defendant, and were not rebuilt by the lessor or the plaintiff; and that the defendant did not occupy the premises during the year for which the rent was claimed. On demurrer, it was holden, on the authority of *Paradine v. Jane*, Aleyn, 27, that the defendant was bound by his express covenant to pay the rent during the term.(g)

The doctrine laid down in the preceding case having been alluded to in argument, in *Cutter v. Powell*, 6 T. R. 323, Lord *Kenyon*, C. J., said, "that it must be taken with some qualification; for where an action was brought for rent after the house was burned down, and the tenant applied to the Court of Chancery for an injunction; Lord *Northington* said, "that if the tenant would give up his lease, he should not be bound to pay the rent." Probably the case here alluded to by Lord *Kenyon* was the first of the following cases:—

The plaintiffs were tenants to the defendants of a house,(h) &c., by lease, in which there was a covenant by the plaintiffs to do all repairs, accident by fire only excepted: the defendants had insured the buildings, which were burned down; the insurers paid the loss: the defendants declined re-building, and brought an action of covenant for the rent accrued due after the accident had happened. The plaintiffs filed a bill in the Court of Chancery for an injunction, and obtained the

(e) *Dyer*, 33; a.

(f) *Monk v. Cooper*, Str. 763; 2 Lord Raym. 1477, S. C.

(g) See *Belfour v. Weston*, 1 T. R. 310, S. P.

(h) *Camden and another v. Morton and another*, in Canc. E. 4 Geo. III. MSS. 2 Rep. Temp. Ld. Chan. Northington, p. 219, S. C.

(1) This rule, extracted from the case of *Paradine v. Jane*, has been recognized in many subsequent cases. *Atkinson v. Ritchie*, 10 East, 533. So in *Warren v. Powers*, 5 Conn. 381. And in *Beale v. Thompson*, 3 Bos. & Pul. 420, *Chambre, J.*, speaking of this case, says: "The court took a rational distinction, that where an obligation is imposed by rule of law, and there is not any express covenant, the law introduces a reasonable exception, viz., that an act of irresistible violence will excuse the party; but if a party enter into an absolute contract, without any qualification or exception, and receives from the party with whom he contracts, the consideration for such engagement, he must abide by the contract, and either do the act, or pay damages, his liability arising from own direct and positive undertaking."

common injunction; the defendants, on coming in of the answer, moved to dissolve the injunction, they having by their answer offered to remit the rent, upon a surrender being made of the lease, which the plaintiffs declined, as the lease was beneficial. The plaintiffs had pleaded at law the truth of the case in bar of the action: and on a demurrer to this plea, the plaintiffs were advised not to argue the demurrer, but to apply to a court of equity. On showing cause against dissolving the injunction, Lord *Northington*, Ch., inclined to think, that the matter pleaded was a good defence at law; but that, in all events, a court of equity ought to restrain this action, until the house, &c., were rebuilt; and therefore continued the injunction.

Bill brought for a specific performance of a covenant⁽ⁱ⁾ for quiet enjoyment, contained in a lease of certain houses demised by defendant to plaintiff, and to have 500*l.* laid out in rebuilding the houses, (which had been burned down by accident since the execution of the lease,) and for an injunction to restrain defendant from proceeding at law. N. [*471] The 500*l.* had been received by the defendant *from the insurance office on account of the insurance of these houses. Defendant, by his answer, offered to accept a surrender of the lease. Lord *Northington*, Ch.—“There is not any covenant from the landlord to rebuild. A court of equity can decree a specific performance in those cases only, where clear directions can be given in what manner, and when, the act is to be performed. It would be most arbitrary for me to decree a rebuilding, in a case where there is not any covenant for the rebuilding. All that can be required from a court of equity is, in a case like this, when an action shall be brought for rent, to order an injunction, until the houses are rebuilt, or the lease delivered up. In the present case, there has not been any action brought for the rent, and the defendant has offered to accept a surrender of the lease, which is all the relief the plaintiff is entitled to.” There being a valuable wharf on the demised estate, the plaintiff declined surrendering his lease; the bill therefore was dismissed with costs.⁽¹⁾

But where there are no special circumstances, the general rule prevails, that equity follows the law; and a court of equity will not restrain a party from proceeding at law for rent arrear after the premises are destroyed by fire: the agreement for payment of the rent being with-

(i) *Brown v. Quilter*, in Canc. 1 June, 1764, MSS. Amb. 619, S. C. But see *Hare v. Groves*, 3 Anstr. 687, and *Holtzapffel v. Baker*, 18 Ves. 115.

(1) Ejectment by tenant against landlord to recover the possession of some houses which had been burned down during the term, and had been rebuilt by the landlord. In the lease there was an express covenant, on the part of the tenant, to pay the rent, but he had not paid any after the time of the fire. Lord *Mansfield*, C. J., said, the consequence of the houses being burned down was, that the landlord was not obliged to rebuild, but the tenant was obliged to pay the rent during the whole term. The houses having been burned down four years before action brought, and the rent not having been paid during that period, he left it to the jury to consider whether it was not to be presumed that the tenant had abandoned the lease at the time of the fire; and accordingly the jury found a verdict for the defendant. *Pindar v. Ainsley*, Middlesex Sittings after M. T. 1767, cited by *Buller*, J., 1 T. R. 312.

out restriction.(k)(1) In a subsequent case of *Leeds v. Cheetham*,^(l) it was decided, that a tenant has no equity to compel his landlord to expend money received from an insurance-office, on the demised premises being burnt down, in rebuilding the premises, or to restrain the landlord from suing for the rent until the premises are rebuilt. In that case the defendant had demised to the plaintiff a cotton factory, with the steam-boiler, &c., for twenty-one years, at a rent of £ . The plaintiff covenanted to pay the rent, and to repair and keep repaired the inside of the cotton factory, &c., and the defendant covenanted to maintain the outside brickwork and all other outer parts of the premises in good and tenantable repair, &c. There was not any exception in respect of accidents by *fire, either in the covenant [*472] for payment of the rent, or in the covenant to repair. During the term the factory was destroyed by fire. After the lease was granted the defendant had insured the factory and buildings for 500*l.*, the steam-engine for 100*l.*, the engine-house for 60*l.*, and the gearing for 40*l.*; and shortly after the fire had received the total of these sums, viz. 700*l.*, from the insurance-office. The bill prayed that it might be declared, that the defendant was bound to apply the 700*l.* and the old materials, in reinstating the factory, steam-engine, &c., and that the plaintiff was not bound to pay the rent during such time as the factory, &c., should continue unrestored. Sir *J. Leach*, V. C., in delivering judgment, observed, "Clearly, at law, the plaintiff, having covenanted to pay his rent during the whole continuance of the lease, is not entitled to any suspension of rent during the the time that will be occupied in rebuilding and restoration of the premises: it appears to me that, in this re-

(k) *Hare v. Groves*, 3 Anstruther, 687, recognized and acted upon in *Holtzapffel v. Baker*, 18 Ves. 115.

(l) 1 Sim. 146.

(1) The lessee of a house, on a general covenant to repair during the term, is bound to rebuild, in case the house be consumed by an accidental fire. *E. of Chesterfield v. D. of Bolton*, Com. R. 627; *Bullock v. Dommitt*, 6 T. R. 650, S. P.; *Phillips v. Stevens*, 16 Mass. Rep. 238. In many cases an exception of accidents by fire or tempest, is introduced into leases for the protection of lessees. It appears, from the cases of *Monk v. Cooper*, and *Hare v. Groves*, 3 Anstr. 687, that this exception should be introduced into the covenant for payment of the rent, as well as into the covenant for repairs, in order to exempt the lessee from the obligation of paying rent as well as rebuilding, in case the house should be destroyed by fire or tempest. In *Walton v. Waterhouse*, 2 Saund. 420, covenant was brought against lessee of a house for not repairing; defendant pleaded that the house had been destroyed by fire, but in convenient time after had been rebuilt. Plaintiff demurred specially, because defendant did not show *by whom* the dwelling-house was rebuilt. Judgment for plaintiff. If a lessor covenant (*Loader v. Kemp*, 2 C. & P. 375, *Best*, C. J.) that he will, in case the messuage, shop, and building demised be burnt down, rebuild and replace the same, in the same state they were in before the fire, he is only bound to rebuild what he let, and not any additional parts, which may have been erected by the lessee. On a covenant to erect a bridge in a substantial manner, and to uphold and keep in complete repair for a certain time; although the bridge be broken down by an extraordinary flood, yet the party covenanting is bound to repair. See *Shubrick v. Salmon*, 3 Burr. 1637, to the same effect. It was decided in *Pollard v. Shaffer*, 1 Dall. Rep. 210, that tenant was not liable under a covenant to repair for damage done by the British troops while in Philadelphia during the war of the revolution. On a covenant to re-deliver a slave at a certain time, the covenantor is excused if the slave dies or runs away before the time, and proper efforts are made for his recovery. *Keas v. Yewell*, 2 Dana, 248.

spect, equity must follow the law; the plaintiff might have provided in the lease for a suspension of the rent in the case of accident by fire; but, not having done so, a court of equity cannot supply that provision, which he has omitted to make for himself; and it must be intended that the purpose of the parties was according to the legal effect of the contract.⁽¹⁾ With respect to the equity, which the plaintiff alleges to arise from the defendant's receipt of the insurance-money, there is no satisfactory principle to support it. The defendant, having so contracted with the plaintiff as to render himself liable to rebuild the outer work of the factory in case of accident by fire, has very prudently protected himself by insurance from the loss he would otherwise have sustained by such an accident; but upon what principle can it be that the plaintiff's situation is to be changed by that precaution on the part of the defendant, with which the plaintiff had nothing whatever to do? The plaintiff has sought his protection in the contract by the covenant, which he has required from the defendant; and to those covenants he must alone resort."

A covenant for payment of rent, or a charge, frequently specifies some place where the payment is to be made. Where this is so, it is for the benefit of the person charged, who would otherwise be bound to seek his creditor. It is matter of defence, and must be specially pleaded.^(m)

Of Express Covenants running with the Land.—Covenants for title are frequently termed real covenants, and pass by the common law to the assignees of the land, who may maintain actions upon them against the vendor and his real and personal representatives.⁽ⁿ⁾ And as the covenants relate to the land, an assignee may maintain an action on them, although they were entered into with the original grantee [*473] and his heirs only; and where the covenants run with *the land, although they are entered into with the party, his executors and administrators, yet they will go to the heir with the land. The right of action, even for a breach in the ancestor's lifetime, will descend to heir, and not to the executor, where no actual damage was sustained by the ancestor.^(o) See further as to covenants for title, *post*, IV. 1, p. 485.

Express covenants, which run with the land, entered into by lessee for years, for himself, his executors, administrators, and assigns, are binding on the lessee and his personal representative, (having assets,) during the continuance of the term; although such covenants are broken, after an assignment of the term by the lessee, and after an acceptance of rent from the assignee by the lessor, or grantee of the reversion; and there is not any distinction in this respect between a voluntary assignment by the lessee and a compulsory transfer by virtue of the bankrupt laws.^(p)—In covenant against lessee of a house by inden-

(m) *Paine v. Emery*, 5 Tyrwh. 1097.

(n) *Middlemore v. Goodale*, 1 Roll. Ab. 521, (K.) pl. 6; Cro. Car. 503, 5.

(o) See 2 Sugden's V. & P. 458, 10th ed., and cases there cited.

(p) *Auriol v. Mills*, 4 T. R. 94. But see stat. 6 Geo. IV. c. 16, s. 75, *post*, p. 496, and

(1) See p. 471, note (1).

ture, (q) wherein the lessee had expressly covenanted for himself, his executors, and assigns, that he would repair within a month after warning; the breach assigned was for not repairing the house within a month after warning given; the defendant pleaded, that a long time before that warning he assigned his term to J. S., who paid his rent always afterwards to the plaintiff, who had accepted the same; and then averred the performance of all the covenants until the assignment; the plaintiff demurred, on the ground that this assignment did not take from the lessor his advantage of the *express* covenant; and, notwithstanding his acceptance of rent by the hands of the assignee, yet he might charge the lessee or assignee at his election; and the whole court being of that opinion, it was (*without argument*) adjudged for the plaintiff. The same point was ruled in *Ventrice v. Goodcheap*, 1 Roll. Abr. 522, (N.) pl. 1, where the lessee had covenanted for himself and his assigns to repair; on the ground that the lessee had expressly covenanted for himself and his assigns, and that this personal covenant could not be transferred by the acceptance of the rent. So where the breach was for non-payment of rent. (r)(1) In *Mayor v. Steward*, 4 Burr. 2439, it was holden, that a bankrupt was bound by an *express collateral covenant, (to indemnify plaintiff against [*474] the covenants of a lease,) which had been broken after act of bankruptcy committed, and after defendant had obtained his certificate.

From the foregoing cases it appears clearly, that express covenants, which run with the land, entered into by lessee for years, for himself, his executors, administrators, and assigns, are binding on the *lessee* during the continuance of the term, although such covenants are broken after an assignment of the term by the lessee, and after the acceptance of rent from the assignee by the lessor or grantee of the reversion, (2) it remains only to add, that such covenants, under the same circumstances, are binding on the personal representative of the lessee *having assets*. In covenant by the lessor against the executor of lessee for years, (s) by indenture, of a garden adjoining to the house of the lessor, in which indenture lessee had covenanted for himself, his executors, and assigns, that he would not erect any building in the

Copeland v. Stephens, 1 B. & A. 593, *post*, p. 515. See *Ross v. Overton*, 3 Call's Rep. 309; *Port v. Jackson*, 17 Johns. Rep. 239; *Kunckle v. Wynick*, 1 Dall. Rep. 305; *Moale v. Tyson*, 2 Har. & M'Hen. 387.

(q) *Barnard v. Godscall*, Cro. Jac. 309.

(r) *Devon v. Collier*, 1 Roll. Abr. 522, (N.) pl. 1; *Crofts v. Taylor*, Ib. Adj. on dem. S. P.

(s) *Bachelour v. Gage, Executor of Gage*, Cro. Car. 188, and Sir W. Jones, 223; *Arthur v. Vanderplank*, B. R. H. 7 Geo. II. MS. S. P.

(1) The following authorities may be referred to, as tending to establish the same point. *Fisher v. Ameers*, 1 Brownl. 20; *Thursby v. Plant*, 1 Sidf. 402; Sidf. 447, *Nota*; *Boulton v. Cann*, Freem. 337; *Ashurst v. Mingay*, 2 Show. 134; T. Jones, 144, S. C.; *Edwards v. Morgan*, 3 Lev. 233; *Jodderell v. Cowell*, Ca. Temp. Hardw. 343; *Auriol v. Mills*, 4 T. R. 94.

(2) So where a covenant in a lease, not to assign without the approbation of the lessor in writing, has been broken by an assignment, the lessor's right of action for a breach of the covenant is not affected by his accepting an assignment of the lease from the assignee of the lessee. *Hazlehurst v. Kenrick*, 6 S. & R. 446.

garden to the prejudice of the lessor's lights ; it was alleged, that an assignee of defendant's testator had erected a house in the garden to the prejudice of the lessor's lights. Defendant pleaded an assignment of the term to J. S., who had paid rent to the lessor, and had been accepted by him as tenant. On demurrer, it was contended, on the part of the defendant, that by the assignment and acceptance of rent, the privity of contract was determined, more especially as it was a contract which concerned an act to be executed on the land, and therefore running with the land ; but the court conceived, that as it was an express covenant, that the lessee should not build, it should bind him and his executors ; and neither an assignment, nor an acceptance of rent, by the hands of the assignee, could deprive the lessor of the advantage of suing the lessee or his executors on an express covenant. Judgment for plaintiff.

Queen Elizabeth, by letters patent, demised a house for years,^(t) which the lessee covenanted to repair. On the death of the Queen, the reversion descended to King James, when the lessee assigned his term, and the assignee paid rent to the King, who afterwards granted the reversion to the plaintiff ; the house being out of repair, the plaintiff brought covenant against the executors of lessee for a breach of the covenant committed after an assignment of the term and reversion, and after plaintiff had accepted rent from the assignee of the term ; it was holden, that the action would lie, on the ground that it was a covenant in fait, by the express words, running with the land ; and that notwithstanding an assignment, the covenantor and his executors were always chargeable, so that he could not, either by the assignment of his estate, or by any other act, discharge himself or his executors, (who [*475] were chargeable by the act *of the testator,) *having assets*, as long as the reversion continued in the lessor ; and by the express words of stat. 82 Hen. VIII. c. 34, such remedy as the lessor might have had against the lessee or his executors, the assignee shall have against them ; *it being a covenant in fait, which runs with the land*.

A covenant^(u) made between a lessee holding under letters patent, and his under-lessees, that he would procure the original letters patent to be renewed, and the lease under which he held to be confirmed absolutely for a certain term, is a covenant which runs with the land, inasmuch as it affects the very existence and continuance of the term itself.

See further as to covenants running with the land, and the rights and liabilities of assignees, *post*, p. 502, V. 3, "Covenant by Assignee ; and VI. 3, "Covenant against Assignee," p. 508.

2. Of Implied Covenants.

In order to constitute a covenant, it is not necessary that the word

(t) *Bret v. Cumberland*, Cro. Jac. 521 ; 2 Rolle's R. 63, S. C.

(u) Per *Tindal*, C. J., delivering judgment of court, in *Simpson v. Clayton*, 4 Bingh. N. C. 780 ; 6 Sc. 469 ; recognizing *Roe v. Hayley*, 12 East, 464.

"covenant" should be employed, (x) for there are certain words, (y) (1) which, though of themselves they do not import any express covenant, yet when used in contracts by deed, will amount to a covenant. (2) As if A., by indenture, "*demise and grant*" lands to B. (z) for years, and C. enters and evicts B. by rightful title, B. may maintain an action on the implied covenant; (3) and A. is estopped from saying that B. was not in by the lease. So if a lessor demise land for a term of years, (a) and afterwards by the words *dedi et demisi* demises the same land to A. for life, (4) who enters and is ousted by the termor for years; A. may maintain an action against the lessor on the implied covenant, and have satisfaction in damages for the chattel evicted; for he continues seised of the freehold. (5)

In covenant on a lease for years made by the defendant by the word *demisi*, (b) it was averred, that at the time of the lease made, the lessor was not seised of the land, but a stranger; it was objected, that the entry of the lessee by force of the lease, and ejectment by the stranger, or some person claiming under him, were *not [*476] alleged; but the court was of opinion, that the action would lie; for the breach of covenant was, that the lessor had undertaken to

(x) *Stevenson's case*, 1 Leon, 324; cited by Lord Gifford, C. J. C. B., in *Saltoun v. Houstoun*, 1 Bingh. 440, recognized in *Sampson v. Easterby*, 9 B. & C. 505, in which the interest of the lessor was an undivided third, and the demise only of a third, and yet the covenant to such lessor was raised by implication. This judgment was affirmed on error in Exch. Chr. 6 Bingh. 644.

(y) 48 Edw. III. 2, b; 1 Rol. Abr. 519, (F.)

(z) *Style v. Hearing*, Cro. Jac. 73.

(a) *Pincombe v. Rudge*, Yelv. 139.

(b) *Holder v. Taylor*, Hob. 12; 1 Inst. 301, b.

(1) No set form of words is necessary to constitute a covenant. As to covenants real, they may be implied—but in covenants personal, terms must be used which by natural import amount to an agreement. Thus on a receipt of a note for collection, a covenant to pay when collected is not implied. *Wengell v. Breckenridge*, 3 Dana, 482.

(2) See the stat. 7 & 8 Vict. c. 76, s. 6, *post*, p. 477; *Christine v. Whitehill*, 16 S. & R. 111; *Marshall v. Craig*, 1 Bibb, 379.

(3) See *Barney v. Keith*, 4 Wend. 502; *Kinney v. Watts*, 14 Id. 38; *Emerson v. Wiley*, 10 Pick. 310. There may be implied covenants in a deed, in which there are express covenants; but there can be none contradictory to express covenants, though there may be implied covenants which are consistent with those expressed. *Gates v. Caldwell*, 7 Mass. 68. *Kent v. Welch*, 7 Johns. 259; *Vanderkarr v. Vanderkarr*, 11 Id. 122; *Sumner v. Williams*, 8 Mass. 201; *Funk v. Voneida*, 11 Serg. & Rawle, 109.

(4) See *Frost v. Raymond*, 2 Caines' Rep. 188, *contra semble*. See also *Kent v. Welch*, 7 Johns. 259; *Sedgwick v. Hollenback*, 7 Id. 251; *Granis v. Clark*, 8 Cow. 36; *Allen v. Saywood*, 5 Greenl. 227; *Seitzinger v. Weaver*, 1 Rawle, 377.

(5) But the word *do* or *give* is the only word from which a covenant can be implied in a deed of feoffment. It cannot be implied from the words *grant*, *bargain*, *sell*, *alien*, *confirm*, or even *enfeoff*. See *Bender v. Fromberger*, 4 Dall. 440; *Gratz v. Ewalt*, 2 Binn. 95; *Funk v. Voneida*, 11 S. & R. 109; *Christine v. Whitehill*, 16 Id. 98; *Seitzinger v. Weaver*, 1 Rawle, 377; *Pricketts v. Dickens*, 1 Murph. 343; *Powell v. Lyles*, Ib. 348. The reasons of this distinction are feudal. Nor does a sale of an estate in fee, by the formal and apt words of conveyance, and for a valuable consideration, of itself imply a warranty or covenant of title. *Enfeoff*, in a lease for years, implies a covenant; and *exchange*, when appropriately used. It is also said, that an express warranty can only be created by the word *warrantizo* or *warrant*. *Frost v. Raymond*, 2 Caines' Rep. 188. *Give* implies a covenant which lasts no longer than the life of covenantor; *Kent v. Welch*, 7 Johns. Rep. 259; and the implied covenant is a covenant of warranty, and not of seisin, and there must therefore be an averment of eviction. *Sedgwick v. Hollenback*, 7 Johns. Rep. 376.

demise that which he could not, the word *dimisi* importing a power of letting, as *dedi* does a power of giving; and they added, that it was not reasonable to enforce the lessee to enter upon the land, and so to commit a trespass.(1) And where a lease for years is made by the words "demise,"(c) the assignee of the lessee is entitled to the same advantage as the lessee, and may in case of eviction maintain an action on the implied covenant. Tenant, for life, remainder over, by indenture demised for 15 years, without any express covenant for quiet enjoyment; the lessee was ousted by the remainder-man, after the death of the tenant for life, but before the expiration of the 15 years: it was holden, that the lessee could not maintain an action of covenant against the executor of the tenant for life; for the covenant in law ends and determines with the estate of the lessor.(d)

The implied covenant follows the nature of the interest granted; as where A. and B. made a lease by the word "*dimiserunt*;"(e) it was holden, that the implied covenant was joint, viz. that A. and B. had a power to demise, and that an action on the ground of their not being seised at the time of the demise should be brought against both, and could not be maintained against one only. The generality of an implied covenant may be qualified and restrained by an express covenant.(2) As where the lessor *demised and granted* a house for a term of years,(f) and covenanted, that the lessee should enjoy the house during the term, *without eviction by the lessor, or any claiming under him*; it was holden, that the express covenant qualified the generality of the covenant raised by implication of law from the words *demise and grant*, and restrained it by the mutual consent of both parties, so that it should not extend further than the express covenant.(3) Sir E.

[*477] *Coke*, from whose *reports this case has been extracted, subjoins as follows: "And there is great reason, that the particular covenant subsequent should qualify the general force of this word 'demise;' for if the force of this should stand, the particular covenant would be in vain, and these words 'demised and granted' are frequent in every common lease; and the better construction of deeds is to make one part of a deed expound another, and so make all the parts agree, and, as far as it can be done, according to the true intention and

(c) *Spencer's case*, 5 Co. 17, a, 4th Resolution.

(d) *Adams v. Gibney*, 6 Bingh. 656. See *Woodhouse v. Jenkins*, 9 Bingh. 431.

(e) *Coleman v. Sherwyn*, Carth. 97; Salk. 237, S. C.

(f) *Nokes's case*, 4 Co. 80, b, recognized and adopted per totam curiam, in *Line v. Stephenson*, 4 Bingh. N. C. 678; 6 Sc. 447; affirmed in Exch. Chr., 5 Bingh. 183. See also *Merrill v. Frame*, 4 Taunt. 329.

(1) See *Granis v. Clark*, 8 Cow. 37; *Frost v. Raymond*, 2 Caines, 188.

(2) See *Weiser v. Webber*, 5 Watts, 279.

(3) This case is stated as it is reported in *Coke*; in *Croke's* report of the same case, Cro. Eliz. 674, it is said, that *Popham*, C. J., inclined to this opinion, but that the other justices did not deliver any opinion thereon, and that judgment was given on another point; *Coke's* report, however, is adopted by *Hale*, in *Deering v. Farrington*, 1 Mod. 113, and recognized by *Vaughan* in *Hayes v. Bickerstaff*, Vaughan, 126; and in *Line v. Stephenson*, 4 Bingh. N. C. 683, *Park*, J., said, "Lord *Coke's* report must be taken to be correct, as he was then attorney-general, and *Croke* was not a judge till twenty-five years after." See *Kent v. Welch*, 7 Johns. 259; *Vanderkarr v. Vanderkarr*, 11 Id. 122.

meaning of the parties.”(1) So where a covenant on an indenture,(g) whereby the defendant granted a fee farm rent to the plaintiff, which he had purchased of the late trustees for sale of the king’s tenements, and covenanted that he was seised in fee, and had good right to sell; the breach assigned was, that he had not good right; the defendant pleaded, that it was further agreed, in the same indenture, that all the covenants in the indenture should not extend further than to acts done by the vendor and his heirs, whereon the plaintiff demurred; and although this was a remote agreement at the end of the deed, at a great distance from the other covenant, it was adjudged, that it had qualified the first covenant, and restrained it to acts done by the *covenantor only*: as in *Nokes’s* case. Judgment for defendant. See also *Browniny v. Wright*, 2 Bos. & Pul. 13, and *post*, p. 485.

By stat. 7 & 8 Vict. c. 76, s. 6, neither the word “grant,” nor the word “exchange,” in any deed shall have the effect of creating any warranty or right of re-entry, nor shall either of such words have the effect of creating any covenant by implication, except in cases where by any act of parliament it is or shall be declared that the word “grant” shall have such effect. This act took effect from the 31st of December, 1844, and does not extend to any deed, act, or thing executed or done before the 1st of January, 1845.(h)

Where a lessee covenanted that he would at all times and seasons of burning lime, supply the lessor and his tenants with lime, at a stipulated price, for the improvement of their lands and repair of their houses; it was holden,(i) that this was an implied covenant also that he would burn lime at all such seasons, and that it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied.(2)

*3. Of joint and several Covenants.

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Where the interest(3) of the covenantees is joint, the action of covenant follows the nature of the interest, and must be brought in the names of all the covenantees;(4) and this rule holds, even where the

(g) *Brown v. Brown*, 1 Lev. 57.

(h) Sect. 13.

(i) *Earl of Shrewsbury v. Gould*, 2 B. & A. 487.

(1) The doctrine of implied covenants is confined to real property. Hence if *goods* be demised for years, and the lessee be evicted, covenant does not lie; for the law does not create a covenant for a personal thing. Com. Dig. Cov. (A. 4).

(2) A lease of a stone quarry, in consideration that lessee shall pay a certain price per perch for the stone, is a covenant to work it. And one verdict and judgment on such contract pending the lease, is no bar to another during the term. *Watson v. O’Hern*, 6 Watts, 362.

But it must not be inferred that there cannot be implied covenants in a deed in which there are express covenants; there can be none contradictory to express covenants, but there may be implied covenants which are consistent with those expressed. *Gates v. Caldwell*, 7 Mass. Rep. 68, *ante*, 475, note (3).

(3) Where the legal and beneficial interests are not united in the same person, this term is to be understood of the legal interest. See *Anderson v. Martindale*, *post*, p. 480.

(4) Tenants in common, holding under one and the same deed, need not join in an action on the covenant of warranty against grantor. *Swett v. Patrick*, 2 Fairf. 177.

covenant is joint and several : (2) as where B. (k) by indenture covenanted with C. and D. and to and with E. and F. his wife, (who afterwards became the wife of D.) and their assigns, *and to and with each of them*, that he (B.) at the time of sealing and delivering the indenture was lawfully and solely seised of a certain rectory ; an action was brought by D. and F. his wife, for a breach of the covenant ; after verdict and judgment for the plaintiffs in B. R., the judgment was reversed on error in the Exchequer Chamber, upon the ground that notwithstanding the words, "*and to and with each of them*," the other covenantee should have joined in the action. When it appears on the face of the declaration, that each of the covenantees is to have a several interest or estate, then the addition of the words "*with each of them*," will make the covenant several in respect of their several interests ; as if one by indenture demise Blackacre to A. and Whiteacre to B., and covenant with each of them, that he is lawful owner of both the said acres ; then, in respect of the several interests, the covenant by those words is made several. (l)

If the interest of covenantees be several, they may maintain separate actions, although the language of the covenant (m) be that of a joint covenant. (2) The result of the cases appears to be this, [*479] *that, where the legal interest *and cause of action* of the covenantees are *several*, they shall sue separately, though the covenant be joint in terms ; but the several interest and the several ground of action must distinctly appear : on the other hand, *if the cause of action be joint*, the action should be joint, though the interest be several ; (n) therefore in a case, where the covenants for which the action is brought are such as to give the covenantees a joint interest in

(k) *Slingsby's case*, on error, Exch. Chr. 5 Rep. 18, b ; 3 Leon. 160, 161, S. C. ; *Lane v. Drinkwater*, 1 C. M. & R. 599.

(l) 5 Rep. 19, a.

(m) *James v. Emery and Cludde*, 8 Taunt. 245 ; 5 Price, 529 ; *Palmer v. Sparshott*, 4 M. & Gr. 137 ; 4 Scott's N. R. 743.

(n) Per Lord Denman, O. J., delivering judgment of court in *Foley v. Addenbrooke*, 4 Q. B. 197.

(1) For the wording of the covenant cannot make that which was before joint, several. A covenant to pay ground rent by two persons to whom land is conveyed, "as tenants in common, and not as joint tenants," is a *joint* covenant notwithstanding their several interests. *Phillips v. Bonsall*, 2 Binn. 138. So, on the other hand, where the interest is several, although the *covenant* be joint, yet it shall be taken to be several. Bull. N. P. 157. *Trustees v. Letcher*, 1 Monr. 13. "Where the covenant is to several, for the performance of several duties to each, the covenant should be moulded according to the several interests of the parties, and each shall only recover for a breach so far as his own interest extends." Per Kenyon, C. J., in *Anderson v. Martindale*, 1 East's R. 501. See also *Servante v. James*, 10 B. & C. 410 ; in which it was holden, that several covenantees must sue severally in respect of their several interests, and that they could not maintain a joint action. *Ernst v. Bartle*, 1 Johns. Cas. 319. As to the cases where the parties covenant generally against incumbrances made by them, and the covenant is construed to extend to *several* as well as *joint* incumbrances. Vide *Craig v. Duvall*, 2 Wheat. Rep. 45, and note to S. C. Ib. 60, note b.

(2) In *Sorsbie v. Park*, 12 M. & W. 158, Parke, B., said, I think the correct rule is laid down by Gibbs, O. J., in the case of *James v. Emery*, with the qualification stated by Mr. Preston in the note to Sheppard's Touchstone, p. 166. That rule is, that a covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction ; not that it will be construed to be several by reason of several interests, if it be expressly joint. See *Ludlow v. M'Crea*, 1 Wend. 228.

the performance of them, and the terms of the indenture are such that the covenantees might have maintained a joint action for any of them, as the covenantees could sue jointly, they are bound to do so.^(o)(1)

The defendant and one G.^(p) covenanted for themselves, and for each of them, with the plaintiff and one C., to receive rents due to the plaintiff and C. in Ireland; and also that they and each of them would pay a moiety thereof *to each of them*, the plaintiff and C.; in covenant by plaintiff against defendant alone for the recovery of plaintiff's moiety, the breach assigned was, that although defendant and G. had received 7000*l.*, neither the defendant nor G. had paid a moiety to the plaintiff: on motion, in arrest of judgment, it was holden, 1st, that the covenant being to pay a moiety to each, the interest was several, and consequently the action was well brought by the plaintiff alone; 2ndly, that the defendant had covenanted for the acts of his companion, as well as for his own acts, and consequently, that the action was well brought against the defendant, and the breach well assigned. So where by deed reciting the grant of two distinct annuities, to A. and B., during the life of the grantors, and the survivor, it was witnessed that C. covenanted with A. and B. to pay the annuities of either of them, when the grantors should make default in payment. A. died; it was holden,^(q) that although regarding only the language of the covenant, it would appear to be a joint covenant; yet the interest of the covenantees was several, each having a distinct interest in the annuity payable to him; and consequently that an action was well brought by the executor of the covenantee whose annuity was in arrear. If a lease be granted to A. and B.^(r) to commence at a future day, and A. and B. jointly and severally covenant for the performance of certain acts, and A. *dies before the day, the covenant [*480] being joint and several, will be binding on the executors of A., although the *interesse termini* survive to B. Where the interest of the covenantees is joint,^(s) if any of them die, the action must be brought by the survivors averring the deaths of their companions.⁽²⁾

(o) *Foley v. Addenbrooke*, *ub. sup.* (p) *Lilly v. Hodges*, 8 Mod. 166; Str. 553, S. C.

(q) *Withers v. Bircham*, 3 B. & C. 254; 5 D. & Ry. 106.

(r) *Enys v. Donnithorne*, 2 Burr. 1190.

(s) *Rolls v. Yate*, Yelv. 177; 1 Bulstr. 25, 6. S. C. Judgment affirmed on error.

(1) See *Trustees v. Letcher*, 1 Monr. 13.

(2) If one named as covenantee in the deed did not execute, in an action brought by his companions, it ought to be so averred. *Vernon v. Jefferys*, Str. 1146; 7 Mod. 358, 8vo. ed. S. C., more fully reported. All joint covenantees, who may sue, must sue; and joint covenantees may sue, although they have not sealed; in such case, therefore, the mere averment of non-execution is not sufficient. *Petrie v. Bury*, 3 B. & C. 353; recognized in *Foley v. Addenbrooke*, 4 Q. B. 197. Covenant lies on a deed of composition with creditors, by one of two partners, who signs the deed in the name of the firm, and sets his seal thereto for the payment of an instalment due on a partnership debt; for the other partner, not being a partner to the deed, cannot join in covenant. *Metcalf v. Rycroft*, 6 M. & S. 75. If an indenture is made between A. and B. on the one part, and C. and D. on the other, and there are covenants on each side, and A. alone seals on the one part, and C. and D. on the other; but it is expressed throughout the indenture, that A. and B. covenant and are covenanted with; in such a case A. and B. may join in an action against C. and D. for a breach of one of the covenants. *Clement v. Henley*, 2 Roll. Abr. Facts, (F.) 2, cited by Parke, J., in *Rose v. Poulton*, 2 B. & Ad. 830, in which case it was decided, that when there had not been a total failure of consideration, a covenantee, who had not executed the deed, might sue.

As where A., by indenture, covenanted with B. and C., that he (A.) would enter into a bond to pay B. a sum of money on a certain day: B. died; B.'s administrator brought covenant; it was adjudged, that it did not lie; for, although the money was to be paid to B., who was dead, yet he who survived and was party to the indenture ought to sue; for B. and the survivor make, as to this purpose, but one person: as if a bond is made to three to pay money to one of them, all ought to join in the suit, for they are all as one obligee: and if he who ought to have the money dies, the survivors must sue; although they have not any interest in the sum contained in the condition: so in this case, the money payable to B., in his lifetime, being to be obtained by suit on this indenture, an action cannot be brought thereon, except by those who are parties during their lives, and after their death by the executor or administrator of the survivor. So where Rt. Mackreth for himself, and the defendant as his surety,^(t) jointly and severally covenanted with J. Anderson, his executors, administrators and assigns, and also with E. Wyatt and her assigns, that he (Mackreth) would pay to Anderson, his executors and administrators, an annuity during [*481] the life of E. Wyatt; Anderson *died intestate, and an action was brought by his administrator against the defendant on the covenant, assigning as a breach the non-payment of the annuity. On *demurrer*, it was holden, that the covenant being both to Anderson and Wyatt for the same thing, although the benefit were only to Wyatt, yet both had a legal interest in the performance of it; and therefore, such interest being joint during the lives of both, on the death of one, it survived to the other.

The reversion of lands demised by indenture to the defendant for years,^(u) was conveyed to A and B. and the heirs of B., in trust for A. and his heirs: A. brought an action against defendant, on a covenant to repair contained in the lease, stating his title as before mentioned: on demurrer, it was holden, 1st, that A. and B. were joint assignees of the reversion, the effect of which was, that the defendant's covenants became, by operation of law, contracts with A. and B. jointly, and that all causes of action to them arising out of those contracts must follow the nature of the contracts, and must accrue to A. and B. jointly; 2ndly, that on general demurrer, it could not be intended that B., the joint covenantee, was dead, in order to sustain the declaration; that plaintiff ought to have shown what was necessary to make out his title, and having, by his own statement, given the legal estate to *himself and another*, he ought to have taken upon himself the burthen of divesting that legal estate in the other, and vesting it in himself; he should therefore have averred that B. was dead. From the preceding cases of *Anderson v. Martindale*, and *Scott v. Godwin*, it appears, that if the objection on the ground of other covenantees not being joined as plaintiffs, arises on the face of the declaration, the defendant may take advantage of it by demurrer, and according to *Slingsby's* case, by writ of error.^(x) The defendant covenanted,^(y) that he would not agree for the taking the

(t) *Anderson, Administrator, &c., v. Martindale*, 1 East's R. 497.

(u) *Scott v. Godwin*, 1 Bos. & Pul. 67.

(x) See *Vernon v. Jefferies*, *post*, p. 482.

(y) *Wilkinson v. Lloyd*, 2 Mod. 82.

farm of the excise of beer and ale for the county of York, without the consent of the plaintiff and another; and the plaintiff alone brought this action of covenant, and assigned for breach, the defendant's agreeing for the said excise, without his consent; upon which the plaintiff had a verdict, and one thousand pounds damages given. The court were of opinion, that here was no joint interest, but that each of the covenantees might maintain an action for his particular damages, or otherwise one of them might be remediless: for, suppose one of them had given his consent that the defendant should farm this excise, and had secretly received some satisfaction or recompense for so doing, is it reasonable that the other should lose his remedy, who never did consent? A. and B.,^(z) and each of them by indenture, granted an annuity, and B. covenanted that A. and B. would duly pay the same; to an action for non-payment against B., he pleaded that A. at the time of the making of the indenture was an infant, *whereby, [*482] and according to the statute, the indenture was void; on demurrer, it was holden that B. was liable.

Where there are several covenantees, and one of them only brings an action, without averring in the declaration that the others are dead; the defendant may either take advantage of it at the trial, as a variance on the plea of *non est factum*, Serjeant Williams, 1 Saunders, 154, n. (1); or he may crave oyer, and demur generally, Bull. N. P. 158, and per Lee, C. J., in *Vernon v. Jefferies*, 7 Mod. 360, 8vo. ed. In *Eccleston v. Clipsham*, 1 Saund. 153, the objection having been taken in arrest of judgment, the plaintiff discontinued. Where there are two covenantors, and only one is sued, the defendant must take advantage of the omission by plea in abatement. Per Lee, C. J., in *Vernon v. Jefferies*, 7 Mod. 360, 8vo. edit. See *ante*, n. 18, p. 480. But by stat. 3 & 4 Will. IV. c. 42, sect. 8, no plea in abatement for the non-joinder of any person as a codefendant shall be allowed in any court of common law, unless it shall be stated in such plea, that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in affidavit verifying such plea. Plaintiff may reply, the discharge of such person by bankruptcy and certificate, or under Insolvent Act. *Ib.* sect. 9. To a declaration in covenant by the executors of a lessor against the assignee of a lessee, the defendant pleaded in abatement that the estate, &c., of the lessee vested by assignment in the defendants, jointly with B., who became, and from thence until, &c., continued to be such assignee, jointly liable with the defendants to perform the covenants, and that the breaches were committed by the defendant jointly with the said B. It was holden, that this plea was bad on demurrer for not stating the mode in which B. became assignee jointly with the defendant.^(a)

^(z) *Gillow v. Lillie*, 1 Bingh. N. C. 695.

^(a) *Heap v. Livingston*, 11 M. & W. 896.

4. *Of Void and Illegal Covenants.*(b)

Although the law,(c) from the deliberation and solemnity which accompanies the execution of a deed, presumes a consideration, and delivers the covenantee from the necessity of proving it, yet that doctrine applies only where the deed is good on the face of it; for a consideration cannot be presumed to support a deed which is void on the face of it. Hence, where in covenant the plaintiff declared, that defendant, being single and unmarried,(d) by deed promised the plaintiff, (she being sole and unmarried,) that he would not marry with any [*483] other person except herself, and if he should marry *with any other, then he agreed to pay plaintiff a certain sum of money within a fixed time after such marriage; the declaration, after averring that defendant had married another person, assigned for breach the non-payment of the money: it was adjudged, after motion in arrest of judgment, in B. R. 4 Burr. 2225, and afterwards in the Exchequer Chamber, on writ of error, 14th November, 1769, (see notes of opinions and judgments, by *Wilmot*, C. J., p. 364,) that this covenant not to marry any body, except a person who was not obliged to marry, being to every purpose the same as a general restraint, and being unsupported by any consideration, the principle of public utility interposed, and forbade the sustaining an action for the breach of it. A covenant by a husband to pay to trustees a certain annual sum,(e) by way of separate maintenance for his wife, in case of their future separation, with the consent of such trustees or their executors, is valid in law. But where, on the face of the deed, it appeared that the parties contemplated present cohabitation and future separation, the deed was holden(f) to be void. So where a deed was made between husband, wife, and a trustee, providing a separate maintenance for the wife, and purporting to be made in contemplation of an immediate separation, but in fact no separation then took place, nor was intended to take place at that time, it was holden(g) that the deed was void. See further as to the legality of deeds of separation, *ante*, p. 296.

A covenant made in general(h) restraint of trade(i) is void;(1) such

(b) See further on this subject, *post*, VIII. 3, "Pleadings, Illegal Purpose."

(c) *Lowe v. Peers*, 4 Burr. 2225; *Wilmot*, 364, S. C.

(d) *Lowe v. Peers*, 4 Burr. 2225; *Wilmot*, 364, S. C., cited in *Gibson v. Dickie*, 3 M. & S. 463.

(e) *Rodney v. Chambers*, 2 East's R. 283.

(f) *Durant v. Tilley*, 7 Price, 577.

(g) *Hindley v. Marquis of Westmeath*, 6 B. & R. 200.

(h) *Hinde v. Gray*, 1 M. & Gr. 195; 1 Sc. N. C. 123, recognizing *Ward v. Byrnes*, 5 M. & W. 548.

(i) See further on this subject, *post*, tit. "Debt, III. Debt on Bond, Pleadings, 4."

(1) A covenant in restraint of trade generally, throughout the state, is void. *Nobles v. Bates*, 7 Cow. 307. But it is otherwise in respect to a covenant not to trade in a particular place, and for a particular time. *Ib.* See *Pierce v. Fuller*, 8 Mass. 223; *Perkins v. Lyman*, 9 Id. 522; *Stearns v. Barrett*, 1 Pick. 443; *Pierce v. Woodward*, 6 Id. 206; *Pyke v. Thomas*, 4 Bibb, 486; *Palmer v. Stebbins*, 3 Pick. 188.

A person may restrain himself by his agreement, for a good consideration, not to run a stage on a particular road. *Pierce v. Fuller*, 8 Mass. 223. Or from engaging in a newly discovered trade on a particular coast. *Perkins v. Lyman*, 9 Id. 522. If there be

as, by the lessor of a brewery, that he will not during the demise carry on the business of a brewer for the sale of ale in S. or elsewhere, or in any other manner be concerned in the business.

A covenant by a friend of a bankrupt to pay all his creditors their full debts,^(k) in consideration that they will not proceed any further under the commission, is good in law. A covenant with a lessor of premises in a parish to indemnify the parish against any paupers, which the covenantor may cause to be settled in it, is valid.^(l)

Where the principal act to be performed, as conveying an estate granting a lease, &c., is void, relative and dependent covenants are void also; as where A., being possessed of a term;^(m) granted to B. so much of the term as should be unexpired at the time of his death, and covenanted for B.'s quiet enjoyment: the lease being void for uncertainty, the covenant was holden void also. But where a covenant is a distinct, separate, and independent covenant, not referring to the estate intended to be granted, nor waiting upon it; in that case, although no estate is granted yet the covenant will be *valid.⁽¹⁾ As where [*484] in covenant,⁽ⁿ⁾ the plaintiff declared, that defendant, by deed, granted to plaintiff in fee, provided that if the grantor paid so much money, it should be lawful for him to re-enter, and that defendant covenanted to pay the money to plaintiff, and assigned for breach the non-payment of the money. After judgment by default and writ of inquiry executed, it was objected, that nothing passed by the deed for want of inrolment, which was admitted: and hence it was inferred, that the covenant was void. But *Holt*, C. J., said, that it was not material whether any estate passed: for the covenant to pay the money was a distinct, separate, and independent covenant. So where a rector granted an annuity out of his benefice,^(o) which is void by stat. 13 Eliz. c. 20, and in the same deed covenanted personally to pay the rent-charge, it was holden, that although the statute avoided the security of the rent-charge upon the living, yet it did not affect the personal covenant. So though a bill of sale for transferring the property in a ship, by way of mortgage, may be void,^(p) as such, for not reciting the certificate of registry, as was required by stat. 26 Geo. III. c. 60, s. 17: yet the mortgagor may be sued on a collateral covenant, for the payment of the money contained in the same deed.

In like manner, although a covenant by the lessee for payment of

(k) *Kaye v. Bolton*, 6 T. R. 134.

(l) *Walsh v. Fussell*, 6 Bingh. 163.

(m) *Capenhurst v. Capenhurst*, T. Raym. 27; 1 Lev. 45, S. C.

(n) *Northcote v. Underhill*, Salk. 199.

(o) *Mouys v. Leake*, 8 T. R. 411; recognized in *Sloane v. Packman*, 11 M. & W. 770; and see *Shawe v. Prichard*, 10 B. & C. 241.

(p) *Kerrison v. Cole*, 8 East, 231.

mutual covenants that each party shall refrain from pursuing the business in particular places, one covenant is a good consideration for the other. *Stearns v. Barrett*, 1 Pick. 443.

(1) When that which is good and that which is void are put together in the same grant, the common law makes such a construction, that the grant shall be good, for that which is good; and void, for that which is void. Per *Hutton*, J., *Ley's Rep.* 79, cited by *Lawrence*, J., 8 East, 236.

the property tax, and for indemnifying the landlord from it, was void by stat. 46 Geo. III. c. 65, s. 115, 195; yet that would not avoid other independent covenants in the lease, such as the covenant for the payment of the rent.(q)

Where A. covenants not to do an act,(r) which it was then lawful to do, and a subsequent statute compels him to do such act, this statute extinguishes the covenant; but if A. covenants not to do an act then unlawful, and a subsequent statute makes it lawful to do the act, the covenant is not extinguished.

The assignee of a void lease cannot maintain an action for a breach of any of the covenants contained in the lease. Tenant in tail demised land for ninety-nine years,(s) and covenanted for himself and his executors for the quiet enjoyment of the lessee. The tenant in tail died without issue. Soon after his death, the lessee assigned to the [*485] plaintiff, who entered, but shortly after was ejected *by the remainder-man, whereupon the plaintiff brought an action against the executors of the tenant in tail for a breach of the covenant; but it was holden, that it would not lie: for the lease being void at the time of assignment, no interest passed under it.

In covenant,(t) the plaintiff declared, that by deed made between her, as attorney for I. S. on the one part, and the defendant on the other part, she demised a house to the defendant, and that he covenanted (not saying with the plaintiff,) to pay the rent to I. S., and then assigned a breach in non-payment of rent, to the damage of the plaintiff (the attorney.) On demurrer, it was objected that the lease was void, and that an action could not be maintained upon it, especially by the plaintiff, who was the attorney only, and to whom the rent was not reserved; neither was there any covenant *with the plaintiff*, the words being general, *that he covenanted* to pay the rent to I. S.; that the power was not pursued by a lease in the name of the attorney, for it ought to have been in the name of the principal.(u) The court gave judgment for the defendant, observing that in a good lease the rent might be reserved to a stranger who was not a party to the deed, but not in the present case where the deed was void; that the deed being void, so as not to pass any interest in the land, it was but just that it should be void as to the reservation of rent, especially where the covenant was not *with the plaintiff*, and where the rent was not reserved to her.

IV. Of particular Express Covenants.(1)

1. *Covenants for Title.* p. 485.

2. *Not to Assign without License.* p. 493.

3. *To Repair.* p. 497.

4. *To Insure.* p. 499.

1. *Covenants for title* are frequently termed real covenants, and run

(q) *Gaskell v. King*, 11 East, 165, recognized in *Wigg v. Shuttleworth*, 13 East, 87. See also *Fuller v. Abbott*, 4 Taunt. 105.

(r) *Dyer*, 27, pl. 278; *Salk.* 198.

(s) *Andrew v. Pearce*, 1 Bos. & Pul. N. R. 158.

(t) *Frontin v. Small*, Str. 705.

(u) 9 Rep. 76, b.

(1) See Rawle on Cov. 127, 131, 182, 203, 2d ed.

with the land: see *ante*, p. 472. The covenants for title usually entered into by the vendor, on a conveyance in fee, are five in number, viz. 1st. That he is seised in fee; 2nd. That he has good right to convey; 3rd. For quiet enjoyment; 4th. For freedom from incumbrances; 5th. For further assurance.

Where in covenant against the executors of J. W., (x) the declaration stated that J. W. by indenture granted land, &c., to the plaintiff in fee, and warranted the land, &c., *against himself and his heirs*, and covenanted that he was, *notwithstanding any act by him done to the contrary*, lawfully and absolutely seised in fee simple, *and that he *had a good right, full power, and lawful and abso-* [*486] *lute authority to convey*; and assigned a breach, that J. W. *had not* at the time of making the said indenture, nor at any time before or since, good right, full power, and lawful and absolute authority to convey or assure the premises to the plaintiff in manner aforesaid. The defendants prayed oyer of the indenture, (by which it appeared that J. W. covenanted for himself, his heirs, executors, and administrators, to make a cartway, and that the plaintiff should quietly enjoy without interruption, from himself or any person claiming under him; and lastly, that he, his heirs, or assigns, and all persons claiming under him, should make further assurance,) and then demurred; (after argument,) it was holden, that the words "that he had a good right, full power, and lawful and absolute authority to convey;" were either part of the preceding special covenant "that he was, notwithstanding any act by him done to the contrary, lawfully and absolutely seised in fee:" or if not, that they were qualified and restrained by all the other special covenants *to the acts of himself and his heirs*.

Covenant for quiet enjoyment(1) during a term, "without the let,

(x) *Browning v. Wright*, 2 Bos. & Pul. 13, recognized in *Stannard v. Forbes*, 6 A. & E. 589; 1 Nev. & P. 633. See also *Foord v. Wilson*, 2 Moore, 592; 8 Taunt. 543.

(1) The covenant for quiet enjoyment goes to the possession, and not to the title; and is broken only by an entry, or expulsion from, or some actual disturbance in the possession. *Waldron v. McCarty*, 3 Johns. 471; *Kortz v. Carpenter*, 5 Id. 120; *Whitbeck v. Cook*, 15 Id. 483; *Van Slyck v. Kimball*, 8 Id. 198; *Webb v. Alexander*, 7 Wend. 281; *Coble v. Wellborn*, 2 Dev. 388; *Grist v. Hodges*, 3 Id. 200. It is to be presumed when parties enter into this covenant, that they have in view evictions and disturbances by reason only of rights then existing, and not of those subsequently acquired. *Ellis v. Welch*, 6 Mass. 246. The eviction may be with or without judgment of court. *Coble v. Wellborn*, 2 Dev. 388; *Grist v. Hodges*, 3 Id. 200. But see *Stewart v. Drake*, 4 Halst. 139.

A recovery in ejectment against the covenantee, is not a breach of the covenant for quiet enjoyment; there must be an actual ouster. *Kerr v. Shaw*, 13 Johns. 236; *Mitchell v. Warner*, 5 Conn. 522; *Coble v. Wellborn*, 2 Dev. 388; *Grist v. Hodges*, 3 Id. 200. A covenant for quiet enjoyment is not broken by demand of possession, made by one having title. *Cowan v. Silliman*, 4 Id. 46. Although the mere existence of a better title, is not a breach of this covenant sufficient to give an action thereon, yet if it be accompanied with possession under it, commenced before the deed containing such covenant was executed, it will amount to a breach. *Grist v. Hodges*, 3 Id. 200. An entry by the covenantor himself, tortiously and without title, is a breach of this covenant. *Sedgwick v. Hollenback*, 7 Johns. 376.

A decree in equity, directing a defendant to execute a deed, and deliver possession of land, is a breach of the covenant for quiet enjoyment; and the fact that the decree is founded on a notice to him when he purchased of an equity in the land, does not bar his action. *Martin v. Martin*, 1 Dev. 413. Actual eviction is necessary to support an action for breach of a covenant for quiet enjoyment. *Boothby v. Hathaway*, 2 App. 251; *Kelly*

suit, interruption, &c., of J. M., his executors, administrators, or assigns, or any of them, *or any other person or persons* whomsoever, having or claiming any estate or right in the premises, and that free and clear, and freely and clearly discharged, or otherwise, by J. M., his heirs, executors, or administrators, defended, kept harmless, and indemnified from all former gifts, grants, &c., made or suffered by J. M. or by their or either of their acts, means, default, procurement, consent, or privity," preceded by a covenant that the lease was a good lease, notwithstanding any act of J. M., and followed by a covenant for further assurance by J. M., his executors, administrators, and all persons whomsoever claiming, during the residue of the term, any estate in the premises under him or them; it was holden, *(y)* *Park, J.*, dissentiente, that the covenant for quiet enjoyment extended only against the acts of the covenantor and those claiming under him, and not against the acts of all the world. Where a lessor covenanted with lessee for quiet enjoyment, without any let, suit, disturbance, &c., by the lessor, or any other person lawfully claiming or to claim by from or under him; it was holden, that an entry and seizure of the goods on the premises, by the collector of land-tax, for arrears due from the lessee before the demise, was not a proceeding within the terms of the covenant. *(z)* But where releasors covenanted *(a)* that, notwithstanding any act, &c., by them done to the contrary, they were seised of the land in fee; *and also*, that they, notwithstanding any such [*487] matter or thing **as aforesaid*, had good right to grant the premises; *and likewise*, that the releasee should quietly enjoy the same without the lawful let or disturbance of the releasors, or their heirs or assigns, *or for or by any other person*; and that the releasee should be indemnified by the releasors and their heirs against all other titles, charges, and incumbrances, except the chief rent payable to the lord of the fee; it was holden, that the general words of the covenant *for quiet enjoyment*, were not, in necessary construction, to be restrained by the language of the antecedent covenants *for title* and

(y) *Nind v. Marshall*, 1 Brod. & Bingh. 319.

(z) *Stanley v. Hayes*, 3 Q. B. 105; 2 G. & D. 411.

(a) *Howell v. Richards*, 11 East, 633. See also *Barton v. Fitzgerald*, 15 East, 539; *Gainsford v. Griffith*, 1 Saund. 51; *Hesse v. Stevenson*, 3 Bos. & Pul. 568; *Belcher v. Sikes*, 8 B. & C. 185; *Smith v. Compton*, 3 B. & Ad. 189.

v. Dutch Church, 2 Hill, 105. A., as guardian of three of the minor children of a deceased father, and B., as guardian of the other minor children of the same father, sold their wards' real estate at auction, under a license from the Probate Court, and jointly gave a deed to the purchaser, in which was this covenant: "We, in the capacity aforesaid, do covenant with the said D., his heirs and assigns, that the premises are free of all incumbrances, by, through, or under us, and that the said E., his heirs and assigns, shall and may peaceably hold and enjoy the same, free from the lawful claims and demands of all persons. D. was afterwards evicted by E., to whom the minors' father had mortgaged the premises. Held, that A. and B. were personally and jointly liable to D., on the covenant for quiet enjoyment. *Donahoe v. Emery*, 9 Met. 63. One purchases unoccupied premises under a covenant of quiet enjoyment. After the purchase, a third person forecloses a mortgage in chancery, and sells the land, making the covenantee a party, and bids in the premises himself. Held, that the covenant for quiet enjoyment is broken, though the covenantee never occupied the premises, the mortgagor having offered to resell the premises, and paid taxes thereon. *St. John v. Palmer*, 5 Hill, 599.

right to convey; although those antecedent covenants were certainly covenants of a limited kind, and provided only against the acts of the releasors; Lord *Ellenborough*, C. J. (who delivered the opinion of the court,) observing, "that the covenant *for title* and the covenant *for right to convey*, are indeed what are somewhat improperly called synonymous covenants; they are, however, connected covenants, generally of the same import and effect, and directed to one and the same object; and the qualifying language of the one may therefore properly enough be considered as virtually transferred to and included in the other of them. But covenant for quiet enjoyment is of a materially different import, and directed to a distinct object. The covenant for title is an assurance to the purchaser, that the grantor has the very estate in quantity and quality which he purports to convey, *viz.* in this case an indefeasible estate in fee simple.⁽¹⁾ The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbances thereupon. For the purpose of this covenant, and the indemnity it affords, it is immaterial in what respects, and by what means, or by whose acts, the eviction of the grantee or his heir takes place; if he be lawfully evicted, the grantor, by such his covenant stipulates to indemnify him at all events. And it is perfectly consistent with reason and good sense, that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of title which he purports to convey, than for quiet enjoyment. The C. J. added, that he did not find any case in which it is held that the covenant for quiet enjoyment is all one with the covenant for title, or parcel of that covenant, or in necessary construction to be governed by it, otherwise than as, according to the general rules for the construction of deeds, every deed (as was said by *Hobart*, C. J., *Winch*, Rep.

(1) The covenants in a deed of land, that the grantor is the lawful owner, that he is seised in fee and has good right to sell, are synonymous, and amount only to a stipulation that the grantor has such an actual or constructive seisin, that the land will pass by his deed. *Willard v. Twitchell*, 1 N. Hamp. 177; *Marston v. Hobbs*, 2 Mass. 437. A seisin in fact is sufficient, though obtained tortiously. *Ib.* *Twambley v. Henly*, 4 Mass. 441; *Bearce v. Jackson*, *Ib.* 408; *Griffin v. Fairbrother*, 1 Fairf. 95; *Willard v. Twitchell*, 1 N. Hamp. 177. This position, however, is questioned, in *Richardson v. Dorr*, 5 Verm. 21, and in *Lockwood v. Sturdevant*, 6 Conn. 385.

A covenant of seisin, if broken at all, must be so at the time it is made. *Innes v. Agnew*, 1 Ham. 386; *Abbott v. Allen*, 14 Johns. 248; *Greenly v. Wilcocks*, 2 Id. 1; *Hamilton v. Wilson*, 4 Id. 72; *Marston v. Hobbs*, 2 Mass. 433; *Bickford v. Page*, *Ib.* 455; *Caswell v. Wendall*, 4 Id. 108; *Twambly v. Henley*, *Ib.* 441; *Catlin v. Hurlburt*, 3 Verm. 407; *Garfield v. Williams*, 2 Id. 327; *Griffin v. Fairbrother*, 1 Fairf. 95; *Hacker v. Storer*, 8 Greenl. 232. To constitute a breach of the covenant of seisin, and of good right to convey, an eviction is not necessary. *Mitchell v. Hagen*, 4 Conn. 495; *Pollard v. Dwight*, 4 Cranch, 430; *Pringle v. Witten*, 1 Bay, 256; *Mackey v. Collins*, 2 N. & M. 86; *Lot v. Thomas*, 1 Penn. 407. The covenant of seisin and right to convey, in a deed of conveyance, is not broken if the grantee were seised by virtue of a deed which is voidable, by grantor, but which is not void. *Wait v. Maxwell*, 8 Pick. 219; *Wheaton v. East*, 5 Yerg. 41.

A covenant that the grantor has an indefeasible estate in fee simple, is not supported by an estate for life in the grantor, as tenant by the curtesy, with actual possession. *Lockwood v. Sturdevant*, 6 Conn. 373. And the covenantee is not bound to wait until the title has been tried, but may bring his action on suspicion of defect, and compel the covenantor to explain his title. *Abbott v. Allen*, 14 Johns. 248. In an action for the breach of this covenant, the covenantor cannot protect himself under a title acquired after action commenced. *Morris v. Phelps*, 5 Id. 49.

93, *Sir George Trenchard v. Hoskins*,) is to be construed according to the "intention of the parties, and the intents ought to be adjudged of the several parts of the deed, as a general issue out of the evidence; and intent ought to be picked out of every part, and not out of one word only." Consistently, therefore, with that case, and with every other that I am aware of, we are warranted in giving effect to the general words of the covenant for quiet enjoyment; and which are entitled to more weight in this case, inasmuch as they immediately follow and en-

large the special words of covenant against disturbance by the [*488] grantors themselves; *and to restrain the generality of these words, thus immediately preceded by express words of a narrower import, would be a much stronger thing than to restrain words of like generality by an implied qualification arising out of another covenant where no such general words occurred. The person using the general words, could not forget that he had immediately before used special words of a narrower extent. If the covenant containing both the special and general words stood by itself, there would be no pretence for refusing effect to the larger words: and if this could not be done in favour of express words of a narrower import in the same covenant, I cannot possibly understand upon what ground it should be done in favour of implied words of narrower import, which occur in another separate covenant, addressed, as has been before said, to a distinct object.

If the purchaser of lands sells them, and afterwards takes a re-conveyance from his vendee, with a covenant for a good title, he may, notwithstanding, maintain an action(b) against the original seller on his covenant for a good title.

A general covenant for quiet enjoyment does not extend to tortious entries by a stranger.(c)(1) This opinion prevailed at an early period of our law, for in the Year Book, 26 Hen. VIII. 3, b, we find the following case:—A man made a lease for years by indenture, and by a clause in that lease covenanted to warrant the demised premises during the term of the lessee; afterwards the lessee was ousted by one who had not any right to the premises; and the question was, whether the lessee should have writ of covenant against the lessor or not; and *Englefield, J.*, said, "The lessee shall not have writ of covenant against his lessor where he is ousted by wrong, for he may have writ of trespass or *ejectione firmæ* against him who ousted him; but if he was ousted by one who had title paramount against him, as in that case he cannot have any remedy [against the person ousting him,] he may have writ of covenant against the lessor by force of the warranty: *quod fuit concessum per plusors.*"(2)

(b) *Sir Robert Goodere, Knight, v. Peniston Lamb*, commonly called *Lord Viscount Melbourne*, B. R. Trin. 37 Geo. III. Dampier, MSS. L. I. L., L. P. B. 186.

(c) *Davie v. Sacheverell*, adjudged on demurrer; 1 Roll. Abr. Condition, (V.), pl. 7; *Hayes v. Bickerstaff*, E. 21 Car. II. Vaug. 119.

(1) See *Webb v. Alexander*, 7 Wend. 281.

(2) See also 22 Hen. VI. 52 b, pl. 26; 26 Hen. VIII. 3 b, pl. 11; F. N. B. 342, 4to ed. to the same effect.

The doctrine laid down in the foregoing case is not confined to covenants in leases for years, for in *Dudley v. Folliott*, 3 T. R. 584, it was adjudged, that a general covenant in a conveyance of lands in fee, that the grantor had legal title, and that the grantee might peaceably enjoy the premises without the interruption of the *grantor [*489] and his heirs, or any other person, did not extend to the acts of wrong-doers; but only to the acts of persons claiming by a legal title.(1) The distinction taken in these cases illustrates the reason of the following rule, viz. that in actions for breach of a general covenant for quiet enjoyment, it is essentially necessary that it should appear on the face of the declaration, that the eviction was made by a person claiming by a legal title. In *Tisdale v. Sir W. Essex*, Hob. 34, in an action on a covenant in a lease for years, for enjoyment during the term, the breach assigned was, that one H. Elsing entered upon the plaintiff and ejected him. The question on demurrer was, whether the ejectment by Elsing, being taken to be by wrong, because no title was laid in him, should be adjudged a breach of covenant; the court was of opinion that it should not be so adjudged.(2)

From the following cases it may be collected in what manner the averment of title in the party evicting ought to be made, in assigning the breach of covenant. In an action on a covenant(*d*) in a lease for quiet enjoyment, the breach assigned was, that *at the time of the demise* to the plaintiff, one J. B. Pierson had lawful right and title to the premises, and *having such lawful right and title, entered and ejected* plaintiff. On special demurrer to the declaration, it was objected, that

(*d*) *Foster v. Pierson*, 4 T. R. 617.

(1) See *Greenby v. Willcocks*, 2 Johns. Rep. 1; *Sedgwick v. Hollenback*, 7 Id. 376.

(2) It is no bar to an action on a covenant for quiet enjoyment, that plaintiff refused to buy in the paramount title, or incumbrance; nor that he was never in actual possession; nor that he neglected to keep sufficient goods on the premises, in consequence of which the ground landlord entered and evicted him. *Miller v. Halsey*, 2 Green, 49. Action of covenant for breach of covenants of seisin and quiet enjoyment, does not lie for an eviction of grantee from lots taken possession of by him under his deed, when not embraced in the description. *Tymasson v. Bates*, 14 Wend. 671.

In an action for breach of covenant for quiet enjoyment, the declaration set forth the deed, covenant, &c., and averred a previous mortgage, and a subsequent sale thereunder, of the premises, by virtue of a decree in chancery, and that plaintiff was obliged to purchase the premises, in order to prevent his being deprived and ousted of the same. On demurrer, it was holden, that there was no eviction within the terms and spirit of the covenant; and it was observed, that it appeared from the precedents, without any authority to the contrary, that the covenant for quiet enjoyment is broken only by entry and eviction. *Waldron v. McCarthy*, 3 Johns. Rep. 464; *Whitbeck v. Cook*, 15 Id. 483; *Van Styck v. Kimball*, 8 Id. 198; *Sedgwick v. Hollenback*, 7 Id. 376. So where the breach assigned was, that the premises were and had been held, time out of mind, adversely; on demurrer it was holden bad, for the want of an averment of eviction or disturbance. *Kortz v. Carpenter*, 5 Id. 120.

In the case of covenant for quiet enjoyment, an entry by the covenantor himself, tortiously and without title, is a breach; *Sedgwick v. Hollenback*, 7 Johns. Rep. 376; *Corie's case*, Cro. Eliz. 544; 1 Roll. Abr. 430, pl. 11; *Crosse v. Young*, 2 Show. 415; and it is unnecessary to allege that it was a lawful entry. 2 Saund. 181, b; *Penning v. Plat*, Cro. Jac. 383; *Loyd v. Tomkies*, 1 Term. Rep. 671.

A recovery in ejectment against the covenantor, is not a breach of the covenant for quiet enjoyment, but there must be an actual ouster by writ of possession. *Kerr v. Shaw*, 13 Johns. Rep. 236.

the plaintiff, in alleging the eviction, ought to have shown the title of J. B. Pierson, or at least it should have been averred, that J. B. Pierson had such a title as was inconsistent with the plaintiff's title to possess these premises; that though it was alleged, that J. B. P. had lawful right and title to the premises, he might only have had a title to recover in a real action, and not a right of entry; and that the mischief to be apprehended from this loose mode of pleading was, that it might give a cover to an eviction by collusion.⁽¹⁾ The court overruled the objections, and gave judgment for the plaintiff; Lord *Kenyon* C. J., observing, that if the declaration was certain to a common intent, it was sufficient; that it would be doing violence to the words to say, that the lawful right and title, which it was stated J. B. P. had, did not legalize his entry; that the fair import of the words, was that he had lawful right and title to do that which he did. *Buller*, J., said, that when it was it was stated "that the party having a lawful right and title entered," it was the same as saying, "He entered by lawful right and title." In the preceding case the objection "that the title of the party evicting was not *particularly* set forth," was not pressed upon the court; but in *Hodgson v. The East India Company*, 8 T. R. 278, this objection recurred, and the *attention of the court was directed [*490] to it; but it was overruled, notwithstanding a contrary decision on error in the Exchequer Chamber, in *White v. Ewer*, Cro. Eliz. 823; and Lord *Kenyon*, C. J., delivering the opinion of the court, said, that to compel the plaintiff to set forth the particulars of the title of the person who entered on him, would impose insuperable difficulties on him; for the knowledge of those particulars could not be acquired, except by an inspection of title deeds, to which plaintiff could not have any access. It must be observed, however, that although it be not necessary to set forth the particulars of the title of the party evicting, yet room must not be left for any intendment, that such title is derived from the plaintiff; for where defendant,^(e) by fine *sur concessit*, granted certain lands to plaintiff for years, and warranted the same against all men during the term; in an action of covenant on this warranty, the breach assigned was, that one S., after the commencement of the term, and during the term, having lawful right and title to the premises, entered and ejected plaintiff: defendant tendered issue on the ejectment; after verdict for plaintiff, it was moved in arrest of judgment, that the breach was not well assigned; because S. might have had, at the time of his entry, a lawful right and title to the premises under the plaintiff himself: and as it was not stated in the declaration, that S. had title to the premises *before* the fine was levied, it should be intended, that he had a right to the premises, at the time of his entry, by a puisne title, to which the covenant of defendant did not extend. The court (*absente Kelynge*, C. J.,) held, that the breach was not well

(e) *Wotton v. Hele*, 2 Saund. 177.

(1) Another objection was taken, viz., that it was not stated, that the plaintiff was evicted by legal process; but this objection was abandoned, the precedents being against it.

assigned. So in an action against executors, (*f*) (in their own right,) who had assigned a lease belonging to their testator by way of mortgage, and had covenanted for good title and quiet enjoyment of the plaintiff without disturbance from them or any other person; the breach assigned was, that the plaintiff was evicted in consequence of a judgment in ejectment, by one Yates, *having lawful title to the premises*. On special demurrer it was objected, that it did not appear that Yates's title commenced by any act of the defendants, or prior to the assignment made by them to the plaintiff, who might therefore have been evicted by means of some act done *by himself* since the assignment. Judgment for the defendants.

This intendment, *viz.* that the title of the party evicting was derived from the plaintiff, may be precluded by averring, (if the facts of the case warrant such an averment,) that the person evicting entered by lawful title, which accrued to him *before* the date of the conveyance to the plaintiff, (1) as in *Buckly v. Williams*, 3 Lev. *325. Covenant upon articles, whereby defendant covenanted that plain- [*491] tiff should quietly enjoy a close, and that one Knolls, (who had a title to the premises by virtue of a certain lease to him thereof, made *before the making of the articles aforesaid*,) entered upon the plaintiff and expelled him. After verdict for plaintiff, it was moved in arrest of judgment, that the breach was not well assigned; because plaintiff did not show what title Knolls had; and, perhaps, the title which he had was under the plaintiff; but the objection was overruled; for the title of Knolls could not be supposed to be under the plaintiff: for the declaration states, that Knolls had a title by virtue of a demise made to him *before* the making of the articles to the plaintiff; and let the title be derived from whom it will, yet being before the articles made with the plaintiff, the covenant is broken. The preceding remarks have been confined to the cases of general covenants and evictions by strangers; but in cases where the covenant is particular, as against interruption by the grantor or lessor, or by any person expressly named; upon the eviction of the covenantee by the grantor or lessor, or by the person expressly named, it is not necessary for the plaintiff to aver title in the party evicting.

In covenant, (*g*) the declaration stated that the defendant granted a messuage, with the appurtenances, to plaintiff in fee, and covenanted for plaintiff's quiet enjoyment thereof, without the lawful let, entry, eviction, or interruption of the defendant; and assigned for breach, that defendant hindered plaintiff in the enjoyment of a pew appurtenant to the messuage; on general demurrer it was objected, that the injury

(*f*) *Noble v. King and Smith*, 1 H. Bl. 34.

(*g*) *Lloyd v. Tomkies*, 1 T. R. 671.

(1) Or by averring that at the time of the demise to the plaintiff, the party evicting had lawful title; as was done in *Foster v. Pierson*, 4 T. R. 617, and *ante*, 489, or that the party evicting entered by virtue of a title theretofore made, *by, from, and under the defendant*, as was done in *Hodgson v. East India Company*, 8 T. R. 278. But merely averring that J. S. entered *claiming* title from the defendant, is not sufficient. *Eeles v. Lambert*, Aleyn, 38.

complained of ought to be the subject of an action of trespass, but could not be the foundation of this action, the covenant being against all lawful disturbance: to this it was answered, that where the breach complained of was the act of the covenantor, any interruption was sufficient to support this action against him. Judgment for the plaintiff: *Ashurst, J.*, observing, that it was not necessary that the party against whom the action was brought should *have a title*; it was sufficient if he did the act *under a claim* of title; that in this case the act itself asserted a title; for the defendant locked up the pew, which was as strong an assertion of right as could well be imagined. So where, in covenant,^(h)

[*492] the plaintiff set forth a covenant, which recited *that defendant had sold, to the plaintiff's testator, goods which had been seized by one Bell, and therefore defendant covenanted to plaintiff's testator, to save him harmless from any costs or damages relating to such seizure, and then assigned for breach, that the said Bell had seized the goods *under pretence* of a debt due from defendant to him, touching which seizure testator was put to great expense, which defendant neglected to pay. It was objected, that the covenant did not extend to tortious acts, for which the plaintiff had a remedy, and therefore the title of Edward Bell ought to have been set forth; that "having lawful title" was not sufficient; that here it was only said "under pretence," which was not so strong. The counsel for the plaintiff admitted it to be a general rule, that the plaintiff must show a title in the disturber; but insisted that the rule extended only to the case of a general covenant, and not where it was particular against the acts of particular persons; for in that case it comprehended even tortious acts. And by the court: This pretence of Bells's being recited in the covenant, shows it was meant as a security against it in all events; and though it should be tortious, yet being particular, it falls within the distinction that has been well taken. Adjourned; and Hil. T. following, judgment for plaintiff, defendants' counsel declining to argue it.⁽¹⁾

The result of the foregoing cases is, that where a person covenants to indemnify against all persons, that is but a covenant to indemnify against lawful title. And the reason is, because, as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant, if it were good against all the acts which the folly or malice of strangers might suggest; and, therefore, the law has properly restrained it within its reasonable import; that is to rightful title. It is, however, different when an individual is named; for, there, the covenantor is presumed to know the person against whose acts he is content to covenant, and may, therefore, be reasonably expected to stipulate against *any* disturbance from him, whether by lawful title or otherwise. Hence where the condition of a bond which recited the purchase, from W. by plaintiffs, of lands, was to save them and the lands harmless from all manner of mortgages, judgments, extents, exe-

(h) *Perry v. Edwards*, 1 Str. 400.

(1) See Metcalf's edition of Yelverton's Rep. 30, note (1).

cutions, and other incumbrances, had and obtained, or thereafter to be had and obtained, by T. T., or any other person; it was holden⁽ⁱ⁾ to bind the obligor against the wrongful entry of T. T.⁽¹⁾

Tenant for life, and his eldest son the remainder-man in tail leased to E. S., for ninety-nine years, and gave E. S., who was acquainted with their title, a bond, conditioned for the due observance of their covenant for quiet enjoyment. E. S. underlet to W., for sixty years, and covenanted with W. against eviction by any *person claiming under E. S. or by his acts, *neglect, default*, or procurement. [*493] Tenant for life and his eldest son being dead without issue, W. was evicted by the next remainder-man in tail. It was holden, that no breach could be assigned on the covenant; for first, the eviction was not by any person claiming under E. S., but by a person claiming by title, paramount to E. S.; secondly, it did not appear to be an eviction arising from the acts or procurement of E. S.; lastly, although the eviction would have been prevented if E. S., at the time he took the lease for ninety-nine years, had required the lessors to join in common recoveries to cut off the entail, and if the lessors had complied with such requisition, yet, inasmuch as E. S. had no means of compelling common recoveries to be suffered by the lessors, if, upon his requisition, they refused, it could hardly be said that he was guilty of any *neglect* or *default* in not procuring that step to be taken, which he was unable to compel.^(k) A. covenants for himself, his heirs, and assigns, that B. shall quietly enjoy, without the let of A., his heirs, or assigns, or any person claiming under him or them. The estate originally belonged to A.'s wife, and on marriage was settled on A. for life, with power to make leases, and also with power to A. and his wife jointly, to revoke the uses, which they did; and, after A.'s death, B. was evicted under the new settlement. Covenant^(l) lies against the executors of A., though the estate moved from the wife and not from A. An action may be maintained^(m) on a covenant for quiet enjoyment, if the lessor has not any title, although the lessee has not entered.

A covenant⁽ⁿ⁾ by lessor, that the lessee, paying the rent, &c., shall quietly enjoy, is not a conditional covenant, making the payment of the rent a condition precedent to the performance of the covenant for quiet enjoyment, on the part of the lessor.⁽²⁾

(i) *Nash v. Palmer*, 5 M. & S. 374. See also *Southgate v. Chaplin*, Comyns, R. 230; and *Fowle, Executor, v. Welsh, Gent.*, one, &c., 1 B. & C. 29.

(k) *Woodhouse v. Jenkins*, 9 Bingh. 431. See also *Ireland v. Bircham*, 2 Bingh. N. C. 90.

(l) *Hurd v. Fletcher and Bridgewood, Executors, &c.*, B. R. M. 19 Geo. III.; B. P. B. 85; Dampier, MSS. L. I. L.

(m) *Ludwell v. Newman*, L. P. B. 76; Dampier's MSS. L. I. L.; 6 T. R. 458, S. C.

(n) *Dawson v. Dyer*, 5 B. & Ad. 584; 2 Nev. & M. 559. But see *Ireland v. Bircham*, 2 Bingh. N. C. 90.

(1) It is not a good assignment of a breach of warranty against all but the *proprietor*, that the defendant had no title, especially where it was known to both parties that the vendor had only a pre-emption right. *Clarke v. M'Anulty*, 3 S. & R. 364.

(2) An averment of an eviction under an elder title, is not always necessary to sustain an action on the covenant, against incumbrances; if the grantee be unable to obtain possession in consequence of an existing possession or seisin by a person claiming and

2. *Of the Covenant not to assign without License.*

A covenant not to assign or under-let without license of the lessor, with a clause of re-entry in case of breach, is frequently introduced into leases, for the purpose of securing to the lessor a responsible tenant in whom he can repose a confidence.⁽¹⁾ It will be proper, [*494] *therefore, to consider the effect and operation of such a covenant; what will amount to a breach of it, and what to a dispensation from it.

The general principle is, that a lessee may assign his interest in the term.⁽²⁾ But the lessor may restrain the lessee from assigning by covenant or proviso; and if the lessor grants the term subject to a condition, that it shall cease, if the lessee assigns, an assignment by the lessee will be void. But if the lessor restrain the lessee from assigning by covenant only, although the lessee by assigning commits a breach of covenant, yet the assignment itself is not void.^(o)

Lessee for years covenanted not to assign, transfer, or set over,^(p) or otherwise do or put away the lease of the premises thereby demised, or any part thereof, to any person, without the license of the lessor in writing; it was holden, that an underlease was not a breach of this covenant. So where covenant was not to assign or otherwise part with the premises, or that present indenture of lease: it was holden,^(q) that a

(o) Per *Holroyd, J.*, *Paul v. Nurse*, 8 B. & C. 488.

(p) *Crusoe dem. Bugby v. Blencowe*, 3 Wils. 234; 2 Bl. R. 766, S. C.

(q) *Doe d. Pitt v. Laming*, 1 Ry. & Moo. 36.

holding under an elder title, it is equivalent to an eviction, and is a breach of the covenant. *Duvall v. Craig*, 2 Wheat Rep. 45. Vide note to S. C. 62, note a.

When the parties to a deed covenanted severally against their own acts and incumbrances, and also against their own acts and those of all other persons, with an indemnity in lands of an equivalent value in case of eviction; it was held, that those covenants were disconnected, and that it was not necessary to allege in the declaration any eviction, or any demand or refusal to indemnify with other lands, but that it was sufficient to allege a prior incumbrance by the acts of the grantors, &c., and that the action might be maintained on the first covenant, in order to recover pecuniary damages. *Ib.* In an action on a covenant of warranty, it is necessary for the plaintiff to allege in his declaration, substantially, an eviction by title paramount. *Day v. Chism*, 10 Wheat. 449. A grantor is liable on a covenant against incumbrances when a judgment, prior to the conveyance, is subsequently revived and the land sold. *Jenkins v. Hopkins*, 8 Pick. 346.

(1) In *Henderson v. Hay*, 3 Bro. Ch. Cas. 632, upon a bill filed for the specific performance of an agreement by a landlord to grant a lease of a public house, containing the common and usual covenants; Lord *Thurlow*, Ch., was of opinion, that though the covenant not to assign without license might be a very usual one, where a brewer or vintner let a public house, that would not make it a common covenant; and declared, that the landlord was not entitled to have it inserted in the lease. In *Morgan v. Slaughter*, 1 Esp. N. P. C. 8, Lord *Kenyon*, C. J., held such a covenant to be a fair and usual covenant. But in *Church v. Brown*, 15 Ves. 258, 531, the opinion of Lord *Thurlow* was recognized by Lord *Eldon*, Chr.; and in *Browne v. Raban*, 15 Ves. 529, Sir *W. Grant*, M. R., held, that under an agreement for a lease "with usual covenants," the lessor was not entitled to this covenant against assigning or under-letting without license. See further on this subject, *Bennett v. Womack*, 7 B. & C. 627; *Vere v. Lovenden*, 12 Ves. 183; *Jones v. Jones*, *Ib.* 188; *Van v. Corpe*, 3 M. & K. 269; *Propert v. Parker*, *Ib.* 280.

(2) By stat. 7 & 8 Vict. c. 76, (which took effect from 31st December, 1844,) s. 3, no partition or exchange or assignment of any freehold or leasehold land shall be valid at law, unless the same shall be made by deed.

deposit of the lease with the creditor, as a security for money advanced, was not a breach. But where the words of the covenant were, (r) that the lessee would not set, let, or assign over the whole or part of the premises without leave; it was holden, that an underlease amounted to a breach. So where the proviso was, that the lease should be void, (s) "if the lessee assigned or otherwise parted with the indenture of lease, or the *premises thereby demised, or any part thereof, [*495] for the whole or any part of the term, without leave in writing;" it was holden, that the words included an underlease. And here it is to be observed, that a lease by the lessee for the whole term amounts to an assignment, although the rent be reserved to the lessee, and a power of re-entry given to him, and not to the reversioner. (t) But if a day only be excepted out of the term, then it is an underlease. (u) If a lease contain a proviso, making it void if the lessee, (x) his executors, or administrators, alien without license in writing, a voluntary assignment by the executor or administrator, without such leave, will amount to a forfeiture. (1) Provisoes for re-entry in a lease are to be construed, as other contracts, according to fair and obvious construction; and not with the strictness of conditions at common law. (y)

An assignment by operation of law will not amount to a forfeiture: this point was decided for the first time in *Doe d. Mitchinson v. Carter*, 8 T. R. 57; where it was holden, that an assignment to a person purchasing the term from the sheriff under a *bonâ fide* execution, would not amount to a forfeiture. (2)

But where the execution is in fraud of the covenant, (z) the assignment under it will amount to a forfeiture, and the lessor may re-enter; as where the lessee gives a warrant of attorney to confess judgment to a creditor for the express purpose of enabling such creditor to take the lease in execution under the judgment.

Covenant against assigning without license, is determined by a license once granted. 12 Ves. 191, per Sir W. Grant.

(r) *Roe d. Gregson v. Harrison*, 2 T. R. 426.

(s) *Doe d. Holland v. Worsley*, 1 Campb. 20, *Ellenborough*, C. J.

(t) *Palmer v. Edwards*, Doug. 186, n. (u) *Holford v. Hatch*, Doug. 182.

(x) *Roe d. Gregson v. Harrison*, 2 T. R. 425.

(y) Per Lord Tenderden, C. J., *Doe d. Davis v. Elsam*, 1 M. & Malk. 189.

(z) *Doe d. Mitchinson v. Carter*, 8. T. R. 300.

(1) In *Seers v. Hind*, 1 Ves. Jun. 295, one of the questions was, whether executors were warranted in disposing of a lease as assets of the testator, where there was a proviso against alienation by the lessee. Lord Thurlow, Ch., said, "If A. lets a farm to B., with a covenant not to alien, and B. dies, may not his executors dispose of the term? I think it has been determined that they may, and I have always taken it to be clear law. It is an alienation by the act of God. I remember Lord Camden entered into the question much in the same way. He took it to be a clear law, that an alienation by death could not be a forfeiture. In the case of a lease for years to A., it goes to his executors, not by way of limitation, as in the case of a remainder over, &c., but it goes to them as coming in the place of the lessee. I understood it to be well settled as I have stated. But I do not mean to lay down, that a man may not by a clause in his will provide that, in case of a devolution to executors, it shall not be alienable by them; but it must be very special for that purpose."

(2) So in *Smith v. Putnam*, 3 Pick. 220, where lessee covenanted not to carry off any hay, &c., under forfeiture of \$10 per ton, and a quantity of hay was attached on mesne process by his creditors and carried off against his consent, it was held that this was not a breach of the covenant.

[*496] Under a condition not to alien without *leave, if leave is once granted, the condition is entirely discharged:

Corpus Christi College, in Oxford, (a) demised land for a term of years to A., with a condition, that neither A. nor his assigns should alien the land without the special license of the lessors: afterwards the lessors by writing under seal, licensed A. to alien the land to any person, and A. afterwards assigned the term to B.: after B.'s death, C. became entitled to the term, and assigned it to the defendant Syms. The lessors entered for condition broken. It was resolved by the court, that the alienation by license to B. had determined the condition as to the assignees; and that it was not in the power of the lessors to dispense with an alienation for one time, and yet to consider the estate aliened or demised as afterwards remaining subject to the condition; for a condition is to be taken strictly, and by the alienation with license it is satisfied. So in the case of a demise to A., B., and C., (b) with a like condition, if a license to alien be granted to A., and A. aliens by virtue of such license, the condition is determined as to B. and C. (1)

Lessee covenanted that he, his executors, or administrators, would not demise, &c. the premises without license; the lessee became a bankrupt; his assignees took to the lease, and assigned it to A. who assigned it to the original lessee, who underlet to B.; it was holden, that the covenant of the lessee was discharged by 49 Geo. III. c. 121, s. 19; and consequently that the subsequent under-letting by the lessee was no breach of that covenant, which no longer existed. (c) The stat. 49 Geo. III. c. 121, is now repealed, but see similar enactment in 6 Geo. IV. c. 16, s. 75, which provides for three cases: first, where the assignees accept the lease; in which case it declares that the bankrupt shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of the non-performance of any of the covenants; secondly, where the assignees decline the same; in this case also the bankrupt shall not be liable, in case he deliver up the lease to

[*497] the lessor within *fourteen days after he shall have had notice that the assignees shall have declined to accept the lease; in this case the covenants on both sides fall to the ground. (d) It has been holden, however, that this is a personal discharge to the lessee only, and that a surety (e) who has joined in the lease with him is liable for breaches of covenant, accruing between the date of commission and

(a) *Dumper v. Syms*, 4 Rep. 119, b; Cro. Eliz. 815; 1 Roll. Abr. 471, (G.) pl. 1. S. C. See the record of special verdict, Co. Ent. 614, b, pl. 22. "The profession have always wondered at *Dumper's* case, but it has been law so many centuries that we cannot now reverse it." Per *Mansfield*, C. J., in *Doe d. Boscawen v. Bliss*, 4 Taunt. 736.

(b) *Leeds and Crompton*, adjudged; cited in 4 Rep. 120, a; 1 Roll. Abr. 472, (G.) pl. 7, S. C.

(c) *Doe d. Cheere v. Smith*, 5 Taunt. 795.

(d) *Kearsey v. Carstairs*, 2 B. & Ad. 716.

(e) *Tuck v. Fyson*, 6 Bingh. 321.

(1) So in the case of a demise, upon condition that the lessee shall not alien the land, or any part thereof, without the assent of the lessor, and afterwards the lessee aliens part, with the assent of the lessor, the lessee may alien the residue without such assent; per *Popham*, C. J., 4 Rep. 120, a, who denied the contrary position (though adjudged in *Dyer*, 334, b, pl. 32,) to be law.

actual delivery up of lease by lessee under this statute. And where original lessee had assigned to B. *subject to the payment of rent*, and B. entered, and afterwards became bankrupt, and rent became due after the commission, and the assignees of the estate declined the lease; and then covenant was brought by the lessor against the lessees; it was holden, *(f)* that the action might be maintained; for if, before the statute, there had been an assignment of the lease, and the lessor had accepted rent, he might, notwithstanding, have proceeded by covenant against the lessee; for the privity of contract was not destroyed. The statute made no difference; it contemplated the case of a bankrupt lessee only, not of an assignee of the term. The statute did not apply to this case. The statute operates only as a personal discharge of the bankrupt; for it does not say that the lease and the covenants shall be at an end, but merely that the bankrupt lessee shall not be liable to be sued in respect of any subsequent non-observance of the covenants. Lastly, where the assignees do not, upon request, elect, whether they will accept or decline; in which case, the Lord Chancellor has power, upon petition, to order the assignees to elect and to deliver up the lease and possession of the premises. See further on this subject, *post*, p. 514, 5.

Whether the license to assign be general, as in the preceding case of *Dumper v. Syme*, or particular, as “to one particular person, *(g)* subject to the performance of the covenants in the original lease,” yet the condition is gone, and the assignee may assign without a license. But where there is an exception out of the original restriction to alienate in favour of an assignment by will, and an assignment is made by the lessee by will; and then his executors make another assignment, and not by will, it seems that this last assignment is bad. *(h)* Acceptance by the lessor of rent due after condition broken *with notice*, is a waiver of the forfeiture. *(i)* A court of equity will not relieve against a forfeiture occasioned by breach of covenant *(k)* not to assign.

3. Of the Covenant to Repair. *(l)*

The lessee of a house, on a general covenant to repair during the term, is bound to rebuild in case the house be consumed by an *accidental fire. *(m)* *(1)* If a lessor covenant *(n)* that he will, [*498]

(f) *Manning v. Flight*, 3 B. & Ad. 211.

(g) *Brummell v. Macpherson*, 14 Ves. 173, *Eldon*, Ch.

(h) *Lloyd v. Crispe*, 5 Taunt. 249.

(i) *Goodright d. Walter v. Davids*, Cowp. 804; *Whitchot v. Fox*, Cro. Jac. 398.

(k) Per Lord *Eldon*, Chr. in *Hill v. Barclay*, 18 Ves. 63.

(l) See *ante*, p. 469, 470.

(m) *E. of Chesterfield v. D. of Bolton*, Com. R. 627; *Bullock v. Dommitt*, 6 T. R. 650, S. P.

(n) *Loader v. Kemp*, 2 C. & P. 375, *Best*, C. J.

(1) In many cases an exception of accidents by fire or tempest is introduced into leases for the protection of lessees. It appears, from the cases of *Monk v. Cooper*, and *Hare v. Groves*, 3 Anstr. 687, that this exception should be introduced into the covenant for repairs, in order to exempt the lessee from the obligation of paying rent as well as rebuilding, in case the house should be destroyed by fire or tempest. In *Walton v. Water-*

in case the messuage, shop, and building demised be burned down, rebuild, and replace the same, in the same state they were in before the fire, he is only bound to rebuild what he let, and not any additional parts, which may have been erected by the lessee.

On a covenant to erect a bridge in a substantial manner, and to uphold and keep in repair for a certain time; although the bridge is broken down by an extraordinary flood, yet the party covenanting is bound to repair.^(o)(1) Where the lessor of a house situate in a borough covenanted with lessee to repair all the external parts of the premises, except, &c., and the corporation pulled down an adjoining house, leaving the wall of the demised house exposed and without support, and thereupon the wall fell down and the house became uninhabitable, and lessor when called upon to repair refused, and lessee began to rebuild the wall, and sued lessor upon his covenant; it was holden, that the external parts of premises are those which form the inclosure of them, and beyond which no part extends; and that defendant was liable on his covenant, though the injury to the wall was done in the first instance by the corporation.^(p)

In a lease of a dwelling-house^(q) with the appurtenances for fourteen years, the covenant to keep and leave the house in repair, was held to be satisfied by keeping it in substantial repair, according to the nature of the building; and with a view to determine the relative sufficiency of the repair, the jury may be directed to inquire whether the house was new or old at the time of the demise. So where the covenant was to keep the premises in good and tenantable repair, and to surrender them at the end of the term in like tenantable condition, reasonable wear and tear excepted; *Tindal*, C. J., said the meaning of such a covenant was well understood to be good and tenantable repair, regard being had to the state of the *premises in point of age. The landlord is not to have, at the end of the term, a new house at the tenant's expense. The general state and condition of the premises at the time of the demise may be shown, but *not* matters of detail.^(r) The same nicety of repair is not exacted^(s) for an old building as for a new one. And where a lessee covenants^(t) to keep old premises in repair, he is not liable for such dilapidations as result from the natural operation of time and the elements. In a recent case at *Nisi Prius*,^(u) where the agreement was "to put premises into

(o) *Brecknock Company v. Pritchard*, 6 T. R. 750. See *Shubrick v. Salmond*, 3 Barr. 1637, to the same effect.

(p) *Green v. Eales*, 2 Q. B. 225; 1 G. & D. 468.

(q) *Stanley v. Towgood*, 3 Bingh. N. C. 4; 3 Sc. 313.

(r) *Young v. Mantz*, 6 Sc. 277. See also *Burdett v. Withers*, 7 A. & E. 136.

(s) *Mantz v. Goring*, 4 Bingh. N. C. 453.

(t) *Gutteridge v. Munyard*, 1 M. & Rob. 334.

(u) *Belcher v. M'Intosh*, 2 M. & Rob. 186.

house, 2 Saund. 420, covenant was brought against lessee of a house for not repairing: defendant pleaded that the house had been destroyed by fire, but in convenient time after had been rebuilt. Plaintiff demurred specially, because defendant did not show by whom the dwelling-house was rebuilt. Judgment for plaintiff.

(1) See *ante*, p. 470, note.

habitable repair," *Alderson*, B., said, "It is difficult to suggest any material difference between the term 'habitable repair,' used in this agreement, and the more common expression 'tenantable repair;' they must both import such a state, as to repair, that the premises may be used and dwelt in, not only with safety, but with reasonable comfort, by the class of persons by whom, and for the sort of purposes for which, they were to be occupied." Where by an agreement for a lease of copyhold premises for twenty-one years, to be made as soon as a license could be obtained from the lord of the manor, defendant covenanted to keep the premises in repair during the said term, and there was a covenant by plaintiff for quiet enjoyment; defendant entered, and occupied the premises for the twenty-one years: it was holden, that he was liable on the covenant to repair, though no lease had ever been made to him pursuant to the agreement, nor any license obtained from the lord for that purpose.(x)

See further as to the covenant to repair where the premises have been burnt down, *ante*, p. 470, 1, 2.

4. *Of the Covenant to Insure.*

In every lease, containing a covenant to insure against loss by fire, it should be stipulated that the money to be recovered from the insurance office shall be laid out in restoring the premises; and a covenant containing such a stipulation will run with the land. And where the premises are situated within the limits mentioned in the Party-wall Act, (14 Geo. III. c. 78,) the effect of which act is to enable the landlord by application to the governors or directors of the insurance office to have the sum insured laid out in rebuilding the premises, a covenant to insure is a covenant running with the land; for, connecting that covenant with the act of parliament, the landlord has a right to say, that the money, when recovered, shall be so laid out. It is, therefore, as compulsory on the tenant to have the money laid out in rebuilding, and as beneficial for the landlord, as if the tenant had expressly covenanted that he would lay out the money to be received in respect of the policy upon the premises.(y) *Lessee covenanted, [*500] that he and assigns would insure the demised premises and keep them insured during the term, and deposit the policy with the lessor; it was holden,(yy) that the true construction of this covenant was, not, that the lessee should effect one policy, and keep that policy on foot, but that the lessee and his assigns should always keep the premises insured by some policy or another; and that it was a breach, if they were uninsured at any one time, and a continuing breach for any portion of time that they remained uninsured.

If a lease contains a covenant by the tenant to keep the premises in repair, and a covenant to insure them for a specific sum against fire; on their being burnt down, the tenant's liability on the former covenant

(x) *Pistor v. Carter*, 9 M. & W. 315.

(y) *Vernon v. Smith*, 5 R. & A. 1.

(yy) *Doe d. Flower v. Peck*, 1 B. & Ad. 428. See also *Doe d. Pitt v. Laming*, 4 Camp. 73.

is not limited to the amount of the sum to be insured under the latter.(z)

A court of equity will not afford any relief by injunction against a forfeiture for breach of a covenant to insure.(a)

V. *By whom the Action of Covenant may be Maintained:*

1. *Heir.* p. 500.
2. *Executor.* p. 501.
3. *Assignee.* p. 502.

1. *By Heir.*—Covenants which run with the land will descend to the heir of the covenantee;(1) and he may sue for a breach thereof; as where the lessee covenanted with the lessor,(b) his executors, and administrators, to repair; it was holden, that the heir of the lessor, though not named, might have covenant against lessee for not repairing.(2) Plaintiff declared as heir on a covenant by lessee for years to repair,(c) and assigned for breach, that the premises were out of repair for a period of time which included a portion of his ancestor's life; and on this ground an exception was taken in arrest of judgment, after verdict for the plaintiff; but it was overruled; *Holt*, C. J., observing, that if the premises were out of repair in the time of the ancestor, and continued so in the time of the heir, it was a damage to the heir; and the jury give as much in damages as would put the premises in repair, respect being had, not to the length of time they continued in decay, but to what it will cost *at the time of action brought*, to put the premises in repair. Upon a covenant with A. and his heirs to do all lawful and reasonable acts for further assurance, upon request, and a request,

(z) *Digby v. Atkinson*, 4 Campb. 275.

(a) *White v. Warner*, 2 Mer. 459.

(b) *Lougher v. Williams*, 2 Lev. 92; *Skin.* 305.

(c) *Vivian v. Campion*, Salk. 141.

(1) A covenant of warranty until eviction, passes to heir or assignee. *King v. Kerr*, 5 Ohio, 155; *Backus v. McCoy*, 3 Id. 221; *Robinson v. O'Neil*, 3 Id. 526.

(2) An action of covenant must be brought by one of the parties between whom the covenant is made. A third person cannot maintain an action on a covenant though made for his benefit. *Montague v. Smith*, 13 Mass. 404, 405, per *Parker*, C. J.; *Hornbeck v. Westbrook*, 9 Johns. 73; *Smith v. Emery*, 7 Halst. 53; *Howe v. How*, 1 N. Hamp. 49; *Gardner v. Gardner*, 10 Johns. 47. Actions for the breach of the covenants in a deed of land, must be brought in the name of the covenantee, except in the cases of a covenant real, when it may be brought in the name of any subsequent purchaser of the land. *Clark v. Swift*, 3 Met. 390. But these actions may be brought by the grantee in his own name, although he has sold the land, if the benefit of the covenant is reserved, although not by writing under seal at the time of the sale. *Thompson v. Shattuck*, 2 Met. 615. Thus where A. sold land to B., with a covenant of general warranty, and B. sold to C. with warranty also, C. was evicted by paramount and sued A. upon his warranty to B., declaring as the assignee of B. Held, that the sale of the land to C., with warranty, constituted him the assignee of B., and that he was entitled to bring the action. *Hopkins v. Lane*, 9 Yerg. 79. So where parties mutually covenant, one to convey, and the other to do certain acts in consideration of the conveyance, the failure of either to perform his part of the covenant, gives a right of action to the other on the covenant, although such failure may work a forfeiture of the rights of one of the parties, for the other may waive the future. *Lucas v. Clemens*, 7 Miss. 367.

made by the ancestor in his life to levy a fine, and neglect so to do, the *ancestor not being evicted in his life, but the heir [*501] being evicted afterwards, the heir may maintain an action upon the request of the ancestor, and refusal made to him; because the ultimate damage had not accrued in the life of the ancestor.(d)

2. *By Executor*.—A. and B. his wife, by indenture, demised lands to C. for twenty-one years, and thereby covenanted, that they (*viz.*) A. and B. would at the end of twenty-one years, make a good lease to C. *and his assigns* for twenty-one years,(e) commencing at the expiration of the first term. During the first term, the lessee died, having made his will and appointed D. his executrix, who entered, &c., and died, having made her will and appointed the plaintiff her executor, who entered, &c. At the expiration of the first term, A. and B. having refused to grant the further lease, an action was brought by the plaintiff (as executor of D. executrix of C. the lessee,) on this covenant, against A. the husband; and it was adjudged that the action would well lie. The reasons of the judgment are not mentioned in the report; but it appears to have been decided on the ground that the plaintiff, being executor of D. who was executrix of C. the lessee, was, as such, entitled to the benefit of his covenant. Covenant by the plaintiff as executor of J. S.(f) The defendant sold lands to J. S., and covenanted with him, his heirs, and assigns, that he should enjoy the lands against all persons claiming under one A.; and the breach assigned was, that B. and C. in the lifetime of the testator, entered claiming under A. On demurrer to defendant's plea, it was contended, for the defendant, that the covenant was with J. S., his heirs, and assigns, touching an estate of inheritance, and, therefore, that the action ought to have been brought by the heir or assignee, and not by the executor; but it was resolved by the court, that the eviction being to the testator in his lifetime, he could not then have an heir or assignee of this land, and therefore the damages belonged to the executor, though not named in the covenant; for he represented the person of the testator. But where the plaintiff as executrix declared that the defendant, by deed, conveying to plaintiff's testator certain land in fee, subject to redemption on payment of a sum certain, covenanted with the testator, his heirs, and assigns, that he was at the time of the execution of the deed seised in fee, and had a right to convey, &c., and assigned for breach that the defendant was not seised, &c., and had not a right to convey, &c.; it was holden, that the executrix could not maintain this action without showing some special damage to the testator in his lifetime, or that the plaintiff claimed some interest in the premises.(g) But the plaintiff, being devisee in fee, sued afterwards in that character, stating as damage, *that the premises were thereby of [*502] much less value than they would have been, and that she had been prevented from selling them at so large a price as she otherwise

(d) *King v. Jones and another*, 5 Taunt. 418. Affirmed on error, 4 M. & S. 188.

(e) *Chapman v. Dalton*, Plowd. 284, a.

(f) *Lucy v. Levington*, 2 Lev. 26; 1 Vent. 175, S. C.

(g) *Kingdon v. Nottle*, E. 53 Geo. III. B. R. on special dem. 1 M. & S. 355, cited by Heath, J., delivering judgment of court in *King v. Jones*, 5 Taunt. 418.

would; and it was holden^(h) that the action was maintainable. The cases of *Kingdon v. Nottle*, and *King v. Jones*, have decided, that where there are covenants real, that is, which run with the land and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the substantial *damage* has taken place since his death, the real representative and not the personal is the proper plaintiff. But where the covenant is merely collateral, as where lessee covenanted not to fell, lop, or top timber trees, excepted out of the demise, the executor of the lessor may maintain an action for a breach in the lifetime of the testator.⁽ⁱ⁾(1)

(h) *Kingdon v. Nottle*, 4 M. & S. 53.

(i) *Raymond v. Fitch*, 2 Cr. M. & R. 588.

(1) In the last case, *Kingdon v. Nottle*, Lord *Ellenborough* says, that "the point is certainly a new one, and that he should have paused, if he had thought that more authorities could have been found." A directly contrary decision had been made in the Supreme Court of New York, principally on the authority of *Lucy v. Levington*. In an action by the heirs, on a breach of covenant of seisin, it was holden, that the right of action did not descend to the heirs, but to the personal representatives; that the covenant was not connected with the estate, because, as no estate passed by the deed to the ancestor, none descended to the heirs; and that the right of the ancestor was a mere right of action for a breach of covenant in his lifetime, which, upon his death, belonged exclusively to his personal representatives, and the damages recovered were assets in their hands. *Hamilton v. Wilson*, 4 Johns. Rep. 72; *Bennett v. Irvin*, 3 Id. 329. In *Mitchell v. Warner*, 5 Conn. Rep. 497, 594, Ch. J. *Hosmer*, examines this subject, and concludes, that "The determinations in the cases of *Kingdon v. Nottle*, are against the ancient, uniform, and established law of Westminster Hall; against well settled principles and decided cases in the surrounding states." See also *Davis v. Lyman*, 6 Conn. Rep. 254, to the same effect. The same doctrine with the New York cases quoted above, is asserted in *Marston v. Hobbs*, 2 Mass. Rep. 439; *Withy v. Mumford*, 5 Cowen, 137; *Chapman v. Holmes*, 5 Halsted, 20; *Binney v. Hann*, 3 Marshall, 324; *Lott v. Thomas*, 1 Pennington, 409.

"On this side of the Atlantic, the state of Indiana is the only one in which the principle decided by the English cases has been fully recognized and enforced from the bench, although there are some in which no opposite opinion has been expressed. *Martin v. Baker*, 5 Blackf. 332.

"Recent statutory provisions, however, in Maine, have established the law in accordance with it. Rev. Stat. 1841.

"The Supreme Court of Ohio, though professing not to go quite to the extent of the modern English cases, yet has not in reality, stopped far short of them. *Backus, Administrator, v. McCoy*, 3 Ohio, 216, is the leading case, and although the pleadings did not, perhaps, strictly call for the doctrine there laid down, yet it has since been adhered to, and become the law of that state. After referring to the English decisions just cited, *Sherman, J.*, in delivering the opinion of the court, held, that they settled that "when the heir or assignee acquires any interest in the land, however small, by even an imperfect or defective title, he shall be entitled to the benefit of all those covenants that concern the realty; and where he has been evicted by paramount title, he is the party damnified by the non-performance of the grantor's covenants, and for such breach may sustain an action. This seems to be reasonable in itself, as well as in accordance with the terms of the covenant. By considering the covenant of seisin as a real covenant, attendant upon the inheritance, it will form a part of every grantee's security, and make that which otherwise must be either a dead letter or a means of injustice, a most useful and beneficial covenant. A dead letter, when an intermediate conveyance has taken place between the making of the covenant and the discovery of the defect of title, and the covenantee refuses to bring suit. A means of injustice, when, after the covenantee has sold and conveyed without covenants, he brings and sustains an action, on the ground that the covenant was broken the moment it was entered into, and could not, therefore, be assigned. When lands are granted in fee, by such a conveyance as will pass a fee, and the grantor covenants that he is seised in fee, we can perceive no objection, legal or equitable, to this covenant, as well as the covenant of warranty, pass-

Lessee for years by indenture demised for a term longer than his own, the under-lessee covenanting to pay rent to the lessee; it was holden, *(k)* that the executor of lessee might sue the under-lessee for rent accruing during the continuance of the term; for the deed operated as a demise, and the covenant was for a payment in the nature of rent. Executors, *(l)* though not named, may sue on a covenant made with testator, in reference to a chattel.

3. *By Assignee.* (1)—Assignee of part of the reversion of all the land demised, *(m)* may take advantage of the covenants contained in an indenture of demise; for he is an assignee within the stat. 32 Hen. VIII. c. 34. As the assignee of a term is bound by covenants which run with the land, so he may take advantage of them. *(n)* (2) If a man demise or grant land to a woman for years, *(o)* and the lessor covenant with the lessee to repair the houses during the term, the woman takes husband, and dies, the husband shall have an action of covenant as well

(k) *Baker v. Gostling*, 1 Bingh. N. C. 19.

(l) *Doe d. Rogers v. Rogers*, 2 Nev. & Man. 550.

(m) 1 Inst. 215, a.

(o) *Spencer's case*, 5 Rep. 17, a, 5th Resolution.

(n) Cro. Eliz. 553.

ing with the land, so long as the purchaser and the successive grantees under him, remain in the undisturbed possession and enjoyment of the land.

The doctrine thus held, though strenuously assailed in the argument of a subsequent case, was nevertheless there adopted by the court; and it may be said to be the settled law in the state of Ohio. *Fort v. Burnett*, 10 Ohio, 327; *Deirre v. Sunderland*, 17 Ib. 60.

The weight of American authority is nevertheless undoubtedly in favor of the position that the covenant for seisin being broken, if at all, at the instant of its creation, is thereby turned into a mere right of action, incapable of assignment, and consequently of being exercised by any but the covenantee, or his personal representatives. *Hacker v. Storer*, 8 Greenl. 228; *Heath v. Whidden*, 24 Maine, 383; *Williams v. Wetherbee*, 1 Aiken, 233; *Garfield v. Williams*, 2 Verm. 327; *Richardson v. Dorr*, 5 Id. 9; *Potter v. Taylor*, 6 Id. 676; *Pierce v. Johnson*, 4 Id. 253; *Mitchell v. Warner*, 5 Conn. 497; *Davis v. Lyman*, 6 Id. 249; *Bickford v. Page*, 2 Mass. 455; *Prescott v. Trueman*, 4 Id. 629; *Whelock v. Thayer*, 16 Pick. 68; *Thayer v. Clemmence*, 22 Id. 490; *Clark v. Swift*, 3 Metc. 390; *Hamilton v. Wilson*, 4 Johns. 72; *Townsend v. Morris*, 6 Cowen, 123; *Beddoes, ex'r, v. Wadsworth*, 21 Wend. 120; *McCarty v. Leggett*, 3 Hill, 134; *Lot v. Thomas*, 1 Penn. 407; *Chapman v. Holmes*, 5 Halst. 20; *Garrison v. Sandford*, 7 Id. 261; *Wilson v. Forbes*, 2 Dev. 30; *Grist v. Hodges*, 3 Id. 200; *South's heirs v. Hoy's heirs*, 3 Monr. 94; *Rice v. Spottiswood*, 6 Id. 40; *Pierce v. Duval*, 9 B. Monr. 48; *Logan v. Moulder*, 1 Pike, 313; *Ross v. Turner*, 2 English, 132; "Rawle on Cov. 347, 2d ed.

(1) Covenant of warranty runs with the land, and the assignee may sue the covenantor in his own name, and is not affected by the equities existing between the original parties. *Suydam v. Jones*, 10 Wend. 180. When grantor was disseised at the time of conveyance, no action lies against him by the assignee of the grantee on the covenant of warranty and seisin. *Bartholomew v. Cardee*, 14 Pick. 167; *Backus v. McCoy*, 3 Ohio, 221; *Robinson v. O'Neil*, 3 Id. 526. No action lies for breach of covenant of special warranty in the name of grantee, if he has before the breach conveyed to another, as it is a covenant that runs with the land. *Griffin v. Fairbrother*, 1 Fairf. 91. The assignee of a fee farm rent being an estate of inheritance, may sue therefore in his own name. *Scott v. Lunt*, 7 Pet. 596.

(2) If grantee of land assign by deed of warranty, he may sue on covenants running with the land, although the breach was subsequent to the assignment; *Secus*, if he assigns by a quit-claim deed. *Kane v. Sanger*, 14 Johns. Rep. 89. The rule is, that if the assignment be such that the assignor is holden to indemnify the assignee against the covenants, he may sue. *Beckford v. Page*, 10 Mass. Rep. 455. This rule is founded on the principle, that no man can recover damages who can have sustained no damages. And plaintiff must aver in his declaration, that he is answerable to his assignee, on account of the eviction stated. *Niles v. Sawtell*, 7 Mass. Rep. 444.

on the covenant in law upon the words "demise or grant," as upon the express covenant. The law is the same with respect to tenant by statute merchant, or statute staple or elegit, of a term, and with respect to him to whom a lease for years is sold by force of any execution, who shall have an action of covenant in the like case as a thing annexed to the land, although they come to the term by act of law.⁽¹⁾ So the executor of B.,^(p) the executor of A., is entitled to the benefit of a covenant made with A. and his assigns, for he is the assignee in law of A. N. The word *assignee* comprehends the assignee of the assignee, the executors of the assignee of the assignee,^(q) and the assignee of the executor or administrator of the assignee.⁽²⁾ But covenant does not lie by an assignee for a breach done before his time.^(r)

[*503] A mortgagee *died possessed of the residue of a mortgage term, subject to the usual proviso of its being determined on payment of the money on a given day; the money was not paid at the day, and afterwards the mortgagee died, having bequeathed the money to the plaintiff by will, and appointed him his executor: it was held,^(s) that the plaintiff could not sue in covenant as assignee of the term, because this was a personal covenant, collateral, and not running with the land, and because it was broken in the lifetime of the testator.⁽³⁾

Stat. 32 Hen. VIII. c. 34.—The stat. 32 Hen. VIII. c. 34, after reciting, that many temporal and religious persons had made leases and grants of land for life or lives, or for term of years, by writing under seal, containing conditions and covenants to be performed as well on the part of the lessees and grantees, their executors and assigns, as on the part of the lessors and grantors, their heirs and successors; and that by the common law no stranger to any covenant could take advantage thereof; but only such persons as were parties or privies thereunto; by reason whereof grantees of reversions, and grantees and patentees of lands lately belonging to religious houses, were excluded from any entry or action against the lessees and grantees, their executors and assigns, for breach of any condition or covenant, enacts, "that all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the king, of any lands or other hereditaments, or of any reversion of the same which belonged to any of the monasteries, &c., dissolved, or by any other means come to the king's hand, since the 4th day of February, A. D. 1535, or which at any

(p) *Chapman v. Dalton*, Plowd. 284, a, ante, p. 501.

(q) *Spencer's case*, 5 Rep. 17, b.

(r) *Lewes v. Ridge*, Cro. Eliz. 863. See *Greenby v. Wilcocks*, 2 Johns. Rep. 1.

(s) *Canham v. Rust*, 2 Moore, (C. P.) 164.

(1) See, as to purchaser at sheriff's sale, *McCady v. Brisbane*, 4 Nott & M'C. 104.

(2) Tenant in dower evicted, cannot sue in covenant on a warranty to her husband. *St. Clair v. Williams*, 7 Ohio, 111.

(3) The covenants of seisin and against incumbrances in a deed of land, are personal covenants, not running with the land, and are broken immediately on the delivery of the deed, if false, and become choses in action and not assignable. *Mitchell v. Warner*, 5 Conn. Rep. 497; where the subjects of covenants and warranties are learnedly discussed; and see *Lockwood v. Sturdivant*, 6 Id. 373. See also, for full discussion, Rawle on Cov. 48, 131, 217, 2d ed.

time before the passing this act belonged to any other person, and after came to the hands of the king, and all other persons being grantees or assignees to or by the king, or to or by (1) any other person than the king, and their heirs, executors, (2) successors, and assigns, shall have like advantages *against the lessees, their executors, [*504] administrators, and assigns, by entry for non-payment of the rent, or for doing waste or other forfeiture, (3) and by action only for not performing other conditions, covenants, or agreements expressed in the indentures of leases and grants, against the said lessees (4) and grantees, their executors, administrators, and assigns, as the said lessors and grantors, their heirs or successors, might have had. By sect. 2, all lessees and grantees of land or other hereditaments, for terms of years, life, or lives, their executors, administrators, or assigns shall have like action and remedy against all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the king, or of any other persons, of the reversion of the same lands and hereditaments so letten, or any parcel thereof, for any condition or covenant, expressed in the indentures of their leases, as the same lessees might have had against the said lessors and grantors, their heirs and successors."

The first section of the preceding statute gives to the assignee of the reversion two remedies: one, by entry for non-payment of rent, doing waste, or other forfeiture; and the other, by action, for not performing other conditions, &c.; and as the remedy by *entry*, according to the construction, 1 Inst. 215, b, is confined to forfeitures by force of such conditions, as either are incident to the reversion, or for the benefit of the estate; so it hath been resolved, (t) that the remedy by *action* is

(t) *Spencer's case*, 5 Rep. 18, a.

(1) It seems to have been the opinion of the court in *Les and Arnold's case*, 4 Leon. 29, that the bargainee of a reversion, by bargain and sale, indented and inrolled, was an assignee within the statute, though he hath but an use by the act of the party, and the possession by stat. 27 Hen. VIII.

(2) In respect of this word, it hath been holden, that an assignee of part of the reversion, as an assignee of the reversion for years, of all the estate demised, may enter for condition broken. *Matures v. Westwood*, B. R. H. 40 Eliz., Cro. Eliz. 599, 660, 617; Moor. 527, S. C.; 1 Inst. 215, a. So the grantee, for life, of a reversion, is an assignee within this statute, and may enter for condition broken. *Kidwelly v. Brand*, Plow. 72. But the grantee of the whole estate in reversion, in part of the thing demised, is not within the meaning of the statute; as if the reversioner in fee of four acres, grants two acres in fee, the grantee cannot enter, because *conditions* cannot be apportioned by act of the party, 4 Leon. 27. But *covenants* may. See *Twynam v. Pickard*, 2 B. & A. 105, where it was adjudged, that covenant will lie by the assignee of the reversion of part of the demised premises against the lessee for not repairing such part. See *Demarest v. Willard*, 8 Cow. 206.

(3) Although the words of the statute be for non-payment of the rent, or for doing waste or other forfeiture, yet the grantees or assignees shall not take advantage of every forfeiture by force of a condition, but of such conditions only, as either are incident to the reversion, as rent, or for the benefit of the estate, as for keeping the house in repair, for making fences, scouring ditches, preserving woods, or such like, and not for the payment of any sum in gross, delivery of corn, wood, or the like. 1 Inst. 215, b; Moor. 876, pl. 1228.

(4) This statute does not extend to covenants upon estates tail. 1 Inst. 215, a. See also the preamble.

confined to the breaches of such covenants, as relate to the thing demised, and not to collateral covenants. And on this ground, where the mortgagor and mortgagee of a term made an under-lease, (u) in which the covenants for the rent and repairs were with the mortgagor and his assigns only; it was holden, that the assignee of the mortgagee could not maintain an action for the breach of these covenants; because they were not covenants running with the land, but collateral [*505] covenants, being entered into with a *stranger to the land, that is the mortgagor, who had only an equity of redemption. If the estate in reversion, (x) in respect of which the condition or covenant was made, be extinguished, the condition or covenant is also extinguished: as where a lease was made for 100 years, and the lessee made an under-lease for 20 years, rendering rent, with a clause of re-entry; and afterwards the original lessor granted the reversion in fee, and the grantee purchased the reversion of the term; it was holden, that the grantee should not have either the rent, or the power of re-entry; for the reversion of the term, to which they were incident, was extinguished in the reversion in fee. But now by stat. 7 & 8 Vict. c. 76, s. 12, where the reversion of any land expectant on a lease shall be merged in any remainder or other reversion or estate, the person entitled to the estate into which such reversion shall have merged, his heirs, executors, administrators, successors, and assigns, shall have and enjoy the like advantage, remedy and benefit against the lessee, his heirs, successors, executors, administrators, and assigns for non-payment of the rent, or for doing of waste or other forfeiture, or for not performing conditions, covenants, or agreements contained and expressed in his lease, demise, or grant, against the lessee, farmer or grantee, his heirs, successors, executors, administrators, and assigns, as the person who would for the time being have been entitled to the mesne reversion which shall have merged would or might have had and enjoyed if such reversion had not been merged. This act took effect on the 31st December, 1844, and does not extend to any deed, act or thing executed or done, or to any estate, right, or interest, created before the 1st January, 1845. (y) Tenants in common of a reversion may maintain covenant against the assignee of the term for the recovery of arrears of rent, although it should appear that at time of action brought the reversion was out of the plaintiffs, they having granted it over, after the rent became due. (z) N. In *Glover v. Cope*, (a) B. R. Pasch. 8 W. & M. Carth. 205, it was adjudged, after two solemn arguments, by *Holt*, C. J., and the court, that the grantee of the reversion of copyhold lands was within the intention and equity of the statute, 32 Hen. VIII. c. 34, which is a remedial law, and of great and universal use, and absolutely necessary as well for copyholders as others; and that by this construction of the statute the lords of copyhold manors

(u) *Webb v. Russell*, 3 T. R. 402, 3, cited and relied on in *Whitton v. Peacock*, 2 Bingham. N. C. 411.

(x) *Moore*, 94, pl. 232, recognized by *Kenyon*, C. J., delivering the opinion of the court in *Webb v. Russell*, 3 T. R. 402, 3; see *Thorn v. Woollcombe*, 3 B. & Ad. 586.

(y) Sect. 13.

(z) *Midgley and another v. Lovelace*, Carth. 289; 12 Mod. 45, S. C.

(a) 3 Lev. 326; Skin. 305, S. C. See also *Whitton v. Peacock*, 3 Myl. & K. 325.

could not be injured. A remainder-man is an assignee of the reversion within this statute: Devise to A. for life, remainder to B. for life, &c., with power to make leases for 21 years: A. leases for 14 years, by indenture, in which lessee covenants with lessor, *his heirs, and assigns, for payment of the rent to lessor, and to such other [*506] person as should be entitled to the freehold, &c. A. dies pending the term, and after the death of A., rent becoming in arrear, B. brings covenant: (b) held, that it would lie: for B. is, within the meaning of the statute, an assignee of the reversion of that estate out of which the lease is granted. But where J. B., being seised in fee, conveyed to the defendant and T. J., their heirs, and assigns, to the use that J. B., his heirs, and assigns, might have and take to his use a rent certain to be issuing out of the premises, and subject to the said rent, to the use of defendant, his heirs, and assigns; and defendant covenanted with J. B., his heirs, and assigns, to pay to him, his heirs, and assigns, the said rent, and to build, within one year, one or more messuages on the premises, for better securing the said rent; and J. B., within one year, demised the said rent to plaintiffs for 1000 years; it was holden, (c) that covenant would not lie at the suit of the plaintiffs for non-payment of the rent, or for not building the messuages, for here was neither privity of contract, nor privity of estate; the rent was reserved out of the original estate; the covenant was a covenant in gross. (1) Lessee for years assigns over his term by indenture to J. S.; (d) and in the same deed, he covenants that J. S. and his assigns shall enjoy the land during the term without interruption from any person; after which J. S. assigns over the term by parol, and the assignee being disturbed brought an action of covenant; and adjudged, that it well lies; although the assignment was not by writing, because the assignee was privy in estate. But now by stat. 29 Car. II. c. 3, s. 8, leases, estates, or interests, either of freehold, terms of years, or uncertain interest, cannot be assigned, unless by deed or note in writing, signed by the assignor or his agent, or by operation of law; and by stat. 7 & 8 Vict. c. 76, s. 3, (which took effect from 31st December, 1844,) no partition or exchange or assignment of any freehold or leasehold land shall be valid at law, unless the same shall be made by deed. A person to whom an apprentice is assigned according to the custom of the city of London, (e) cannot maintain covenant on the indenture of apprenticeship to which he is not a party; because custom cannot make an assignee, so as to entitle him to an action.

As an assignee of a lessee is charged in covenant for repairs, (though assignees are not named in the covenant,) in respect of his having the possession; so an assignee of the reversion has an action of covenant

(b) *Isherwood v. Oldknow*, 3 M. & S. 382, recognized in *Bringloe v. Goodson*, 4 Bingham N. C. 735.

(c) *Milnes v. Branch*, 5 M. & S. 411.

(d) *Awder v. Nokes*, Cro. Eliz. 436, recognized and briefly stated in 3 Rep. 63, a.

(e) *Barker v. Beardwell*, 1 Show. 4.

(1) See *Lumette v. Anderson*, 6 Cow. 302; *Thompson v. Rose*, 8 Id. 266.

for default of repairs in respect of his having the reversion, though assignees are not named in the covenant.(f)

Tenants in common *may* join in covenant for repairs,(g) [*507] but no *case has decided that they must join.(h) Hence also assignee of part only of the interest of the original lessee may sue upon a covenant to procure a renewal of letters patent, without joining the assignee of the remaining part; for they are tenants in common, having separate and distinct interests in the term, and the damages are, in their nature, severable, and may be apportioned by the jury according to the value of the share of each.(i)

VI. *Against whom the Action of Covenant may be maintained:*

1. *Heir.* p. 507.
2. *Executor.* p. 507.
3. *Assignee.* p. 508.

1. *Against Heir.*—An action of covenant will lie against the heir on a covenant by his ancestor for himself and his heirs, as well as an action of debt will lie against the heir on a bond, wherein the ancestor has bound himself *and his heirs*.(k) It is not necessary to allege in the declaration, that the heir has lands by descent. It seems, however, that in this case, as well as in debt on bond against the heir, if the heir has not any lands by descent, he may insist on it by way of defence to the action.(1) See the form of plea of *riens per descent* to an action of covenant against heir, Lutw. 290.

In an action on a breach of covenant in a lease for quiet enjoyment, the declaration, after stating that defendant's ancestors granted the lease in question, alleged, that the reversion vested in the defendant *by assignment*; defendant, by guardian, pleaded that the reversion did not vest in him *modo et formâ*; it appeared in evidence, that the estate *descended* to the defendant, an infant, as heir at law to the lessors;(l)

(f) *Per Cur.* in *Kitchen v. Buckley*, 1 Lev. 109; T. Raym. 80.

(g) *S. C.* recognized by Tindal, C. J., in *Simpson v. Clayton*, 4 Bingham N. C. 781.

(h) *Per Tindal*, C. J., in *Simpson v. Clayton*, 4 Bingham N. C. 781.

(i) *Simpson v. Clayton*, *ubi sup.*

(k) *Dyke v. Sweeting*, Willes, 585.

(l) *Derisley v. Custance*, 4 T. R. 75.

(1) Warranty of ancestor, lineal, collateral, or commencing by *disseisin*, binds the heir, in Kentucky, to the extent of assets descended, and no further. *Logan v. Moor*, 1 Dana, 58. In New Hampshire, an heir is liable on covenant of his ancestor only when no action lies against executor or administrator. *Hutchinson v. Stiles*, 3 N. H. R. 404. It is not necessary to name heirs in order to give grantee remedy against them on death of grantor under the statute of Maine. *Webber v. Webber*, 6 Greenl. 127.

Heirs and assignees by deed are jointly chargeable for breach of a covenant real of their ancestor. *Morse v. Aldrich*, 1 Met. 544. In an indenture, each covenant is to be considered as the covenant of the party who is to perform it, and as being his language. The signature of the other party only indicates the acceptance of the covenant in the terms in which it is made. *Olcott v. Dunklee*, 16 Verm. 478. If several join in a deed of lands with warranty, against the claims of all persons claiming "by," "through," or "under them," they will be jointly liable on the covenant if a legal claim under one of them exist at the time. *Carleton v. Tyler*, 4 Shep. 392.

whereupon it was objected, that the reversion vested in the defendant by *descent*, and not by *assignment*; and that if the declaration had charged the defendant as heir, he might have prayed the parol to demur,^(m) in order that he might have an opportunity of electing whether he would take the estate subject to the incumbrance or not. But the court was of opinion, that if the defendant had intended to avail himself of his infancy, he ought to have pleaded it; that it was sufficient to prove the substance of the issue, which was, that defendant was clothed with such a character as would make him liable to the covenant: and that was sufficiently proved by showing that the estate was vested in him; for whether he was *in possession* as assignee or heir at law, he was equally liable to this covenant.

2. *Against Executor*.—Executors and administrators⁽¹⁾ are bound *by the covenants of their testator or intestate, [*508] although⁽²⁾ they be not named; unless the covenants are such as in their nature determine by the death of the covenantor.⁽³⁾ It was said by the court in *Hyde v. Dean of Windsor*, Cro. Eliz. 558, that covenant lies against an executor in every case, although he be not named, unless it be such a covenant, as is to be performed by the person of the testator, which the executor cannot perform. Executors and administrators may be sued as assignees;⁽ⁿ⁾ for they are assignees in law of the interest of the term.^(o) Where covenant is brought against an executor,^(p) although the breach assigned be for default of reparation committed in the time of the executor, yet the judgment must be *de bonis testatoris*; for it is the covenant of the testator which binds the executor as representing him, and therefore he must be sued by that name.⁽⁴⁾ Covenant by testator to teach an apprentice his trade

(m) But see stat. 11 Geo. IV. & 1 Will. IV. c. 47, s. 10.

(n) *Tilney v. Norris*, E. 12 Will. III. B. R. Carth. 519; 1 Ld. Raym. 453; Salk. 309, S. C.

(o) Per *Fleming*, C. J., 1 Bulstr. 23.

(p) *Collins v. Thoroughgood*, Hob. 188.

(1) See *Executors of Van Rensselaer v. Executors of Hunter*, 2 Johns. Cas. 17; *Lee v. Cooke*, 1 Wash. Rep. 306; *Harrison v. Simpson*, 2 Id. 155. Executors conveying land of their testator, covenanted to warrant, "to the extent of their assets," and if the land should be lost by any prior claim, the purchase money to be refunded with interest from this date. This covenant imposed no obligation on them individually, nor beyond the assets remaining in their hands at the time of the eviction. *Manifec v. Morrison*, 1 Dana, 208. A covenant by the executor on the conveyance of land of his testator, in his capacity of executor, and not otherwise, does not bind him in his individual capacity. *Thayer v. Wendall*, 1 Gallis. 37. So where executors covenant to warrant and defend the premises conveyed in a deed, "as executors are bound by law to do," this is not a personal covenant. *Day v. Brown*, 2 Ham. 347. Executors are bound by covenants in a deed of their testator, though they are not named. *Harrison v. Sampson*, 2 Wash. 155; *Lee v. Cooke*, 1 Id. 306; *McCrady v. Brisbane*, 1 N. & M. 104. Unless the covenant be one which the testator was to perform in person. *Ib.*

(2) An agent, attorney, executor, administrator, or trustee, who covenants in his own name, although he describes himself as agent, attorney, executor, &c., is personally liable on his covenant. *Duvall v. Craig*, 2 Wheat. Rep. 45, and note to *S. O.* *Ib.* 56, note a; *Thayer v. Wendell*, 1 Gallis. Rep. 37.

(3) A warranty of lands in a deed is the subject of a personal action of covenant against the executors of the warrantor; and the grantee is not confined to his voucher or *warrantia chartæ*, as it seems he anciently was. *Townsend v. Morris*, 6 Cowen, 123.

(4) A covenant in a deed of bargain and sale for grantor and his heirs to warrant and

is binding on the executors, (q) and they ought to see that the apprentice is taught his trade; and if they are not of the same trade, they ought to assign him to another who is of the trade, so that he may be taught according to the covenant. Where an administrator had occupied premises demised by indenture to the intestate, it was holden, (r) that a plea to covenant for non-payment of rent, taxes, and nonrepair, stating that the premises yielded no profit, could not be supported. The general rule is, that the executor of a lessee is liable as assignee, except that with respect to rent, his liability does not exceed what the property yields. No such exception applies to the covenant for repairs. (s)

3. *Against Assignee.*—1. If the covenant extends to a thing in esse, parcel of the demise, as a covenant to repair, (t) to reside constantly on the demised premises, (u) to leave part of the land demised every year for pasture, (x) to insure against fire premises situated within the limits mentioned in the Party-wall Act, 14 Geo. III. c. 78, (y) or the like, the thing to be done by force of the covenant, is in a manner annexed and appurtenant to the thing demised: it is a parcel of the contract, and tends to the support of the thing demised; hence, it shall bind the assignee, *although he be not named*; and the assignee by act in law, as tenant by elegit of a term, or he to whom a lease for years is sold by force of any execution, is equally bound with the assignee by act of the party. (z)(1) Where it is proved (a) that A. is tenant, and [*509] that upon his quitting *the premises B. takes possession, B. may be presumed to have come in as assignee of A. (2)

A covenant by a lessor to supply the premises demised, (two houses,)

(q) *Walker v. Hull*, 1 Lev. 177, cited arg. in *Wentworth v. Cock*, 10 A. & E. 43; 2 P. & D. 252.

(r) *Tremeere v. Morison*, 1 Bingh. N. C. 89.

(s) Per *Bosanquet, J.*, *S. C.* See *Hornidge v. Wilson*, 3 P. & D. 641; 11 A. & E. 645.

(t) *Dean and Chapter of Windsor's case*, 5 Rep. 24, a. [See *Pollard v. Shaffer*, 1 Dall. 210; *Phillips v. Stevens*, 16 Mass. 238.]

(u) *Tatem v. Chaplin*, 2 H. Bl. 133.

(x) *Cockson v. Cock*, Cro. Jac. 125.

(y) *Vernon v. Smith*, 5 B. & A. 1.

(z) 6th Resolution. *Spencer's case*, 5 Rep. 17, b.

(a) *Doe v. Murless*, 6 M. & S. 110, recognized by *Bayley, J.*, in *Doe d. Morris v. Williams*, 6 B. & C. 42.

for ever defend the title to grantee, his heirs and assigns, is not a mere warranty *real*, but a personal covenant, on which an action lies on eviction against the executor of bargainor. *Tabb v. Binford*, 4 Leigh, 132. Covenant lies against the executor of grantee for non-payment of rent reserved by deed conveying real estate after an assignment, although there may also be a good remedy against the assignee. *Scott v. Lunt*, 7 Pet. 596.

(1) See *Hurst v. Rodney*, 1 Wash. C. C. R. 375.

(2) Covenant does not lie by lessor against an occupant of the premises as assignee, if in fact there was no assignment. *Quackenboss v. Clarke*, 12 Wend. 555. In covenant for rent, although seisin be alleged, it is not necessary to prove it, nor to show that defendant was in possession, when it is in evidence that he claimed to be assignee and actually paid rent. *Lush v. Druse*, 4 Wend. 313. See *Grant v. Gill*, 2 Whart. 42. Where a covenant running with the land is divisible in its nature, if the entire interest in different parcels passed by assignment to separate individuals, it will attach on each parcel *pro tanto*. And the assignee of each part is answerable for his proportion of the common burden, and exclusively liable for a breach of any covenant relating to his part alone. *Astor v. Miller*, 2 Paige, 68.

with a sufficient quantity of good water at a certain rate for each house, is a covenant that runs^(b) with the land.(1)

2. If the covenant relates to a thing *not* in esse at the time of the demise, but to be done upon the thing demised, as a covenant to build a new wall upon the thing demised; it shall bind the assignee, *if named*.

3. If the covenant relates to a thing merely collateral to and not in any respect concerning the thing demised,^(c) as a covenant to build a house on the land of the lessor which is not parcel of the demise; or to pay any collateral sum to the lessor, or to a stranger;^(d) the assignee, *though named*, is not bound by such covenant; because the thing covenanted to be done, is merely collateral, and not in any respect touching or concerning the thing demised.(2) In order to bind the assignee, even though named, it is essentially necessary, that the thing covenanted to be done, or not to be done, should directly affect the nature, quality, or value of the thing demised, or the mode of occupying it:(3) Hence, where in a lease of land,^(e) with liberty to make a water-course, and erect a mill, the lessee covenanted for himself and his assigns, not to hire persons to work in the mill, who were settled in other parishes, without a certificate of their settlement; it was holden, that this covenant was not binding on the assignee of the term: because the state of the thing demised would be the same at the end of the term, whether the parish were more or less burdened with poor; and although the value of the reversion would not be so great if the poor's rate were increased, yet that burden would be increased by a collateral circumstance: and the work to be done being the same, whether it were done by workmen from one parish or another, could not affect the mode of occupation.

4. If a covenant relates to personal goods,^(f) as on a demise of sheep for a certain time, if the lessee covenants for himself and his assigns to re-deliver the sheep at the end of the time, and the lessee assign the sheep over, this covenant(4) will not bind the *assignee, [*510] *though named*, because there is not any privity. In the case

(b) *Jourdain v. Wilson*, 4 B. & A. 266.

(c) *Spencer's case*, 2nd Resolution.

(d) *Mayho v. Buckhurst*, Cro. Jac. 438.

(e) *Mayor of Congleton v. Pattison*, 10 East, 130, recognized in *Easterby v. Sampson*, 1 Cro. & J. 118. See 6 Bingh. 170.

(f) *Spencer's case*, 3rd Resolution.

(1) Where A., who is the owner of a town, lets a house to B. and covenants that he shall have the exclusive privilege of vending merchandise there during the term, and then lets another house to C. without restriction: held, that neither C. nor his under lessee, whether with or without notice, is liable to B. *Taylor v. Owen*, 2 Blackf. 301, 304.

(2) It is a substantive, independent agreement, not *quodam modo*, but *nullo modo* annexed or appurtenant to the thing leased. Per *Wilmot*, C. J., delivering the opinion of the count in *Bally v. Wells*, *Wilmot*, 345. See this doctrine discussed by *Tindal*, C. J., in *Flight v. Glossop*, 2 Bingh. N. O. 131.

(3) A covenant not to build on a common square owned by grantor in front of the lot conveyed, runs with the land, and passes to a subsequent grantee without any special assignment. *Trustees v. Cowen*, 4 Paige, 510.

(4) "The covenant in this case is not collateral, but the parties, that is, the lessor and assignee, are total strangers to each other, without any line or thread to unite and tie them together, and to constitute that privity, which must subsist between debtor and creditor to support an action." *Wilmot*, C. J., in *Bally v. Wells*, *Wilmot*, 345.

of realty there subsists a privity between the lessor and the lessee, and his assigns, in respect of the reversion; but in the case of a lease of personal goods, there is not any reversion, but merely a chose in action in the personalty, which cannot bind any but the covenantor, or his personal representative.⁽¹⁾ A lessee of tithes covenanted for himself,^(g) his executors, administrators, and assigns, not to let any of the farmers occupying the estate out of which tithes arose, have any part of the tithes without the consent of the lessor; and further covenanted for himself and his assigns to find and allow to the lessor sufficient wheat straw for thatching any of the buildings then in lessor's occupation; the lessee assigned to the defendant, who suffered several of the farmers to retain part of the tithes without the lessor's consent. An action having been brought against the defendant for this breach of the covenant, and a verdict for the plaintiff, it was moved, in arrest of judgment, that the action would not lie against the defendant, inasmuch as the covenant was merely personal and collateral, binding the lessee only; that tithes were incorporeal, lying in grant, and which therefore would not endure such an annexation of covenant. But the court were of opinion, that there was not any difference between land and tithes as to the annexation of covenants; that this covenant was not a mere collateral covenant, but related to the thing demised, materially and essentially tending to preserve it, and as such, obligatory on the assignee being named, and there being a privity in respect of the reversioner, the lessor. So where a lease contained a demise of all mines and minerals then opened or discovered, or which might during the term be opened or discovered, in or under certain moors or waste lands, and also all smelting mills then standing upon the lands, with full liberty to sink shafts there, and to build thereon any mills or other buildings requisite for working the mines; the lessor afterwards granted [*511] his reversion to A., who by will devised the *same to the plaintiffs; it was holden,^(h) that the covenant to build the new smelting mill (which was implied from the language of the deed) tended to the support and maintenance, of the thing demised, and that the assignee of the reversion might therefore sue upon it.

Covenant by lessee against the assignees of lessor.⁽ⁱ⁾ The lessee covenanted to leave all the trees he should plant during the term. The lessor covenanted for himself, his executors, and administrators, to pay for the trees at a fair valuation, by two persons to be named by each

^(g) *Bally v. Wells*, M. 10 Geo. III. C. B.; 3 Wils. 25; Wilmot, 341, S. C.

^(h) *Sampson and another v. Easterby*, 9 B. & C. 505. Judgment affirmed on error, 6 Bingh. 644. See also *Carr v. Roberts*, 5 B. & Ad. 78.

⁽ⁱ⁾ *Grey v. Cuthbertson and another, Assignees of Mills*, T. 25 Geo. III. B. R. MSS., and 4 Doug. 351.

(1) "To carry the lien of a personal obligation over to an assignee, and to make him the object of an action at the suit of a person with whom he did not originally contract, *he must in all cases be named*, and there must also be a privity between the assignee and the person to whom he becomes engaged; and the covenant must respect the thing leased. The *chose in action*, which of itself is not assignable, loses that property under those circumstances, and in a waiting dependent state follows its principal; and assignees of leases become liable to assignees of reversions, and *vice versa*." Per Wilmot, C. J., *Ib.* 345.

party, their executors, administrators, or assigns. The term expired. The defendants, assignees of lessor, refused to name an arbitrator, which was the breach assigned. On general demurrer to the declaration, after argument, and time taken to consider, Lord *Mansfield*, C. J., delivered the opinion of the court, that the covenant to refer to arbitration did not run with the land; and therefore the assignees were not bound by it, on the authority of *Spencer's* case, the assignees not being named. So where a term is granted as a security for money lent on mortgage, the covenant in the indenture of mortgage to pay the money on a given day, is a personal and a collateral covenant not running with the land.^(k) Where lands are conveyed by A. to B.,^(l) in fee, to the use of such person as C. shall appoint, and C. covenants for himself and his assigns to pay to A. a fee farm rent for the lands, and afterwards C. in pursuance of his power, makes an appointment to D.; D. the appointee cannot be sued on the covenant as the assignee of C.; for the appointee has not the estate of C., but is in by the original conveyance. A covenant which runs with the land,^(m) e. g. a covenant to repair, is divisible; and will bind the assignee of parcel of the estate demised, *quoad* the repairs of such parcel. So where covenant was brought by the lessor against the assignee of the lessee for the non-payment of a year's rent.⁽ⁿ⁾ Defendant, as to the rent^(o) for half the year, pleaded an eviction during that time of a moiety of the premises by title paramount. On demurrer, the question was, whether the rent was apportionable; it was holden, that the condition of the assignee was different from that of the lessee who was chargeable on the privity of contract, for the assignee was chargeable on the privity of the estate, and in respect of the land; hence the rent in question was apportionable; on the same principle as the rent of the lessee or assignee would have been in an action of debt or replevin.⁽¹⁾

*Where the lessee of a public-house covenanted for himself, [*512] his executors, and assigns, with his lessors (brewers,) to take all his beer of them or their successors in their said trade; and the lessors sold their trade and the public-house, with other premises, to third persons, who removed the plant, &c., to a distance of two miles, and there carried on the business of brewers: it was holden,^(p) that the trade of the lessors was thereby determined; and that their assignee could not take advantage of the covenant, on the assignee of the lessee purchasing beer from another brewer.

Assignee of the term is not answerable for the breach of such covenants

(k) *Canham v. Rust*, 2 Moore, 164.

(l) *Roach v. Wadham*, 6 East, 289, cited in *Doe d. Wigan v. Jones*, 10 B. & C. 459.

(m) *Congham v. King*, 1 Rol. Abr. 522; Sir William Jones, 245, S. C.; Cro. Car. 221, S. C., recognized by the court in *Stevenson v. Lambard*, 2 East's R. 580.

(n) *Stevenson v. Lambard*, B. R. T. 42 Geo. III. 2 East's R. 575.

(o) This ought to have been pleaded to a moiety of the rent for half a year.

(p) *Doe d. Calvert v. Reid*, 10 B. & C. 849.

(1) *Lansing v. Van Alstyne*, 2 Wend. 563, in note. But to entitle a defendant in such case to ask for an apportionment on account of an eviction of part, he must plead the facts specially, and not in bar of the whole action. S. C. 2 Wend. 561.

as were broken by lessee before he became assignee, (q) *e.g.* as where lessee covenanted to rebuild within such a time, and failed to do so, and then after the expiration of the time, assigned. Neither is he answerable for such breaches of covenant as are committed after he has assigned over the thing demised, (r) for if an action be brought against him charging him with such breaches, he may plead, that before the breach was incurred, he assigned all his estate and interest in the thing demised to J. S., (1) and this will be a good discharge; and it is observable that in

such plea, it is not necessary to allege that the lessor had no-
[*513] tice of such assignment. (s) *An assignee cannot, (t) by assigning before action brought, defeat an action for breaches of covenant running with the land, and incurred in his time, the right of action being complete, and vested before the assignment.

The lessee, by deed-poll, assigned his interest in the demised premises to A., subject to the payment of the rent, and performance of the covenants contained in the lease. A. took possession and occupied under this assignment, and before the expiration of the term, assigned to a third person. The lessor sued the lessee for breaches of covenant committed during the time that A. continued assignee, and recovered damages: it was holden, (u) that the lessee might maintain an action founded in tort against A., for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage. This case proceeded upon the ground that, during the continuance of the interest of the assignee, there is a duty on his part to pay the rent and perform the covenants. (x)

From the form of the foregoing plea, it may be collected that an

(q) *Grescot v. Green*, Salk. 199; *Churchwardens of St. Saviour's v. Smith*, 3 Burr. 1271; 1 Bl. R. 351, S. C.

(r) *Chancellor v. Poole*, Doug. 764.

(s) *Pitcher v. Tovey*, Salk. 81; 4 Mod. 71; 2 Vent. 228; Carth. 177, S. C., by name of *Tovey v. Pitcher*, 3 Lev. 295; 1 Show. 340, S. C.

(t) *Harley v. King*, 2 Cr. M. & R. 18.

(u) *Burnett v. Lynch*, 5 B. & C. 589; 8 D. & Ry. 368.

(x) Per *Denman*, C. J., in *Wolveridge v. Steward*, 3 Tyr. 653; see *Walker v. Hatton*, 10 M. & W. 249.

(1) An assignment to a beggar or a person leaving the kingdom, provided the assignment be executed before his departure, is good, nor will such assignment be considered as fraudulent, although the assignee never takes possession, *Taylor v. Shum*, 1 Bos. & Pul. 21. See also *Lekeux v. Nash*, Str. 1221, and *Odell v. Wake*, 3 Campb. 394. A fraudulent assignment is as no assignment at all. In that case, both at law and in equity, the act is altogether void. But it is a mistake to call an assignment to a beggar a fraudulent assignment. If a party assign nominally, only, retaining the beneficial possession all the time, it is fraudulent, because, whilst he assumes to do one thing, he really does another. He retains the benefit, and by a false act endeavours to get rid of the burthen. But if he assigns really, getting rid of the burthen, and giving up really the benefit also (if any) to his assignee, it is not a fraudulent act. His motive for parting with it, or the other's motive for receiving it, are not enough to make it fraudulent, if the act done be a real act, intended really to operate as it appears to do. Per *Alderson*, B., in *Fagg v. Dobie*, 3 Y. & C. 103. See also the remarks of Lord *Cottenham*, C., on the right of an assignee to relieve himself from the obligations of a lease, in *Rowley v. Adams*, 4 M. & Cr. 534. An assignment to a feme covert, where husband has not refused his assent, is sufficient; for a feme covert is of capacity to purchase of others without the consent of her husband; and though he may disagree and divest the estate, yet if he neither agree nor disagree, the purchase is good. *Barnfather v. Jordan*, Doug. 451.

assignee, in order to exonerate himself from his liability under the covenants in a lease, must convey *all*(1) his estate and interest in *the thing demised. If the conveyance falls short of this, it [*514] will not amount to an assignment, so as to discharge the assignee from his liability. In a plea of this kind, it is usual to aver the entry and possession of the person to whom the defendant assigned the premises; but such averment is not traversable.(y)(2)

It is to be observed, that assignees of a bankrupt lessee are not liable for rent arrear, where they have not taken possession of thing demised.(z) Neither are they bound to take possession of a *damnosa hereditas*, that is, property of the bankrupt, which, so far from being valuable, would be a charge to the creditors. The assignees may take to the bankrupt's property or not, according as it is or is not beneficial to the creditors; and consequently they may do such previous acts as are necessary to ascertain whether the property be beneficial or not, before they take it. Hence, where defendants, assignees of a bankrupt lessee, advertised the lease for sale by auction, in which advertisement they did not state that the premises belonged to them, nor for or by whom they were to be sold, but only generally that there was a saleable term, and no bidder offering, they declined interfering any further with the property; and it did not appear that they had ever taken possession, either actually or by receiving or paying any rent; it was holden, that there was not sufficient evidence to fix upon the defendants the characters of assignees of the bankrupt's term, so as to render

(y) *Walker v. Reeves*, Doug. 461, n.

(z) Per *Kenyon*, C. J., in *Bourdillon v. Dalton and others, Assignees of Bell, a Bankrupt*, Peake's N. P. C. 238; 1 Esp. N. P. C. 233.

(1) In *Eaton v. Jacques*, Doug. 454, it was holden, that an assignment by way of mortgage, was not an assignment of *all* the estate and interest of the assignor, so as to make the mortgagee, *who had never taken possession*, chargeable in debt for rent arrear; although the mortgage had been forfeited before such rent became due; *Buller*, J., observing, "That he had looked into the precedents, and they always alleged, 'by virtue whereof the assignee entered and was possessed.'" Having stated this decision, it will be proper to remark, that *Kenyon*, C. J., twice expressed his disapprobation of it; 1st, in *Westerdell v. Dale*, 7 T. R. 312; "As to the cases respecting the mortgagee, *whether in or out of possession*, he is the legal owner, and must be so considered in a court of law, notwithstanding he is subject to equitable interests. It is said in one of the cases, (*Eaton v. Jacques*, had been cited in argument,) that a mortgagee is only liable when in possession, and what proves this point is, that in charging the mortgagee, it is necessary to state in pleading, that he entered and was possessed; but, with great deference to the learned judge who gave that reason, I doubt it; I consider these as mere formal words." 2ndly, in *Stone v. Evans*, Middlesex Sittings, T. 39 Geo. III. cited in 7 East, 341, and reported in Woodfall's Landlord and Tenant, 2nd edit. p. 113, and Abbott, p. 20, Gibbs having cited *Eaton v. Jacques*, Lord *Kenyon* said, he could not subscribe to the doctrine laid down in that case; that the defendant, who was assignee of a term by way of mortgage, was liable to the covenants in the lease, not on the ground of possession, but as assignee; his liability was not limited by his possession; so long as he had the legal estate, so long he continued liable. If he had wished to avoid that liability, he should have taken an under-lease. See also *Williams v. Bosanquet*, 1 Brod. & Bingh. 238, where *Eaton v. Jacques* was considered, by a great majority of judges, as not having been rightly decided; and it was holden, that where a party takes an assignment of a lease by way of mortgage as a security for money lent, the whole interest passes to him, and he becomes liable on the covenant for payment of rent, although he has never occupied or become possessed in fact: and see *Burton v. Barclay*, 7 Bingh. 745.

(2) See Lord *Kenyon's* opinion as to this averment in the preceding note.

them responsible for the performance of the covenants in his lease. *Turner v. Richardson*, 7 East, 335. Some assent of the assignees of a bankrupt to the assignment to them, of the premises is necessary, in order to charge them with the bankrupt's covenants. Adm. S. C. Until some act is done to manifest the assent of the assignees, the term remains in the bankrupt, and he is liable to the payment of [*515] the rent accruing due subsequent to the bankruptcy. **Copeland v. Stephens*, 1 B. & A. 593. But see 6 Geo. IV. c. 16, s. 75, *ante*, p. 496; and *Briggs v. Sowry*, 8 M. & W. 729.

The assignees of a bankrupt having allowed his effects to remain upon the premises nearly a year after the bankruptcy, in order to prevent a distress, paid the arrears of rent then due, at the same time intimating to the landlord that they did not mean to take to the lease unless it could be advantageously disposed of; the effects were soon after sold, and removed from the premises; the lease was at the same time put up to sale by order of the assignees, but there were not any bidders for it; they omitted to return the key to the landlord for nearly four months after: however, they were not asked for it, and they did not otherwise make use of the premises: Lord *Ellenborough* held, that they were not liable to the landlord as assignees of the lease; for the mere omission to send the key was not tantamount to entering and taking possession. *Wheeler v. Bramah*, 3 Campb. 340. But if they put up a lease to sale, and accept a deposit from the purchaser, they are liable, unless they show the contract rescinded. *Hastings v. Wilson*, Holt. 290; and see *Thomas v. Pemberton*, 7 Taunt. 206; *Welch v. Myer*, 4 Campb. 368. But a release of an under-tenant has been held not to fix them. *Hill v. Dobie*, 8 Taunt. 325. Where the assignees of a bankrupt entered and kept possession of his leasehold property for three months; it was holden, that they were chargeable with the covenants in the lease, although the bankrupt's effects were upon the premises during that period, and the assignees immediately after the sale delivered up the key. *Hanson v. Stevenson*, 1 B. & A. 303. [If assignees take possession with a view to a beneficial occupation, they are liable upon a tenancy from year to year, until it is terminated, the same as upon a lease. *Ansell v. Robson*, 2 Cr. & J. 610.] But see the stat. *ante*, p. 496.

That the whole interest in the original lease must be conveyed, in order to make a person chargeable as assignee, will appear from the following cases:

Lessee for lives, of a messuage, (a) under a covenant to keep the same in repair during the term, and at the end of the term to deliver it up so repaired, by indenture "granted and assigned *all his estate* and interest therein to A. and his executors, *habendum*, to A. and his executors, for ninety-nine years, *if cestui que vie should so long live*, in as large, ample, and beneficial way as the grantor, his heirs, &c., held the same, paying a certain rent to the reversioner." On the expiration of the lives, the reversioner brought covenant against the executors of A., for not yielding up the messuage in repair. It was alleged in the

(a) *E. of Derby v. Taylor*, 1 East's R. 502.

declaration, that all the estate and interest of the lessee for life vested in A. by assignment. This was denied by defendant's plea.

A case having been *reserved and argued, the court directed [*516] the *postea* to be delivered to the defendants; Lord *Kenyon*, C. J., observing, that there were not any words in the indenture, by which the freehold, of which the original lessee was seised, was conveyed to the testator of the defendants: that the conveyance of all the grantor's estate and interest to a man and his executors, for years, could not convey a freehold; that such words meant only their interest, &c., in the legal estate thereby granted; and that the court could not give those words a larger operation than the parties themselves had declared they should have. So the devisee of an *equitable* estate is not liable as assignee.(b) So where in covenant for rent arrear,(c) brought against the defendant as *assignee* of J. S., it appeared in evidence, that by the deed, under which the defendant held, the premises were conveyed to him by J. S., for a day or some days less than the original term; the court were of opinion, that the action could not be maintained, the defendant being an under-lessee, and not an assignee of the whole term.(1)

But where a lessee for years granted *the whole of the term* to J. S.:(d) it was holden, that J. S. might maintain an action as assignee of the term against the lessor for a breach of covenant; although in the deed of assignment, the rent was reserved to the lessee, with a power of re-entry in case of non-payment, and although new covenants were introduced into that deed. With respect to declaring *against* an assignee, it is to be observed, that it is not incumbent on the lessor to set forth mesne assignments. It is sufficient to state, generally, that all the estate, &c.,(e) of the lessee vested in the defendant by assignment; for it cannot be presumed that the lessor is acquainted with the particulars of the assignee's title. A. demised to B. for a term of years, and B., after covenanting for payment of rent, covenanted for himself, his executors, and assigns, that neither he, nor his executors, or administrators, would assign without the consent of A. The term vested by assignment in C., who, upon being sued for non-payment of rent, pleaded, that before the rent became due, he had assigned to D. A. replied the covenant not to assign; but the replication was holden(f) bad on demurrer, on the ground that the assignment itself was not void (although a breach of covenant,) and as soon as C. ceased to be assignee, his obligation to perform the covenant was at an end.

(b) *The Mayor, &c. of Carlisle v. Blamire and Tyson*, 8 East, 487.

(c) *Holford v. Hatch*, Doug. 183.

(d) *Palmer v. Edwards*, Doug. 186, n.

(e) *Pitt v. Russell*, 3 Lev. 19.

(f) *Paul v. Nurse*, 8 B. & C. 486.

(1) It has been held in Ohio that where a lessee assigns but a *part* of the premises, for the *whole* term, it is but an underlease, and lessor cannot sue in covenant. *Fulton v. Stuart*, 1 Ohio, 369.

*VII. *Of the Declaration.* p. 517; *Breach.* p. 520; *Dependent Covenants and Conditions precedent.* p. 522; *Concurrent Covenants.* p. 527; *Mutual and Independent Covenants.* p. 528.

Venue.—As this action is more frequently brought for breaches of covenants contained in leases, than on any other kind of covenants, the following table may be useful, in which the reader will see, at one view, in what cases such action is transitory, and in what local.(1) The principle on which the table is framed is this; where the action is founded on privity of contract, it is transitory, and the venue may be laid in any county; but where the action is founded upon privity of estate only, it is local, and the venue must be laid in the county where the estate lies. In the third and fourth cases in the table, the privity of contract is transferred by the operation of the stat. 32 Hen. VIII. c. 34.

TRANSITORY.

1. Lessor v. Lessee.
2. Lessee v. Lessor.
3. Assignee of Reversion v. Lessee; stat. 32 Hen. VIII. c. 34; *Thursby v. Plant*, 1 Saund. 237.(2)
4. Lessee v. Assignee of Reversion; stat. 32 Hen. VIII. c. 34.

LOCAL.

5. Lessor v. Assignee of Lessee; *Stevenson v. Lambard*, 2 East, 575.
6. Assignee of Lessee v. Lessor. N. If the locality does not appear on declaration, and no issue is raised on it, the defendant is not entitled to a nonsuit, by reason of the venue being laid in a wrong county. *Boyes v. Hewetson*, 2 Bingh. N. C. 575.
7. Assignee of Reversion v. Assignee of Lessee; *Barker v. Damer*, Carth. 182; Salk. 80.
8. Assignee of Lessee v. Assignee of Reversion.

The circumstance of rent being made payable in a different county from that in which the lands lie, will not affect the locality of an action of covenant for non-payment of such rent.(g) Where, however, the action is local,(h) although it be brought and tried in a wrong county, yet the defects will be aided after verdict, by stat. 16 & 17 Car. II. c. 8. And by stat. 3 & 4 Will. IV. c. 42, s. 22, reciting, that unneces-

(g) *Barker v. Damer*, Salk. 80.

(h) *Mayor of London v. Cole*, 7 T. R. 583.

(1) In an action on a covenant of seisin the venue was changed to where the lands lay, on the usual affidavit. *Clarkson v. Gifford*, 1 Caines' Rep. 5.

(2) See *Herwood v. Cheeseman*, 3 S. & R. 502.

sary delay and expense is sometimes occasioned by the trial of local actions in the county where the *cause of action has [*518] arisen, it is enacted, that in any action depending in any of the superior courts, the venue in which is by law local, the court in which such action shall be depending, or any judge of the court may, on the application of either party, order the issue to be tried, or writ of inquiry to be executed, in any other county or place than that in which the venue is laid; and for that purpose any such court or judge may order a suggestion to be entered on the record, that the trial may be more conveniently had or writ of inquiry executed, in the county or place where the same is ordered to take place.

It must appear on the face of the declaration, (i) that defendant covenanted by deed; for where plaintiff declared that defendant *per quoddam scriptum suum factum apud Westminster concessit, &c.*, it was holden bad; because *scriptum* did not import a deed, and *factum* being joined to *apud Westminster*, rendered it impossible to be taken as a substantive. As this action is brought on a deed, (k) with the execution of which defendant is charged, plaintiff must make a profert of the deed in the declaration, and bring the deed into court, in order that the court may see whether it be executed according to law. (1) Profert being made, defendant is entitled to crave oyer, and the court cannot then dispense with oyer, although plaintiff make an affidavit, that he has searched for the deed, and cannot find it any where. (2) It is a general rule however, that a party is not required to make profert of an instrument to the possession of which he is not entitled. (l)

*Every deed is supposed to be executed the same day that [*519] it bears date. (m) But though the deed appear on the face of

(i) *Moore v. Jones*, Str. 814. See also *Southwel v. Brown*, Cro. Eliz. 571.

(k) *Thoresby v. Sparrow*, B. R. E. 16 Geo. II.; 1 Wils. 16; 2 Str. 1186, S. C.

(l) *Dangerfield v. Thomas*, 9 A. & E. 292; 1 P. & D. 287, recognized in *Bain v. Cooper*, 8 M. & W. 751. (m) *Stone v. Bale*, 3 Lev. 348. See also, *Goddard's case*, 2 Rep. 4, b.

(1) An action of covenant lies on a specialty exclusively, and not on a specialty modified or enlarged by parol. The alteration of a sealed contract by parol makes it all parol. *Vicary v. Moore*, 2 Watts, 451; *Luciani v. The American Fire Ins. Co.*, 2 Whart. 167; *Langworthy v. Smith*, 2 Wend. 587.

(2) In *Read v. Brookman*, 3 T. R. 151, in a plea in bar to an avowry, plaintiff, instead of making a profert, pleaded that the deed was lost by time and accident. On special demurrer, this averment was holden good, per *Kenyon*, C. J., *Ashhurst*, J., and *Buller*, J. — *Grose*, J., *dissentiente*; but, in pleading a lost deed, it is necessary to set forth the supposed names of the parties to the deed and the date. *Hendy v. Stephenson*, 10 East, 55. If the deed has been destroyed by fire, it may be so alleged as an excuse for the non-production of it, as in *Roulledge v. Burrell*, 1 H. Bl. 254, where the plaintiff declared that by a certain deed-poll, made, &c., (which said deed-poll was casually burnt and destroyed by the fire thereafter mentioned). But if profert be made in the declaration, the deed must be produced; for the plaintiff, so declaring, will not be permitted to give evidence of the destruction of the deed, or of its being in the hands of the defendant. *Smith v. Woodward*, 4 East, 585. An instrument set out upon oyer must be read as forming part of the declaration, (or other pleading,) in which profert has been made of such instrument. *Ashton v. Freeston*, 2 M. & Gr. 1; 2 Scott's N. R. 273; *Trott v. Smith*, 10 M. & W. 463. But where profert of a deed is excused in a plea, and the replication states the indenture as a part of itself, the indenture is not then to be taken as part of the plea. *Hyde v. Watts*, 12 M. & W. 254. See *Powers v. Ware*, 2 Pick. 457; *Jansen v. Bull*, 6 Cowen, 628; *Rees v. Overbaugh*, Ib. 746. Profert is necessary in covenant, where the deed is not mere matter of inducement. *Smith v. Emory*, 7 Halst. 53.

it to have been made, that is, written on one day, yet if in truth it were delivered on a subsequent day, that may be shown by averment. A declaration in covenant stated that the deed was *indented, made, and concluded*,⁽ⁿ⁾ on a day subsequent to the day on which the deed itself was stated on the face of it to have been *indented, made, and concluded*; it was holden, that such allegation was no more inconsistent with the deed, than if it had been alleged that it was sealed and delivered on a day subsequent; that it was quite immaterial when it was *indented*, and equally so when it was *made*, by which might be understood when it was *written*; the only material word was *concluded*, and a deed could only be said to be *concluded* when it was delivered. The time of delivering was the important time when it took effect as a deed: and from the preceeding case of *Stone v. Bale*, it appeared that the delivery might be after the date. In framing the declaration, it is not necessary to set forth the provisions of the deed *in letters and words*.⁽¹⁾ It will be sufficient to state *the substance and legal effect*.⁽²⁾ Neither is it necessary to set forth *all* the provisions of the deed; stating such parts as are necessary to entitle the plaintiff to recover will be sufficient.⁽³⁾ Hence in covenant on a mortgage deed,^(o) the court were of opinion, that it was sufficient for the plaintiff to set forth in his declaration, that defendant, by a certain indenture, had demised certain premises therein mentioned, (not specifying the premises,) subject, among other things, to such a proviso; then setting out the substance of the covenant for the payment of the money, and breach for the non-payment. If the deed on which plaintiff declares contain a proviso,^(p) operating by way of defeasance of the covenants, the plaintiff is not obliged to state such proviso in his declaration; if the defendant means to rely on [*520] it, it is incumbent on him **to show it*. It is sufficient to say "*whereas by a certain indenture, &c., it is witnessed, &c.,*" without a direct affirmation,^(q) that by such an indenture defendant

(n) *Hall v. Cazenove*, 4 East, 477.

(o) *Dundass v. Lord Weymouth*, Cowp. 665.

(p) *Elliott v. Blake*, 1 Lev. 88; T. Raym. 65, S. C.

(q) *Bultivant v. Holman*, adjudged on error from C. B. in B. R. T. 17 Jac., Cro. Jac. 537.

(1) A covenant may be declared on according to its operation in law, or set forth *in hæc verba*, at the election of the party. *Moore v. White*, 6 Lit. 151; *Price v. Bus*, 1b. 216.

(2) Where there has been a mistake in drawing the articles, the plaintiff may declare on the amended articles with proper averments showing the mistake. *Gower v. Sterner*, 2 Whart. 75. In covenant, fraud may be specially averred in the declaration, and a judgment in such case is a bar to a subsequent action on the case. *Cutler v. Cox*, 2 Blackf. 181.

(3) This rule ought to be strictly adhered to, as well to prevent the extension of the record to an unreasonable length, as to avoid the danger resulting to the party setting forth the deed, from variances and formal objections. In *Dundass v. Lord Weymouth*, Cowp. 665, the court said, they would animadvert upon any future instance of putting parties to the enormous expense of setting out deeds at length, or superfluous parts of them. And in *Price v. Fletcher*, Cowp. 727, where the plaintiff in an action for breach of covenant for quiet enjoyment under a lease, had set out the whole lease *verbatim*, it was referred to the master to strike out the superfluous matter in the declaration *with costs*. See 1 Wms. Saund. 233, n. 2, where the learned serjeant has given a concise form of declaration in covenant for non-payment of rent. See *Macon v. Crump*, 1 Call's Rep. 575; *Bustor's Executor v. Wallace*, 4 Hen. & Mun. 82.

covenanted. In covenant by husband of reversioner in fee, (r) he must declare on a seisin in fee in himself *and his wife*, in right of his wife. If he state that he is seised of the reversion in his demesne as of freehold, it will be bad on special demurrer. (1)

Of the Breach.—The breach assigned ought to be co-extensive with the import and effect of the covenant; (2) but, where the covenant is general, (s) the breach may be assigned as generally as the covenant; (3) and it is sufficient, if it negative the words of the covenant; (4) as where, on a covenant in an indenture of lease, that defendant had full power and lawful authority to demise, the breach assigned was, that defendant, at the time of making the said indenture, had not full power and lawful authority to demise the premises according to the form and effect of the indenture: after verdict for plaintiff, and judgment in B. R. on error in the Exchequer Chamber, it was objected, that it was not stated in the declaration, who had title to the premises at the time of making the indenture; but it was resolved, that the assignment of the breach was good; because it had pursued the words of the covenant *negative*; and that it lay more properly in the notice of the lessor what estate he himself had in the land, than in the lessee, who was a stranger to it; and therefore defendant ought to have shown what estate he had in the land at the time of the demise, whereby it might have appeared to the

(r) *Polyblank v. Hawkins*, Dougl. 328.

(s) *Salmon v. Bradshaw*, 9 Rep. 60, b; Cro. Jac. 304, S. C. See also to the same effect, *Muscot v. Ballet*, Cro. Jac. 369; *Brigstock v. Stannion*, Ld. Raym. 106; *Proctor v. Burdet*, 3 Lev. 170; 3 Mod. 69, S. C.; *Boscawen v. Cook*, 1 Raym. 107; *Rawlins v. Vincent*, Carth. 124; [*Abbot v. Allen*, 14 Johns. Rep. 248; *Marston v. Hobbs*, 2 Mass. Rep. 433.]

(1) In covenant against the assignor of a bond guaranteeing its payment, it is not necessary to aver notice of non-payment. *Sibley v. Stall*, 3 Green, 332; *Bush v. Critchfield*, 4 Ohio, 105.

(2) The breach may be assigned according to the *substance*, though not according to the *letter* of the covenant. *Potter v. Bacon*, 2 Wend. 583.

(3) In an action on a covenant of seisin or that grantor has a good right to convey, it is sufficient to allege a breach by negating the words of the covenant: but covenants for quiet enjoyment and of general warranty require the assignment of a breach by specific ouster or eviction by a paramount title. *Richest v. Snyder*, 9 Wend. 416. But it is not necessary to state all the facts constituting the eviction. *Ib.* And a grantee may be *evicted* though he never was in actual occupation of the land. *Curtis v. Deering*, 3 Fairf. 499. In an action on a covenant of special warranty the breach alleged was that defendant "had no right to sell, &c." Held, that the two covenants were distinct and the action could not be sustained. *Griffin v. Fairbrother*, 1 Fairf. 91.

(4) Mr. Chief Justice *Parsons*, in *Marston v. Hobbs*, 2 Mass. Rep. 433, says, the general rule is, that the plaintiff may assign the breaches generally, by negating the words of the covenant. The exception to the rule is, that when such general assignment does not necessarily amount to a breach, the breach must be specially assigned. The covenants of seisin, and of right to convey, (which was called synonymous, because the same fact, the seisin of the defendant, supports both,) come within the *rule*. The covenants against incumbrances, and for quiet enjoyment, come within the exception. For the defendant does not covenant against all interruptions of the plaintiff's possession, nor against all possible incumbrances. To these covenants the breaches should be specially assigned, showing the nature of the incumbrance and interruption complained of. The covenant of warranty also comes within the exception; for the defendant is not bound, by his general warranty, to warrant against all claims and ousters, and the plaintiff must assign a breach by showing an ouster by an elder or paramount title. *S. P. Wait v. Maxwell*, 4 Pick. 87; *Mitchell v. Warner*, 5 Conn. Rep. 497. See also, 2 Greenl. on Evid. §§ 236, 237.

court, that he had full power and authority to demise. So where, in covenant, (t) the declaration stated that plaintiff by indenture let to defendant's testator a house for years, and the lessee covenanted to repair it well from time to time, during the term, and at the end of the term to leave the same well repaired; and the breach assigned was, that the lessee did not leave it well repaired at the end of the term: an exception was taken, because the declaration did not show in what point the house was not well repaired: but it was overruled; for, the breach being according to the covenant, it was sufficient: but if the defendant had pleaded, that at the end of the term he delivered it up well repaired, then if the plaintiff will assign any breach, he ought particularly to show in what point it was not well repaired, so as the defendant might give a particular answer thereto. In covenant by a master against his servant, (u) on a covenant not to buy or sell without the master's [*521] leave, within two years; the breach assigned *was, that defendant had *diversis diebus et vicibus*, between such a day and such a day, sold to H., and to several other persons unknown, goods to the value of 100*l*. Issue upon this, and, after verdict for plaintiff, it was moved in arrest of judgment, that the breach was uncertain as to the times and persons; *Holt*, C. J., said, that in covenant (1) it was sufficient if a general breach was assigned; and that the breach in question was certain enough; for it was so described, that if another action were brought, the defendant might plead a former recovery for the same cause, and aver this to be the same selling. *Gould*, J., agreed, that, the action being only for damages, it was well enough. Judgment for plaintiff. (2) Plaintiff declared that defendant covenanted to allow plaintiff 2*s*. for every quire of paper he should copy, (x) and assigned for breach, that he copied four quires and three sheets, for which 8*s*. and 3*d*. was due, which defendant had not paid. On writ of error after verdict, and judgment for plaintiff in C. B., it was moved, that there could not be any apportionment in this case, for the covenant was to allow plaintiff 2*s*. for copying a quire, but not *pro rata*, for which cause the judgment was reversed. But it seems that on demurrer this objection would not avail the defendant, because in that case the plaintiff might remit his claim for the odd sheets, and enter up judgment for the residue, in conformity to the rule laid down in *Incedon v. Crips*, Salk. 658, recognized in *Buckley v. Kenyon*, 10 East, 139, and *infra*, that where the sum demanded does not depend on the deed itself, but upon matter extrinsic, there may be a remittitur; because the variance is not inconsistent with the deed. In covenant, the breach assigned was for non-

(t) *Hancock v. Field and others, Executors of Crouch*, Cro. Jac, 170, 171.

(u) *Farrow v. Chevalier*, Salk. 139, cited 8 East, 84; 8 Tr. 459.

(x) *Needler v. Guest*, Aleyn, 9.

(1) *Secus* in debt on bond to perform covenants, and debt for a penalty on a statute; there a precise breach must be shown. Lord Raym. 107.

(2) Covenant "to pay 250 dollars in manner following, viz. 125 dollars on the 20th May ensuing, and 125 dollars on the 20th May, 1811; breach, that "the said sum of 125 dollars was unpaid," &c. On demurrer, it was holden, that the breach was not well assigned, it not appearing with sufficient certainty, which of the two sums had not been paid. *Carpenter v. Alexander*, 9 Johns. Rep. 291.

payment of rent on different days, (y) *which amounted to a certain sum*, and the plaintiff had made a mistake in calculating the sum; it was holden good; because in this action the whole shall be recovered in damages, and the plaintiff shall not have damages according to his summing, but according to the matter. The plaintiff declared on an indenture of demise for years of certain coal mines, (z) reserving a fourth part of the coal raised, or its value in money, at the election of the lessor; but if the fourth part fell short of the annual value of 400*l.*, then reserving such additional rent as would make up that annual sum, to be rendered on the first day of every month in each year of the term, by equal portions; and that the plaintiff elected to be paid in money; the breach assigned was that 900*l.* of the reserved rent for two years and *three months* was in arrear. On general demurrer, it was objected that the rent **being reserved yearly*, the breach was not well [*522] assigned, inasmuch as it included a fraction of a year; but the court overruled the demurrer, observing that it could not be sustained on the construction of the covenant; for, though it spoke of an annual sum of 400*l.* to be made up in case the proportion of coal reserved should fall short of that sum, yet the rent was to be rendered monthly. But, even admitting it to be a yearly rent, the excess for three months might be remitted, and judgment given for the residue; and *Bayley, J.*, cited *Inclendon v. Crips*, Salk. 658, and 2 Lord Raym. 814, as an authority in point as to the remittitur. Where lessee covenanted for himself and his assigns to plant a certain number of trees every year, (a) and the breach was, that defendant had neglected to do it; it was holden sufficient without negating that his assigns had done it, for the court will not intend an assignment.(1)

(y) *Farrer v. Snelling*, 1 Roll. Rep. 335.

(z) *Buckley v. Kenyon*, 10 East, 139.

(a) *Gyse v. Ellis*, Str. 228.

(1) So in action against the assignee of lessee for rent, an averment that the rent accrued subsequently to the assignment to defendant, and is due and owing to the lessor, and still remains in arrear and unpaid from the defendant, is sufficient without negating that lessee had paid it. *Executors of Dubois v. Van Orden*, 6 Johns. Rep. 105.

The defendant covenanted, that he "the sale of the said slave to the plaintiff, his heirs and assigns, against all persons lawfully claiming any estate, right, or title to the said slave, would warrant and for ever defend;" breach, that the defendant had no property or title in the girl, so sold as a slave, but that she was free, and not a slave: on demurrer holden good; for the substance of the covenant was that defendant would warrant the sale. *Quackenboss v. Lansing*, 5 Johns. Rep. 49; and covenants are to be construed according to their spirit and intent.

In an action on a covenant for such further assurance, as by the plaintiff, &c., or his counsel, &c., should be reasonably devised, advised, or required, the breach assigned was, that plaintiff had requested defendant to make a lawful and reasonable assurance to the plaintiff, of the right of dower of defendant's wife; yet the said defendant had not made such assurance, &c. On demurrer, the breach was holden bad; for the plaintiff or his counsel were to devise the further assurance, and after having done so, the plaintiff was bound to give notice thereof to the defendant, allowing him a reasonable time to consider it. *Miller v. Parsons*, 9 Johns. Rep. 336; *Sweitzer v. Hummell*, 3 Serg. & Rawle's Rep. 228. The vendor, however, is to prepare the deed, where he covenants to convey a good title, without any regard to its being devised by the purchaser.

It is not a sufficient breach of a covenant of seisin, that a public road or highway runs through the land, for the existence of a road is a mere easement, and the seisin, subject to the easement, exists in full vigor. *Whitbeck v. Cook*, 15 Johns. Rep. 483; *Jackson et*

A demurrer for misjoinder of breaches must be to the whole declaration, and not to the breach alone which is misjoined.(b)(1)

As to the necessary averments in action for breach of covenant for quiet enjoyment, see *ante*, Sect. IV. 1, p. 489.

I shall now proceed to explain the nature of dependent covenants and conditions precedent, concurrent acts or covenants, and mutual or independent covenants, subjoining to each division such cases as appear to afford the best illustration of the subject under consideration. And first, of dependent covenants and conditions precedent;

Conditions precedent.—If A. covenants to do, or to abstain from doing, a certain act, in consideration of the prior performance of some act or covenant on the part of B., A.'s covenant is termed a dependent cove-

(b) *Kingdon v. Nottle*, 1 M. & S. 535.

dem. Yates v. Hathaway, 15 Johns. Rep. 447. But it has been holden, to be a breach of a covenant against incumbrances. *Kellogg v. Ingersoll*, 2 Mass. Rep. 97; *Pritchard v. Atkinson*, 3 N. H. 335; *Hubbard v. Norton*, 10 Conn. 422.

A mortgagor in possession, before foreclosure, is regarded as seised of the land; and if he convey the land with covenant of seisin, the mere existence of the mortgage is not a breach of the covenant; *Stanard v. Eldridge*, 16 Johns. Rep. 254. A covenant that the land is free from incumbrances, is broken by the existence of a mortgage from the grantor to the grantee. *Bean v. Mayo*, 5 Greenl. 94.

Plaintiff claiming certain land by one title, and defendant by another, defendant made a deed of the land to plaintiff, with a covenant of seisin; in an action for a breach of the covenant, it was holden, that the existing title of the plaintiff did not constitute a breach of the covenant, and that plaintiff was estopped from alleging that defendant was not seised, in consequence of his own prior seisin. The covenant of seisin extends only to guaranty the grantee against any title existing in a third person, and which might defeat the estate granted. *Fitch v. Baldwin*, 17 Johns. Rep. 161.

An action cannot be maintained on a covenant of warranty, without showing an eviction. *Emerson v. Proprietors of land in Minot*, 1 Mass. Rep. 464; *Clark v. M'Annulty*, 3 Serg. & Rawle, 364; *Bender v. Fromberger*, 4 Dall. 436; *Day v. Chism*, 10 Wheat. 449. No formal words, however, are prescribed in which this allegation is to be made; and an averment that the defendant "had not a good and sufficient title, &c., and by reason thereof, the said plaintiffs were ousted and dispossessed of the said premises by due course of law," is sufficient. *Ib.* *Simpson v. Hawkins*, 1 Dana, 306; *Woodward v. Allar*, 3 Id. 164; *Innis v. Agnew*, 1 Ohio, 180; *Griffin v. Fairbrother*, 3 Fairf. 499.

A covenant to convey property, or to do any other act, is broken by the covenantor if, before the time for performance, he destroys the property to be conveyed, or puts it out of his power to do the act which is the subject of the covenant. *Hopkins v. Young*, 11 Mass. 306. See also 16 Id. 161. Where A. covenants to pay a specific sum for a slave or return her on or before a given time, and the slave dies before that time, he is liable on his covenant, if it be found that her death was caused by his cruel and unnatural treatment. *Mann v. Trabue*, 1 Mis. 709. Where a covenant is to indemnify against a debt or duty already incurred, it is not broken without suit brought against the covenantee. But where the debt or duty may accrue in future, a liability to suit is a breach of the covenant. *Lewis v. Crackett*, 3 Bibb, 197. A covenant by one party, holding a bond and mortgage against another, that for a certain time he will not seek, have, or receive, any other indemnification or satisfaction, than what may be derived from the mortgaged premises, is broken by a suit on the bond, commenced within the limited time. *Hustons v. Winans*, 5 Wend. 163. Though the same covenant may contain various stipulations, in their nature distinct, they are various covenants; and though there be but one stipulation, if it is broken at different times, different actions may be sustained for each breach. *Breckenridge v. Lee*, 3 Marsh, 449; *Davis v. Harrison*, 1 Id. 515. A covenantee may recover upon successive breaches of the covenant from time to time, as they occur. *Adams v. Essex*, 1 Bibb, 169.

(1) A general demurrer to a declaration containing one count on breach of covenant of warranty, and another on breach of covenant of warranty and of seisin, was overruled. *Sweet v. Patrick*, 2 Fairf. 179.

nant, because B.'s right of suing A. for a breach of this covenant *depends* upon the prior performance, or that which the law considers equivalent to performance, of the act of the covenant to be performed by B., and the prior act or covenant, on the part of B. being in the nature of a condition precedent, is technically termed a condition precedent, the performance whereof must be shown by B. in order to entitle him to recover damages against A. It may be remarked, that if the act, undertaken to be done, is dispensed with by the other party, it is sufficient so to state it on the record. Per *Buller, J.*, in *Hotham v. East India Company*, Doug. 278. See an averment to this effect in *Jones v. Barkley*, Doug. 684.

The following cases will illustrate the nature of a dependent covenant and condition precedent, (1) and the reader may collect from them the rules by which the courts have guided their decisions in this subject.

*The plaintiff declared, (c) that defendant by deed poll (2) [*523] agreed with plaintiff, that he, defendant, would accept of the plaintiff a quantity of South Sea stock, so soon as the receipts should be delivered out by the company, and would pay for the same such a sum on a certain day, next after the date of the deed, and then averred that defendant did not pay the money at the day; on general demurrer, because the plaintiff had not averred an assignment of the stock, or a tender; *Pratt, C. J.*, delivering the opinion of the court, said, that the intent of the parties appeared to be, that one should have the money, and the other the stock; and not that either should perform his part of the agreement, and lay himself at the mercy of the other for the equivalent; that this was not a covenant entered into by both parties, upon which each would have his mutual remedy, but it was the deed poll of

(c) *Lock v. Wright*, Str. 569.

(1) Where there are dependant covenants, a party cannot recover without averring and proving, either that he performed, or was ready and willing to perform, his part. *Harrison v. Taylor*, 3 Marsh. 168; *Fannen v. Beauford*, 1 Bay, 237; *Hounsford v. Fisher*, Wright, 580; *Halloway v. Davis*, Ib. 130; *Pollard v. McClain*, 3 Marsh. 25; *Gardiner v. Carson*, 15 Mass. 508; *Goodwin v. Lynn*, 4 Wash. C. C. 714; *Leonard v. Bates*, 1 Blackf. 175; *Bank of Columbia v. Hagner*, 1 Pet. 455; *Bean v. Atwater*, 4 Conn. 3; *Robb v. Montgomery*, 20 Johns. 15; *Parker v. Parmele*, Ib. 130; *Timney v. Ashley*, 15 Pick. 552; *West v. Emmons*, 5 Johns. 179; *Dakin v. Williams*, 11 Wend. 67; *Webster v. Warren*, 2 Wash. C. C. 456; *Jones v. Sommerville*, 1 Port. 437; *Smith v. Christmas*, 7 Yerg. 565. Or that he was prevented by the other party. *Fannen v. Beauford*, 1 Bay, 237; *Clendennen v. Paulsel*, 3 Mis. 230.

Where the covenants are dependent, it is a good plea in bar, that the party seeking performance has not performed, or offered to perform, the covenants on his part. *Parker v. Parmele*, 20 Johns. 130. *Aliter*, where the covenants are independent. *McC Campbell v. Miller*, 1 Bibb, 453; *Webster v. Warren*, 2 Wash. C. C. 456. Where one covenants to do a certain act, and before the time of performance, disables himself from so doing, he is thereupon liable for a breach of the covenant. *Heard v. Bowers*, 23 Pick. 455. But the rule does not apply where he becomes involuntarily unable to perform his stipulations, if he can remove the disability before the day of performance. Ib.

The owner of land conveyed it, with a covenant against incumbrances, the purchaser verbally agreeing to indemnify him against all claims owing to an adjoining well being placed partly on the land conveyed. Held, that the liability of the grantor to pay for said well being merely personal, was not a breach of said covenant. *Wild v. Nichols*, 17 Pick. 538.

(2) In *Strange's* statement of the case, p. 569, it is said to have been by writing indented; but it is evident from the reasoning of the court, even in *Strange*, (see p. 571,) that it was a deed poll. See also *S. C.* 8 Mod. 40, where it is expressly stated to have been an action of covenant on a deed poll.

the defendant only; and, therefore, though upon delivery or tender of the stock, the plaintiff would have his remedy for the money, yet the defendant, on the other side, upon payment of the money, would not have any remedy to compel the delivery of the stock, and therefore he should not be obliged to pay the money until the consideration for which it was payable was performed: that the word *pro* would either be a condition precedent or subsequent, as would best answer the intent of the parties; and in this case it must be a condition precedent, because otherwise the intention of the defendant to have the stock for his money, could never take effect. Judgment for defendant. *Pratt*, C. J., observed also, that the difference between a mutual covenant and a deed poll was taken and allowed in *Pordage v. Cole*, 1 Saund. 320, (d) where the court were of opinion that the defendant had his remedy; "otherwise (says the book) it would have been, if the deed had been the words of the defendant only."

In covenant against a lessee for not repairing, (e) the declaration stated, that by indenture the defendant covenanted to repair the demised premises, and at the end of the term to surrender up the same in good repair, the lessor (the plaintiff) finding timber sufficient for such repairs: the breach assigned was for not repairing; plea, that the plaintiff did not find timber sufficient; on demurrer, it was adjudged that the finding the timber was a thing in its nature necessary to be done

first, and therefore a condition precedent, the performance of [*524] which ought to have been averred in the *declaration. So

where in a covenant on an indenture of lease for seven years, for non-payment of rent, (f) it appeared that the lease contained the usual covenants, that the lessee should pay rent, repair, &c., and proviso, that if the lessee, at the end of the first three or five years, should be desirous of quitting, and should give six months' notice thereof, before the expiration of the first three or five years, then, from and after the expiration of the first three or five years, and payment of all rents, and performance of the covenants on the part of the lessee, the indenture should be void; it was holden, that the payment of rent, and performance of the other covenants, by the lessee, were conditions precedent to the lessee's determining the term at the end of the first three years, and that merely giving six months' notice, expiring with the first three years, was not sufficient for that purpose; Lord *Kenyon*, C. J., observing, that it had frequently been said, and common sense seemed to justify it, that conditions were to be construed to be either precedent or subsequent, according to the fair intention of the parties, to be collected from the instrument; and that technical words, if there were any to encounter such intention, (and there were not in this case,) should give way to that intention: that it was impossible to read this lease, without seeing, that the parties intended, that the tenant should do every thing required of him, before he could put an end to the lease. So where by a policy of assurance against fire it was stipulated, (g) that

(d) See *Matlock v. Kinglake*, 10 A. & E. 50; 2 P. & D. 346.

(e) *Thomas v. Cadwallader*, Willes, 496.

(f) *Porter v. Shepherd*, B. R. E. 36 Geo. III., affirming judgment of C. B., 6 T. R. 665.

(g) *Worsley v. Wood*, in error from C. B. B. R. T. 36 Geo. III., 6 T. R. 710.

the assured sustaining any loss by fire should procure a certificate of the minister, churchwardens, and of some reputable householders of the parish, importing that they knew the character of the assured, and believed that he had sustained the loss by misfortune, and without fraud; it was holden, that the procuring such a certificate was a condition precedent to the right of the assured to recover, and that it was immaterial that the minister and churchwardens wrongfully refused to sign the certificate; *Lawrence, J.*, observing, that the cases were uniform to show, that if a person undertakes for the act of a stranger, that act must be done. See *Routledge v. Burrell*, 1 H. Bl. 254, and *Oldman v. Bewicke*, 2 H. Bl. 577, n. (a) to the same effect. If A. be bound to B. to pay ten pounds to C., A. tenders to C. and he refuseth, the bond is forfeited. 1 Inst. 208, b. If a man be bound in an obligation, with condition to enfeoff B., (who is a mere stranger,) before a day, the obligor doth offer to enfeoff B. and he refuseth, the obligation is a forfeit, *for the obligor hath taken upon him to enfeoff him*, and his refusal cannot satisfy the condition, because no feoffment is made. 1 Inst. 209, a. So where in covenant on a charter-party, (h) to recover the value of a ship against defendant, to whom she had been *let [*525] to freight, for the purpose of carrying government stores to America, the declaration stated a covenant, that "if the ship were taken during the time she was in his Majesty's service, and it should appear to a court-martial that the master and ship's company had made the utmost defence they were able, the value of the ship should be paid by the defendant;" and then averred a capture, the master and ship's company having made the utmost defence they were able, and that it would have appeared to a court-martial, &c., if the defendant had thought proper to have had an inquiry made in that respect by a court-martial. The defendant pleaded, that it had not appeared, &c. On demurrer to the plea, the court gave judgment for the defendant; observing, that the charter-party annexed an express condition, that it should appear to a court-martial, &c., and therefore the plaintiff was bound to show that it had appeared, or that it arose from the default of the defendant that it had not. So where in covenant on a charter-party of affreightment, (i) whereby the plaintiff let his ship to the defendant to freight from Liverpool to W., and back to Liverpool, and agreed that the master should take on board a cargo of salt to W., and after delivering the same there, should take on board there a cargo of deals; in consideration of which the defendant agreed to pay the plaintiff—"in full for the freight for the said voyage, at the rate of so much per standard hundred for deals *delivered at Liverpool*, &c.; the freight to be paid, one-fourth in cash on her arrival, and the remainder by an acceptance on London at four months' date." The declaration then averred, that the ship, after carrying the cargo of salt to W., took on board there a cargo of deals, &c., and proceeded on her voyage towards Liverpool, &c., and whilst the ship was so proceeding, &c., and after she had performed a great part of her voyage, but before her arrival at Liverpool, on, &c., the ship was, by the force of

(h) *Davis v. Mure*, B. R. M. 22 Geo. III., cited in argument in *Hotham v. East India Company*, 1 T. R. 642.

(i) *Cook v. Jennings*, 7 T. R. 381.

the winds and waves, wrecked, and thereby became incapable of proceeding any further on the voyage, by reason whereof the deals obliged to be put on shore for the preservation thereof; "which deals, so unladen, the defendant afterwards accepted, and sold the same to his own use, whereby he became liable to pay to the plaintiff a proportionable part of the freight for the carriage of the deals from W. to Liverpool, &c.;" with an averment that a proportionable part amounted to such a sum. And the breach assigned was, in the non-payment of that sum. The defendant pleaded, that no part of the cargo of deals was delivered at Liverpool, according to the form and effect of the said charty-party. On special demurrer to the plea, assigning for cause, that the defendant had not confessed and avoided or denied the matter alleged in the declaration, but had attempted to put in issue collateral matters; it

was holden, that the plea was good: *Lawrence, J.*, observing, [*526] that when a ship *is driven on shore, it is the duty of the master either to repair the ship, or to procure another, and having performed the voyage, he is then entitled to his freight; but he is not entitled to the whole freight, unless he perform the whole voyage, except in cases where the owner of the goods prevents him; nor is he entitled *pro rata*, unless under a new agreement. Perhaps the subsequent receipt of these goods by the defendant might have been evidence of a new contract between the parties; (1) but here the plaintiff has resorted to the original agreement, under which the defendant only engaged to pay in the event of the ship's arrival at Liverpool. That event has not happened, and therefore the plaintiff cannot recover in this form of action.

By charter-party the freighter covenanted to pay to the owner freight at and after the rate of so much per ton, per month, for the term of six months at least, and so in proportion for less than a month, or for such further time than six months as the ship might be detained in the service of the freighter, until her final discharge, or until the day of her being lost, captured, or last seen or heard of: such freight to be paid to the commander of the ship in manner following: *viz.* so much as might be earned at the time of the arrival of the ship at her first destined port abroad, to be paid within ten days next after her arrival there, and the remainder of the freight at specific periods: it was holden, (k) that this constituted one entire covenant, and that the arrival of the

(k) *Gibbon v. Mendez*, 2 B. & A. 17.

(1) The principal cases on the subject of apportionment and freight, are, *Lutwidge v. Grey*, D. P. 23 Feb. 1733; *Luke v. Lyde*, 2 Burr. 882, and 1 Bl. R. 190; *Baillie v. Medigliani*, Park's Ins. 53; but not reported elsewhere. These three cases are stated at length in Abbott on Shipping. The case of *Luke v. Lyde*, was much commented upon in *Cook v. Jennings*, 7 T. R. 381, and in *Mulloy v. Backer*, 5 East, 316. See further on the same subject, *Ward v. Felton*, 1 East, 507; *Hunter v. Prinsep*, 10 Id. 378; *Liddard v. Lopes*, Ib. 526; *Ritchie v. Atkinson*, post, 531; *Christy v. Row*, 1 Taunt. 300; *Mitchell v. Darthez*, 2 Bingh. N. C. 555. "It is a settled rule, even in the case of deeds, that if there be a condition precedent in a deed, and it is not performed, and the parties proceed with the performance of other parts of the contract, although the deed cannot take effect, the law will raise an implied assumpsit. Upon this ground, freight is daily recovered in actions of assumpsit on implied promises, substituted for the charter-parties by deed." Per Cur. in *Burn v. Miller*, 4 Taunt. 748. But see a limitation of this remark, in *Schack v. Anthony*, 1 M. & S. 573. See also *Pinder v. Wilkes*, 5 Taunt. 612.

ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight; and that the ship having been lost on her outward voyage, the owner was not entitled to recover freight at so much per calendar month to the day of the loss.

From the preceding cases it may be collected, that where- [*527] ever there is a condition precedent on the part of the plaintiff, performance, or that which is equivalent to performance,(1) must be alleged and proved, otherwise the action cannot be supported; and, consequently, the defendant may plead non-performance of the condition precedent, in bar of the plaintiff's action; or, if the averment of performance be entirely omitted, or imperfectly made,(2) the defendant may take advantage of it on demurrer.(3) If made, but imperfectly, defendant must demur specially.(4)

(1) *Varley v. Manton*, 9 Bingh. 365.

(1) "Where a person, by doing a previous act, would acquire a right to a debt, or duty, by a tender to do the previous act, if the other party refuse to permit him to do it, he acquires the right as completely as if it had actually been done." Arg. *Jones v. Barkley*, Doug. 685, cited by Lord *Ellenborough*, C. J., delivering judgment in *Smith v. Wilson*, 8 East, 443. So if the plaintiff has been discharged by the defendant from the performance of the condition, the action may be maintained. See *Jones v. Barkley*, Doug. 684, recognized in *Laird v. Pim*, 7 M. & W. 474. So where the plaintiff has been prevented from the performance by the neglect and default of the defendant. 1 T. R. 645.

(2) As to what will be sufficient averment in this respect, see *Jones v. Barkley*, Doug. 684.

(3) In dependent covenants, when the plaintiff has performed a part for which he can have no other remedy than by an action on the covenant, he may sue as if the covenants were independent. *Lewis v. Weldon*, 3 Rand. 71. Covenants are to be construed dependent or independent, according to the intention of the parties and the good sense of the case, and technical words should give way to such intention. *McCrelish v. Churchman*, 4 Rawle, 26; *Goodwin v. Lynn*, 4 Wash. C. C. R. 714; *Corneier v. Graham*, 1 Ohio, 154; *Tileston v. Newhall*, 13 Mass. 410; *Thompkins v. Elliott*, 5 Wend. 496; *Baruss v. Madan*, 2 Johns. 145.

Where A. covenanted to convey to B. a newspaper establishment, and not to publish a newspaper in the same place while he continued as publisher, under a penalty, and in the same instrument B. covenanted to pay for the same the sum of \$3,500; in covenant by B. against A., it was held, that the covenants were dependent. *Dakin v. Williams*, 11 Wend. 67. Courts lean against construing covenants independent. Per *Nelson, J.*, *Ib.* A covenant to sell a house for a certain sum, the defendant covenanting to pay when the house is finished and the key delivered, with a satisfactory deed free of incumbrances, is dependent and conditional. *Howland v. Leach*, 11 Pick. 151. Under an agreement that defendant should have certain land, for which plaintiff was to pay in three instalments, the deed to be executed on the last payment, it was held, that the covenant to pay the first two instalments was independent, but that the agreement of defendant to pay the last, and of plaintiff to execute the deed, were mutually dependent and conditional. *Kane v. Hood*, 13 Id. 281. A bond, with condition indorsed, that obligee shall remove incumbrances before payment, is a dependent covenant. *Hodges v. Holeman*, 1 Dana, 54. See also, *Johnson v. Wygant*, 11 Wend. 48; *Egbert v. Chew*, 2 Green, 447; *Trimble v. Green*, 3 Dana, 355; *Brown v. Lowens*, *Ib.* 473; *Watchman v. Crook*, 5 Gill & J. 240; *Pence v. Smock*, 2 Blackf. 316; *Finley v. Boehme*, 3 Gill & J. 42; *Courcier v. Graham*, 1 Ohio, 154.

Mutual covenants are to be construed as dependent or independent, according as it may best concur with the design of the whole instrument, and effectuate the intention of the parties. *Wright v. Smyth*, 4 Watts & Serg. 527; *Adams v. Williams*, 2 Id. 227. The intention of the parties is to be discovered rather from the order of time in which the acts are to be done, than from the structure of the instruments or the arrangement of the covenants. *Goodwin v. Lynn*, 4 Wash. C. C. 714; *Speake v. Shepperd*, 6 Har. & J. 85; *Gardiner v. Carson*, 15 Mass. 504; *Hopkins v. Young*, 11 Id. 304. Where one act is to

The reader who is desirous of pursuing this branch of the subject further, is referred to the analogous cases under tit. "Assumpsit," ante, p. 112. To the cases there abridged, the following may be added:

be done by one party before another act, which is the consideration of it, is to be done by the other, the covenants to do these acts are independent. *Tileston v. Newell*, 13 Mass. 410; *Couch v. Ingersoll*, 2 Pick. 300; *Goodwin v. Holbrook*, 4 Wend. 377; *Cunningham v. Morrell*, 10 Johns. 203; *Barrusa v. Madan*, 2 Id. 145; *Cradock v. Aldridge*, 2 Bibb, 15; *Mullins v. Cabiness*, Minor, 21.

In dependent covenants, when the plaintiff has performed a part, for which he can have no other remedy than by an action on the covenant, an action may be maintained in the same manner as if the covenants were independent. *Lewis v. Weldon*, 3 Rand. 71. Where mutual covenants go only to a part of the consideration, and a breach of that part may be paid for in damages, the covenants are regarded as independent. *Bennet v. Pixley*, 7 Johns. 249; *Payne v. Bettsworth*, 2 Marsh. 429; *Obermyer v. Nichols*, 6 Binn. 166. Where there are mutual covenants, and one party has received the principal part of the consideration for the engagements on his part, the covenants of the parties will be construed to be independent. *Tomkins v. Elliott*, 5 Wend. 496; *Tileston v. Newell*, 13 Mass. 410; *Muldron v. McClelland*, 1 Litt. 1. If, by the terms of a contract, money is to be paid by a day certain, which is to happen or may happen before the covenants on the other part are to be performed, the covenants are independent. *Couch v. Ingersoll*, 2 Pick. 300; *Seers v. Fowler*, 2 Johns. 272; *Cunningham v. Morrell*, 10 Johns. 203; *Taylor v. Rhea*, Minor, 414; *McCoy v. Bizbee*, 6 Ham. 312. Where covenants are mutual and independent, either party may recover damages from the other, for an injury which he may have sustained by the nonperformance; *Cook v. Johnson*, 3 Mis. 239; without proving a compliance with every stipulation on his part. *Morrison v. Galloway*, 2 Har. & J. 467; *Benson v. Hobbs*, 4 Id. 285; *Payne v. Bettsworth*, 2 Marsh. 429; *Bean v. Atwater*, 4 Conn. 3; *Gibson v. Gibson*, 15 Mass. 112; *Goodwin v. Holbrook*, 4 Wend. 377; *Manning v. Brown*, 1 Fairf. 49; *Obermyer v. Nichols*, 6 Binn. 164.

A covenant, with penalty annexed, will always be considered as independent. *Freeland v. Mitchell*, 8 Mis. 487.

A defendant agreed, under seal, to give the plaintiff, for a certain sum, an interest in a contract; and the plaintiff agreed to give the defendant a power of attorney to transact all business relating to the contract. Held, that the covenants were independent, and that the plaintiff need not show that he had given or offered the power of attorney. *Quinlan v. Davis*, 6 Whart. 69.

A. and B. purchased an estate, which was incumbered by liens to the whole amount of the purchase-money. Each entered into a separate covenant to the other, to pay one-half of these liens, specifying which each was to pay. B. failed to pay; by reason of which the property was sold by the sheriff, and purchased by A. Held, that the covenants were mutual and independent, and that A.'s right of action against B. was not affected by the fact that he had not paid the entire amount which he had covenanted to pay, nor by the fact that B. had not covenanted to pay the whole amount of the lien upon which the property was sold, a part of it having been excluded, by mistake in the calculation, and that the measure of damages in such case was the difference between what A. paid for the whole property, and what he and his covenantor had agreed to give for it. *Bredin v. Agnew*, 3 Watts & Serg. 300.

Where each party covenants to do concurrent acts, and the covenant of one party rests upon a consideration independent of the covenant of the other, the covenants are independent, and the failure of one to perform is no excuse for the non-performance of the other. *Day v. Essex Bank*, 13 Wend. 97.

The general rule is, that where one party agrees to pay to the other certain sums, at different fixed times, in consideration of which the other agrees to perform an act, leaving the time of performance indefinite, the covenants are independent. But if the payment of any one of the sums is made to depend upon the performance of any act by the other party, as it respects that one they are dependent, while, as it respects all the others, they remain independent. *Babcock v. Wilson*, 5 Shep. 372.

Where reciprocal covenants have been contracted, and one party has partially performed the covenants on his part, and has no other remedy for compensation therefor but by action on the covenant, in such case, whatever be the form of the contract, and even though the covenants are expressly dependent in form, and though they are pleaded as dependent covenants, yet they shall be held independent covenants, and the plaintiff shall recover compensation for his part performance. *Bream v. Marsh*, 4 Leigh, 23.

Hesketh v. Gray, Say. 185; *Collins v. Gibbs*, 2 Burr, 899; *Campbell v. French*, 6 T. R. 200. See also *Smith v. Wilson*, 8 East, 437; *Storer v. Gordon*, 3 M. & S. 308.(1)

(1) A covenant to pay money on a certain day, if the covenantee would deliver possession of certain land to the covenantors on a prior day, is a dependent covenant. *Bailey v. White*, 3 Ala. 330. In *Heaton v. Kemper*, 2 Scam. 367, on the question of performance of dependent covenants, it was held that what the plaintiff or defendant was bound to do, was a matter of fact for the jury to determine from the covenant and the evidence adduced by the parties, and that it was not matter of law for the court.

Where A. covenants to give B. a piece of ground and the privilege of the house on it, for him and his wife to use in attending to their affairs and those of A., and in consideration of the use and occupation of the house and lot, B. covenants to keep the house in good order, and have the cooking and washing of A. done, A. to find three-fourths of the provisions, and B. one-fourth, the covenants are dependent and concurrent. *Humphries v. Goulding*, 3 Pike, 581. A. covenanted to build and complete a house for B. by the first of April, 1842, and B. covenanted in the same deed to pay \$2500, when the house was completed. Held, that the latter was a dependent covenant, and that A. could not recover on the covenant unless he showed that the house was completed by the first of April. *Clayton v. Blake*, 4 Ired. 497. A. covenanted to deliver bacon to B., at a certain time and place, "for and in consideration of which bacon when delivered," B. was to pay so much a pound. Held, that these terms implied that the delivery and payment were to be simultaneous acts; that the covenants were dependent; and that neither party could maintain an action without averring performance, or a readiness and offer to perform the covenants, on his part at the time and place specified. *Dryden v. Lewis*, 5 Dana, 138.

A covenant by a vendee to pay the purchase-money, and a covenant by the vendor to convey "upon" the payment of the purchase-money, are dependent. *Adams v. Williams*, 2 Watts & Serg. 227; *Low v. Marshall*, 5 Shep. 232; *Lawrence v. Dole*, 11 Verm. 549. A. and B. entered into an agreement under seal, commencing with these words: "We, the undersigned, do hereby agree and bind ourselves in the sum of two thousand dollars to fulfil the following contract;" A., on his part, agreed to sell and convey to the defendant, by lawful title, a certain tract of land; and B., on his part, agreed to give in exchange therefor \$5000, of which \$3000 were to be paid in real estate, and the balance in cash at stated periods. Held, that the \$2000 were to be regarded as a penalty to secure the performance and to cover the actual damage, and not as liquidated damages; that it was no more than an agreement to sell A.'s land to B. for \$5000; that the act to be done by each, constituted the entire consideration of the covenant on the part of the other; that the conditions were therefore mutual and dependent; and that A. could not maintain an action for the penalty, without averring and proving performance or something equivalent thereto, or that he was prevented and discharged from performance by the act of the defendant. *Law v. House*, 3 Hill, S. O. 268. Where the acts to be done are simultaneous, and each the consideration of the other, the covenants are dependent. *Hawnsford v. Fisher*, Wright, 130; *Parker v. Parmele*, 20 Johns. 130; *Dukin v. Williams*, 11 Wend. 67. A covenant by one to deliver to another a good and sufficient deed of land on a certain day, and a covenant by that other to pay for the same, on the same day, a certain sum of money, are dependent covenants. *Green v. Reynolds*, 2 Johns. 207; *Jones v. Gardner*, 10 Id. 266; *Gazely v. Price*, 16 Id. 293; *Robb v. Montgomery*, 20 Id. 15; *Sprigg v. Albin*, 6 J. J. Marsh. 161; *Passmore v. Moore*, 1 Id. 591.

The plaintiff covenanted to sell a house to the defendant for a certain sum, the defendant covenanting to pay the plaintiff that sum on the day when the house should be finished, and the key delivered to the defendant, with a satisfactory deed and title, free from all incumbrances. Held, the covenants were dependent, and that the plaintiff was not bound to make an unconditional tender of a deed, unless the defendant was willing to accept it, and pay the purchase-money. *Howland v. Leach*, 11 Pick. 151. Where, by the agreement, payments are to be made as the work proceeds, but the whole consideration is not to be paid until the whole work has been performed, the covenants are not independent. *Cunningham v. Morrell*, 10 Johns. 208. But see *Seers v. Fowler*, 2 Id. 272; *Havens v. Bush*, 2 Id. 387. An obligation for the payment of money on which a condition is indorsed that the obligee shall remove all incumbrances from certain property before the obligor shall be compelled to pay, is a dependent covenant. *Hodges v. Holman*, 1 Dana, 54. On a contract for the delivery of stock, the delivery and payment of the money are dependent covenants. *Green v. Reynolds*, 2 Johns. 209, per *Kent*, J.

Having thus endeavoured to illustrate the nature of conditions precedent, I shall proceed to the next object of consideration, viz. concurrent acts of covenants:

Concurrent Acts.—Where reciprocal acts or covenants are to be performed by each party at the same time, they are technically termed concurrent acts or covenants; and in this case, as well as in the case of dependent covenants, one party cannot maintain an action against the other, without averring performance, or that which is equivalent to performance, of the acts or covenants to be performed on the plaintiff's part.(1) As where, in covenant, the declaration stated(m) that by articles of agreement under seal, the plaintiff covenanted to convey to the defendant, on or before the 1st of August, 1797, a school-house and ground; and on or before the 24th of June, 1796, to surrender up the premises, and deliver over the scholars to the defendant; and, in consideration thereof, the defendant covenanted to pay the plaintiff a sum of money, on or before the 1st of August, 1797, [*528] with interest from the 1st of January *next preceding the said 1st of August; the plaintiff then averred, that he surrendered up the premises to defendant on the 24th of June, 1796, and delivered over the scholars; and although the plaintiff had well and truly performed every thing contained in the articles on his part, yet defendant had not paid the money and interest. The defendant pleaded, that he was ready to accept a conveyance of the premises, and at the same time to pay the money to the plaintiff, if he would have made such a conveyance, but the plaintiff did not, on or before the 1st of August, or at any time since, convey the premises to defendant. On demurrer, it was holden, that as the substance of the consideration to entitle the plaintiff to receive the money, was the making the conveyance, payment of the money could not be enforced, until the conveyance was made, or at least offered to be made by the plaintiff: *Lawrence, J.*, observing, that nothing could be inferred in favour of the plaintiff in this case from part execution of the contract; because, though the defendant was to be put in possession in June, 1796, and the money was to be paid in August, 1797, yet as that also was the time

(m) *Glazebrook v. Woodrow*, 8 T. R. 368, cited in 2 Bos. & Pul. N. R. 236, and in *Roe v. Poulton*, 2 B. & Ad. 832.

Where one agrees by covenant to pay a certain sum of money for the rent of land for one year, the covenant is dependent. *Thompson v. Gray*, 2 Stew. & Port. 60.

The reader is also referred to the following cases of dependent covenants: *Green v. Reynolds*, 2 Johns. Rep. 207; *West v. Emmons*, 5 Id. 179; *Jones v. Gardner*, 10 Id. 266; *Gazely v. Price*, 16 Id. 267; *Harding v. Kretsenger*, 17 Id. 293; *Hopkins v. Young*, 11 Mass. Rep. 302; *Tileston v. Newell*, 13 Id. 406; *Gardner v. Corson*, 15 Id. 500; *Couch v. Ingersoll*, 2 Pick. 292; *Northrup v. Northrup*, 6 Cowen, 296; *Dox v. Day*, 3 Wend. 356; *Goodwin v. Lynn*, 4 W. C. C. R. 714; *Bank of Columbia v. Hagner*, 1 Peters' Rep. 464; *Lewis v. Weldon*, 3 Randolph, 71; *Mason v. Chambers*, 4 Litt. 253; *Conn v. Lewis*, 5 Id. 66; *Alexander v. Mann*, 6 Monroe, 360; *Morford v. Mastyn*, Ib. 612.

(1) A covenant to convey land, without specifying time, and a covenant to pay therefor so much in hand and so much at a future day, are concurrent. *McCoy v. Bixbee*, 6 Ohio, 312. Where there are mutual covenants, and defendant has received the principal part of the consideration for his engagement, the covenants will be construed independent. *Tompkins v. Elliot*, 5 Wend. 496. See also *Estil v. Jenkins*, 4 Dana, 75; *McCord v. Tomlin*, 3 Id. 144.

fixed for the execution of the conveyance, it was plain, that the defendant did not intend to part with his money until his title was secure. So where A. covenanted that he would, on or before a certain day, ⁽ⁿ⁾ convey land to B., by such conveyance as B.'s counsel should advise; in consideration of which B. covenanted to pay A., at or upon the execution of the conveyance, a certain sum of money; it was holden, that A. could not maintain covenant against B. for non-payment of the money without showing that he had conveyed; or that he was ready at the day to have conveyed, what he had covenanted to do, and that he had done every thing which lay upon him to do for that purpose, but that he was prevented from so doing by some act, or omission, or neglect, on the part of the defendant. Secus, where the vendee by a distinct instrument, *e. g.* a promissory note, agrees to pay the money on a particular day. ^(o)

Mutual and Independent Covenants. ⁽¹⁾—Where covenants are mutual and independent, one party may maintain an action against the other for the breach of his covenants, without averring a performance of the covenants on his, the plaintiff's part; and the defendant cannot plead non-performance of such covenants on the part of the plaintiff in bar of the plaintiff's action. ^(p)

In covenant on articles of agreement, ^(q) whereby the plaintiff, who was master of a vessel, covenanted to make use of the same in the coal trade, for the defendant's service; and, among other things, covenanted that during twelve calendar months (the time the vessel was hired for) he would pay all seaman's wages yearly; in consideration whereof, the defendant covenanted to pay the plaintiff 42*l.* *every [*529] month during the year; the non-payment whereof was the breach assigned. To this the defendant pleaded, that the plaintiff did not pay the seamen according to his covenant; on demurrer to this plea, it was insisted by the plaintiff, that these were mutual covenants, and that though the words were "in consideration thereof," yet, in the nature of the thing, this could not be a condition precedent; for the payment of the seamen, by the plaintiff, was to be yearly; of the plaintiff, by the defendant, monthly; so that from the manner of covenanting it was impossible the performance of the act to be done by the plaintiff should be necessary to entitle him to an action against the defendant for not doing the act he had covenanted to do; and the case of *Thorp v. Thorp* was cited, where this distinction is taken by *Holt*, C. J., in the resolution of that case: Judgment for the plaintiff; Lord *Hardwicke*. C. J., observing, that there could not be any condition precedent here, for the reason given; and the resolution in *Thorp v. Thorp* was certainly good law; for these cases did not depend so much on the manner of penning the covenants, as the nature of them.

⁽ⁿ⁾ *Heard v. Wadham*, 1 East, 619.

^(o) *Spiller v. Westlake*, 2 B. & Ad. 155. [See *Couch v. Ingersoll*, 2 Pick. 292.]

^(p) *Dawson v. Myer*, Str. 712.

^(q) *Russen v. Coleby*, T. 7 Geo. II. B. R., 7 Mod. 236, Leach's edit.

(1) See notes, *ante*, 527.

It was agreed between plaintiff and defendant,^(r) by indenture, that in consideration of 500*l.* plaintiff should instruct defendant in bleaching materials for making paper, and permit defendant, during the continuance of a patent, which plaintiff had obtained for that purpose, to bleach such materials according to the specification. In pursuance of this agreement, the plaintiff, in consideration of 250*l.* paid, and of the further sum of 250*l.* to be paid to the plaintiff, in the manner hereinafter mentioned, covenanted that he would, *with all possible expedition*, instruct the defendant in the manner of bleaching the materials. The defendant, in consideration of the plaintiff's covenants, covenanted that he would, on or before the 25th of February, 1794, or sooner, in case plaintiff should before that time have sufficiently taught defendant in bleaching the materials, pay the plaintiff the further sum of 250*l.* In covenant on the preceding agreement, the breach assigned was, the non-payment of the 250*l.* Special demurrer, that it was not averred that plaintiff had instructed defendant in the manner of bleaching the materials. Lord *Kenyon*, C. J., delivering the opinion of the court, said, that whether these kinds of covenants be or be not independent of each other, must certainly depend on the good sense of the case. If one thing is to be done by a plaintiff before his right of action accrues on defendant's covenant, it should be averred, in the declaration, that such thing was done. "Where there are mutual promises, yet if one thing be the consideration of the other, there a performance is necessary, *unless a day is appointed for performance.*" Per *Holt*, C. J., *Salk.*

118. "If a day be appointed for the payment of the money, [*530] and the day is to happen before the *thing can be performed, an action may be brought for the payment of the money, before the thing be done," *ib.* 171. Upon the authority of these cases, the judgment of the court must be in favour of the plaintiff, if, upon the true construction of the deed, a certain day be fixed for the payment of the money, and the thing to be done may not happen until after. The plaintiff in this case covenants *with all possible expedition, not by any fixed time*, to instruct the defendant; and in consideration of the plaintiff's covenants, the defendant covenants, that he will, on or before the 25th day of February, or sooner, in case the plaintiff should before that time have instructed the defendant, pay him the further sum of 250*l.* The intent of the parties appears to be that the payment might be accelerated, but should not in any event be delayed. Judgment for plaintiff. N. In a subsequent case, in 8 T. R. 370, *Kenyon*, C. J., speaking of the preceding case of *Campbell v. Jones*, said, "The instruction to be given was not to be, and could not, in the nature of the thing, be performed at the same time with the payment of the money by the defendant, for which a certain time was limited, whereas no time was limited for giving instruction;" and *Lawrence*, J., in the same report, p. 374, observing on this case, said, "That the instruction might, consistently with the plaintiff's covenant, as well be given after as before the time specified for the payment of the money; and therefore it

(r) *Campbell v. Jones*, 6 T. R. 570, recognized in *Carpenter v. Creswell*, 4 Bingh. 409; 1 Mo. & P. 66.

was not necessary to be averred in an action to recover the money." I cannot dismiss the consideration of this subject, without taking notice of a class of cases, in which this principle has been established; viz. that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for a breach of which the party injured may be compensated in damages. The first of this class is the case of *Boone v. Eyre*,^(s) which was stated by *Lawrence, J.*, in *Glazebrook v. Woodrow*, 8 T. R. 373, as follows: The plaintiff had sold to the defendant an estate in Dominica, with the negroes, under the usual covenants for a good title, quiet enjoyment, and further assurance, in consideration of a sum in gross, and a certain annuity for lives, which the defendant covenanted to pay, "he, the plaintiff, well and truly performing all and singular the covenants, clauses, recitals, and agreements, in the said indenture of sale contained;" and in bar to an action of covenant for the arrears of the annuity, besides assigning breaches of specific and partial covenants, the defendant, by his fourth plea, pleaded, "that the plaintiff, at the time of making the said indenture, had not in himself full power, true title, and good and lawful authority, to bargain, sell, and release the said plantation and negroes, &c., in manner and form as in the said indenture mentioned." The court said, it *would be strange if [*531] such a defence were to be allowed, when if any one negro on the plantation were proved not to have been the property of the plaintiff, it would bar his action for the annuity. *Lawrence, J.*, having thus stated the case, proceeded to observe, that the judgment of the court went on the ground that, in the form the breaches were assigned, *the plea did not necessarily go to the whole of the consideration*; but if the plea had been, that the plaintiff had not any title to the plantation, he did not know that it would not have been held sufficient. *Le Blanc, J.*, observing upon the same case, said, "The substantial part of the agreement being the conveyance of the property in respect of which the annuity was to be paid, the court held it to be no answer to an action for the annuity, to say, that the plaintiff had not a good title in some of the negroes, which were upon the plantation: *because all the material part of the covenant had been performed*: and the plaintiff had a remedy upon the covenant for any special damage sustained for the non-performance of the rest; 8 T. R. 375. The case of *Boone v. Eyre* was recognized by Lord *Kenyon*, in delivering the opinion of the court, in *Campbell v. Jones*, 6 T. R. 572, 573, and stated to be another ground for giving judgment for the plaintiff in that case. And, in the case of *Hall v. Cazenove*, 4 East, 483, 484, *Lawrence, J.*, having stated *Boone v. Eyre* at length, applied the principle of the decision to the case then before the court. The doctrine laid down by Lord *Mansfield*, in *Boone v. Eyre*, 1 H. Bl. 273, n. and 6 T. R. 573, viz. "that where mutual covenants go to the whole of the consideration, on

(s) Reported, but imperfectly, in 2 Bl. R. 1312, and 1 H. Bl. 273, n. This case will be found among the paper books of *Ashurst, J.*, A. P. B., No. 41, *Dampier, M. S. S. L. I. L.*

both sides, they are mutual conditions, the one precedent to the other ; but where the covenants go only to a part, there a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent ;" was relied on in *Ritchie v. Atkinson*, 10 East, 295, and by *Tindal, C. J.*, in *Stavers v. Curling*, 3 Bingh. N. C. 368 ; 3 Scott, 740 ; and by *Littledale, J.*, in *Franklin v. Miller*, 4 A. & E. 605 ; and again by *Tindal, C. J.*, in *The Fishmongers' Company v. Robertson*, 5 M. & Gr. 197 ; 6 Scott's N. R. 56. In *Ritchie v. Atkinson*, the master and the freighter of a vessel of 400 tons mutually agreed in writing, that the ship, being every way fitted for the voyage, should with all convenient speed proceed to Petersburg, and there load, from the freighter's factors, a *complete* cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight for hemp 5*l.* per ton, for iron 5*s.* a ton, &c. ; one-half to be paid on right delivery, the other at three months. It was holden, that the delivery of a complete cargo was not a condition precedent, but that the master might recover freight for a short cargo delivered in London at the stipulated rates per ton, the freighter having his remedy in damages for such short delivery. In *Havelock v. Geddes*, 10 East, 555, the authority of *Boone v. Eyre* was recognized by Lord *Ellenborough, C. J.*, delivering the judgment of the court. And in *Davidson v. Gwynne*, 12

East, 389, where freight was covenanted to be paid in con-
 [*532] sideration of several *things, one of which was the sailing with the first convoy ; it was holden, that as the object of the contract was the performance of the voyage, which in this case had been performed, the sailing with the first convoy was not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured might be compensated in damages. It was holden also, in the same case, that the covenant for the right and true delivery of the goods was satisfied by the delivery of the entire number of chests, and that the deteriorated state of their contents afforded no answer to this action for the recovery of the freight, the defendant having a cross action to recover damages for that.(1) So where the plaintiff, as master of a South Sea whaler, covenanted with defendants, as owners, that he would proceed to the fishery and procure a cargo of sperm oil, &c., or as great a proportion as might be, under all circumstances, in his power to obtain ; would return to London, and at his own cost deliver the cargo ; would obey instructions ; be frugal of provisions, and not dispose of any of them without accounting for the same ; and would not smuggle or trade, or permit any on board to do so : the defendants covenanted, *on the performance of the before-mentioned terms and conditions* on the part of the plaintiff, to pay him a certain proportion of the net proceeds of the cargo ; it was holden,(t) that the plaintiff's covenants were independent, and that the performance of them was not a condition precedent to the plaintiff's right to recover on the covenants entered into by the defendant. But where in

(t) *Stavers v. Curling*, 3 Bingh. N. C. 255 ; 3 Sc. 740.

(1) See *Lesch v. Baldwin*, 5 Watts, 446 ; Abbott on Shipp. 266, 7th ed.

a memorandum of charter it was agreed, "that a vessel should proceed to Trieste and there load a full cargo, and being so loaded should proceed to a port in the United Kingdom, and deliver the same, upon payment of freight at a certain rate, &c.; *the vessel to sail from England on or before the 4th of February next*; and that the vessel should be addressed to the charterer's agents at the port of loading and discharge:" it was holden, that the sailing on or before the 4th of February, was a condition precedent.(u)

Assumpsit upon a charter(x) by the plaintiff to the defendant of a ship from London to Maderia and the Cape of Good Hope, and thence to Bombay and back; the plaintiff claiming a compensation in damages against the defendant, for not loading the ship with a cargo of cotton at Bombay. Instead of proceeding by the direct and usual course from the Cape to Bombay, the captain made a deviation to the island of Mauritius; and in consequence of such deviation, the defendant's agents at Bombay refused to find a cargo. The jury were directed to consider, whether the deviation was of such a nature and description as to deprive the freighter of the benefit of the contract into which he had entered; and if such was *their opinion, the defendant was [*533] excused, by the act of the plaintiff's captain, from furnishing a cargo. The jury determined the question in the affirmative, and found a verdict for the defendant; which the court refused to disturb.

Defendant by charter-party covenanted to load a ship at Jamaica with a complete cargo of sugar, and to pay freight for the same at the rate of 10s. 6d. per cwt. The agent of the defendant tendered to the captain a cargo, but insisted upon his signing bills of lading for it, at the rate of 10s. per cwt. The captain refused to take it on board on these terms. Lord *Ellenborough* held, that the defendant was liable for dead freight.(y)

By a charter-party a ship was described to be of the burden of two hundred and sixty-one tons, and the freighter covenanted to load a full and complete cargo: it was holden, that the loading of goods equal in number of tons to the tonnage described in the charter-party was not a performance of this covenant; but that the freighter was bound to put on board as much goods as the ship was capable of carrying with safety.(z) By a charter-party the freighter agreed to pay for the ship 200l. per month, for six months certain, and so in proportion for any longer time than she might be in his employ; the ship was to be kept in repair by the owner. Before the termination of the time repairs were necessary, which occupied twenty-eight days; it was holden, that the freighter was not entitled to deduct those days in calculating the period for which he was to pay freight.(a)

Money paid in advance for freight cannot be recovered back. *De*

(u) *Glaholm v. Hays*, 2 M. & Gr. 257; 2 Scott's N. R. 471; see *Wynne v. Wynne*, 2 M. & Gr. 8; 2 Scott's N. R. 278, and 615; *Richards v. Hayward*, 2 M. & Gr. 574; 2 Scott's N. R. 670.

(x) *Freeman v. Taylor*, 8 Bingh. 124.

(y) *Hyde v. Willis*, 3 Campb. 202.

(z) *Hunter v. Fry*, 2 B. & A. 421.

(a) *Ripley v. Seafie*, 5 B. & O. 167.

Silvale v. Kendall, 4 M. & S. 37, recognized in *Saunders v. Drew*, 3 B. & Ad. 450.

For a further illustration of the subject of conditions, see *Blackwell v. Nash*, Str. 535; *Wyvill v. Stapleton*, Str. 615; *Martindale v. Fisher*, 1 Wils. 88, *ante*, p. 120. See also *Boone v. Eyre*, 2 Bl. R. 1312, and *Terry v. Duntze*, 2 H. Bl. 389. N. By R. G. H. T. 4 Will. IV., two counts upon the same charter-party are not to be allowed. But a count for freight upon a charter-party, and for freight *pro ratâ itineris*, upon a contract implied by law, are to be allowed.(1)

(1) In the within cited case of *Terry v. Duntze*, 2 H. Bl. 389, the covenant was that the plaintiff should finish a building by a given day, and the defendant was to pay the consideration by instalments as the building progressed, and according to a certain and specified state of advancement, and the remaining part of the consideration, when the building should be completed. But because two several sums of money were to be paid before the whole was performed, and when only a part of the service was performed, the court held the covenants independent, and that the plaintiff might maintain his action for the entire consideration without any averment of performance.

On the authority of *Terry v. Duntze*, the two following cases were decided in the Supreme Court of New York, but have been subsequently overruled, and *Terry v. Duntze* declared not to be law.

The plaintiff, in consideration of \$1555, covenanted to build a house for the defendant by the first of November, 1805. The defendant covenanted to pay the plaintiff \$750 on or before the first of May, 1805, and the residue of the \$1555 as soon as the house should be completed. Plaintiff averred a performance as to part of the building before the first of November, 1805, and a completion on the first of December, 1805, and alleged that the whole would have been performed at the time stipulated, but that divers alterations in the work were made, at the request and by the direction of defendant; in consequence of which, and without any neglect or default of the plaintiff, he was prevented, &c. On demurrer it was holden, that as the covenants were mutual and independent, the demurrer was not well taken. *Seers v. Fowler*, 2 Johns. Rep. 272.

The declaration stated, that plaintiff, in consideration of defendant's covenants, covenanted to make a certain road, before the first of November, 1805; and that defendant covenanted to pay the plaintiff, when the work should be done, in the manner agreed on, the sum of \$700, one-half in cash when the work should be done, and the other half in goods, to be paid in proportion as the work should progress, and the whole to be paid when the work should be done. The plaintiff then averred a true performance of the covenants on his part, according to the agreement, and that defendant had not paid the plaintiff the \$700 in the manner stated, &c. Defendant pleaded that plaintiff did not perform in the manner set forth, &c. A special verdict was found, that plaintiff did not perform according to agreement, and before the first of November, 1805, but that he labored on the road before that time, and that defendant paid one-half the \$700 in goods, as the work progressed, but had not paid the other half agreed to be paid in cash. The covenants were holden mutual and independent; and it was observed that the case stood on the same ground as *Seers v. Fowler*, the defendant having made his election to pay a part as the work advanced, and before it was finished. *Havens v. Bush*, 2 Johns. Rep. 387; *Wilcox v. Ten Eycke*, 5 Id. 78.

In *Cunningham v. Morrell*, 10 Johns. Rep. 203, which overrules the two preceding cases, the material covenant was as follows: "The party of the first part agrees to pay to the party of the second part for completing the whole of the aforesaid enumerated articles of covenant and agreement, the sum of \$6000, to be paid on or before the 20th of October, 1810, in instalments as the work progresses, in cash and stock of the said company, in the form and manner hereafter described, to wit, &c." The court observed, on a motion to set aside the report of referees, that this case could not be distinguished from the two preceding cases: but that the error in those cases, and in *Terry v. Duntze*, consisted in holding the covenants to be independent *throughout*, because a part of the consideration money was to be paid before the entire service was to be performed; that this might have been the case, if the contract in all those cases had not provided, that a certain part of the consideration was to be paid on the completion of the service, and which rendered the service *pro tanto* a condition precedent. And it was holden that as the road in this case was to be completed on or before the 20th of October, 1810, and as the defendant was to pay therefor the sum of \$6000, to be paid on or before that day, in

It remains only to add a similar observation to that which was made at the close of the third section, tit. "Assumpsit," *ante*, p. 120, *viz.* that there are not any precise technical words required to constitute a condition precedent, or a dependent or independent covenant; (1) whether a condition be precedent or subsequent, or a covenant be dependent or independent, must be gathered from the words and nature of the agreement, which is to be construed according to the intention of the parties, as far as that can be *collected from the instrument; (2) (to which [*534] intention, when once discovered, all technical forms of expression must give way, (b)) and however transposed the covenants may be, (c) their precedence must depend on the order of time in which the intent of the transaction requires the performance. When it is once established, that the stipulation of one party is a condition precedent to the performance of the covenant by the other party, it follows as a necessary consequence, that an action cannot be maintained, unless performance, or that which the law considers as equivalent to performance, be averred and proved. But where a right of action is once

(b) Per *Tindal*, C. J., in *Fishmongers' Co. v. Robertson*, 5 M. & Gr. 197; 6 Scott's N. R. 56.

(c) Per Lord *Mansfield*, C. J., in *Kingston v. Preston*, Doug. 690, 1.

instalments as the work progressed, the just construction of the contract was, that if the plaintiffs would go for the whole consideration money, they were bound to aver and show a performance of the whole work, and that if they went for a ratable part of the money, they were bound to show a ratable performance.

(1) See *Powers v. Ware*, 2 Pick. 456, where it was held that the covenants in an indenture of apprenticeship, that the apprentice shall serve and that the master shall instruct and provide for him, are independent; so that if the apprentice, by reason of incurable illness, becomes unable to perform his part, the master cannot, of his own authority, put an end to the contract.

The law requires no set form of words to create a covenant. It is sufficient if the language of a deed shows that the parties to it have concurred and assented to the performance or forbearance of a future act. *Marshall v. Craig*, 1 Bibb, 379; *Hallett v. Urglie*, 3 Johns. 44; *Bull v. Follet*, 5 Cow. 170; *Jackson v. Stewart*, 20 Johns. 85; *Wright v. Tuttle*, 4 Day, 321; *Mitchel v. Hazen*, 4 Conn. 508; *Kendal v. Talbot*, 2 Bibb, 614; *Randel v. Ches. & Del. Canal Co.*, 1 Harring. 233. Any agreement under seal is a covenant. *Randel v. Ches. & Del. Canal Co.*, 1 Harring, 151, 233.

(2) The intention of the parties must govern the construction of covenants, where that intention can be ascertained from the instrument itself; and where there is no ambiguity, parol evidence is inadmissible to explain it. *Easterly v. Heillam*, 1 M'Mullen, 469; *Foley v. Cowgill*, 5 Blackf. 18. Courts, in the construction of covenants, should favor that construction which is obviously most just. *Halloway v. Lacy*, 4 Humph. 468. The acts and declarations of the parties are to be considered in connection with the words of the instrument, in order to settle the meaning. *Colden v. Weaver*, 7 Watts, 466. A subsequent parol agreement, varying the terms of a sealed contract, cannot be tacked to it so as to make the whole a covenant between the parties. *Vaughn v. Ferris*, 2 Watts & Serg. 46. The remedy is on the subsequent agreement. *M'Voy v. Wheeler*, 6 Port. 201; *Raymond v. Fisher*, 6 Mis. 29. In construing a covenant it must be considered with the context, and must be performed according to the intention of the parties as derived from both. *Marvin v. Stone*, 2 Cow. 781; *Quackenboss v. Lansing*, 6 Johns. 49; *Watchman v. Crook*, 5 Gill & Johns. 239. A covenant is to be construed according to the plain and obvious meaning of the terms as they are used by the community at large. *Pavey v. Burch*, 3 Mis. 447. The whole of a covenant is to be taken together, and that construction is to be preferred which renders the whole operative. *Randel v. Ches. and Del. Canal Company*, 1 Harring. 154. Where, from the subject-matter of the covenant, it is the evident intent of the parties that they should be taken distributively, they may be so taken, although there be no words of severalty. *Ludlow v. M'Crea*, 1 Wend. 228; *Ernst v. Bartle*, 1 Johns. Cas. 319; *Walker v. Webber*, 3 Fairf. 65, 67.

vested in the plaintiff, (d) liable, however, to be divested by the non-performance of a condition subsequent, that is matter of defence only, and must be shown by the defendant. (1)

VIII. *Of the Pleadings :*

1. *Accord and Satisfaction.* p. 534.
2. *Eviction.* p. 536.
3. *Illegal Purpose.* p. 537.
4. *Infancy.* p. 537.
5. *Limitations, Stat. of.* p. 538.
6. *Nil Habuit in tenementis.* p. 538.
7. *Non est factum.* p. 541.
8. *Non infregit conventionem.* p. 545.
9. *Payment of Money into Court.* p. 546.
10. *Performance.* p. 546.
11. *Release.* p. 547.
12. *Set-off.* p. 548.

1. *Accord and Satisfaction.*

Accord with satisfaction is a good plea in discharge of damages for covenant broken. (2)

In covenant against an assignee for not repairing a house, (e) [*535] *the defendant pleaded accord between him and the plaintiff, and execution thereof, in satisfaction and discharge of the want of repairs ; on demurrer it was objected, that this action of covenant was founded upon deed ; which could not be discharged except by matter of as high a nature, and not by any accord of matter in *pais* : but it was resolved by the court, that the plea of the defendant was good ; and this distinction was taken ; where a duty accrues by the deed, and is ascertained at the time of making the writing, as by covenant, bill, or bond, to pay a sum of money ; in that case, the duty which is

(d) *Hotham v. East India Company*, 1 T. R. 638.

(e) *Blake's case*, 6 Rep. 43, b ; Cro. Jac. 99, S. C. by the name of *Alden v. Blague*.

(1) Where a party agreed on payment by another of certain sums to a third person to assign certain certificates, the covenants were held to be independent, and in a suit by the party, bound to assign a general averment of readiness to perform to be sufficient. *Slocum v. Despard*, 8 Wend. 615. Where there is an agreement to convey land and execute a deed on payment of money by instalments, if vendor waits till all are due, he must aver an actual tender of a deed, or offer to execute the same ; an averment of readiness is not sufficient. *Johnson v. Wygant*, 11 Wend. 48. Where one bound himself to labor for another for three years, and the other party agreed to provide him with a dwelling-house, and to pay him a certain monthly sum, it was held, in an action for negligence in the work, that the covenant to provide a house was distinct and independent. *Betts v. Perrine*, 14 Wend. 219. If in a deed of sale, with covenants, the sale appears on the face of the deed to be void, the dependent covenants are void, but not those which are collateral and independent. *Wade v. Mervin*, 11 Pick. 280.

(2) In *Snow v. Franklin*, Lutw. 358, to covenant for non-payment of rent, the defendant pleaded accord with satisfaction of the covenant, before any breach. The plea was holden bad on demurrer. See also *Kaye v. Waghorn*, 1 Taunt. 428, S. P. ; *Harper v. Hampton*, 1 Harr. & Johns. 622, 675. Accord and satisfaction is a good plea to an action for breach of covenant against incumbrances, and the lapse of twenty years is such a presumption as supports the plea. *Jenkins v. Hopkins*, 9 Pick. 543.

certain, takes its essence and operation originally and solely by the writing, and therefore it must be avoided by matter of as high a nature, although the duty be merely in the personalty.^(f)(1) But where no certain duty accrues by the deed, but a *wrong or subsequent default*, together with the deed, gives an action to recover damages, which are only in the personalty, for such wrong or default, accord with satisfaction is a good plea; as, in this case, the covenant does not give the plaintiff, at the time of making it, any cause of action, but the tort or default in not repairing the house, together with the deed, gives an action to recover damages for the want of reparation. The action is not founded merely on the deed, but on the deed, and the subsequent wrong; which wrong is the cause of action, and for which damages shall be recovered; and in every action where compensation is demanded, by way of damages only, accord executed is a good bar.

The plaintiff being seised in fee of a messuage and lands,^(g) one parcel of which, consisting of about one-third, lay contiguous to the land of one E. P., in consideration of a sum of money, and the covenant hereinafter mentioned, by indenture released the said parcel of land to E. P., in fee, who thereupon covenanted, for herself and her assigns, that she would, from time to time, and at all times thereafter, pay one-third part of all the taxes and assessments that should be imposed on the said messuage and land; the parcel of land came to the defendant by assignment, who neglected to pay the one-third part of the taxes for several years. The plaintiff having declared for a breach of covenant, in the years 1759, 1760, 1, 2, 3, 4, 5, and 6, the defendant pleaded, that in Michaelmas Term, 1766, he commenced an action against the plaintiff, and one R. J., for certain **tres-* [*536] *passes* committed by them upon the lands and goods of the defendant; and thereupon, afterwards, to wit, on the 22nd January, 1767, it was agreed, (not saying by deed,) that the defendant should put an end to his suit, and that plaintiff and R. J. should pay a certain sum of money, and costs: and that *the plaintiff should relinquish all damages and demands which he then had against the defendant*; the plea then averred, that the defendant did not further prosecute his suit against the plaintiff and R. J. and prayed judgment of the action.

(f) See next case.

(g) *Rogers v. Payne*, MSS.; 2 Wils. 276, *S. C.* briefly stated; recognized in *West v. Blakeway*, 2 M. & Gr. 729; 3 Scott's N. R. 199.

(1) A collateral agreement by parol cannot be pleaded to invalidate a claim arising upon a deed. Hence to debt on bond, conditioned for the performance of an award, a parol agreement between the parties to waive and abandon the award cannot be pleaded *Braddick v. Thompson*, 8 East, 344. See *Thompson v. Brown*, 7 Taunt. 656; *Sellers v. Bickford*, 8 Id. 31. The time of the performance of the condition of a bond may be enlarged by a parol agreement of the parties; and where certain acts were done by the obligor, amounting to a substantial, though not a literal performance of a condition, it was holden, that evidence of a parol agreement of the obligee, to waive any further performance was admissible. *Fleming v. Gilbert*, 3 Johns. Rep. 528. But where the condition of a bond is for the payment of money at a fixed day, evidence contradictory to, or varying such express condition, is inadmissible. *Wells v. Baldwin*, 18 Id. 45. See *Jordan v. Cooper*, 3 S. & R. 564; *Lewis v. Green*, Peck's Rep. 161; *Dearborn v. Cross*, 7 Cowen, 48.

On general demurrer to this plea, it was objected, that a covenant to pay money, which was by deed, could not be discharged without deed: and of this opinion was the court, and gave judgment for plaintiff. *Blake's case*, 6 Rep. 44, a, was cited.

Covenant by the heir in reversion, (h) against executor of tenant for life, for breach of covenant in testator, in not repairing the house demised; plea, that the testator, tenant for life, died on such a day, and that afterwards it was agreed, between the plaintiff and defendant, that defendant should quietly depart and leave possession to the plaintiff, and, in consideration thereof, the plaintiff agreed to discharge him from the breach; and averred, that within five days from the day of agreement, he left the house. On demurrer, the plea was holden to be bad; for the time was not fixed by the terms of the agreement, when the executor should depart; and, although it was averred that he departed within five days, yet that would not aid the first uncertainty; for the agreement was the foundation of the whole, which ought to be certain, when it should be performed.(1)

2. *Eviction.*

To covenant for rent arrear, the lessee may plead (i) that he was evicted, by the lessor, from the demised premises, and kept out of possession until after the rent in question became due; (2) for an *eviction* occasions a suspension of the rent: but a mere trespass will not: for where to covenant for rent arrear for a dwelling-house, (k) the defendant pleaded that the lessor had taken away a pent-house, fixed to the dwelling-house, and part of the demised premises; on demurrer, the court held, that the facts stated in the defendant's plea being a mere trespass, for which the defendant might have a remedy by action, would not operate as a suspension of the rent.(3) Although rent is suspended by an entry into part, (l) yet on a demise of a messuage with the appurtenances, the covenant *to repair* is not suspended by an entry into the back yard, the lessee remaining in possession of the messuage.(m)(4)

(h) *Samford v. Cutcliffe*, Yelv. 124; *Russel v. Russel*, 3 Lev. 189.

(i) *Dalston v. Reeve*, Lord Raym. 77.

(k) *Roper v. Lloyd*, T. Jones, 148, cited by Dunning, in *Hunt v. Cope*, Cowp. 242.

(l) *Dorrell v. Andrews*, Hob. 190.

(m) *Snelling v. Stag*, Bull. N. P. 165.

(1) Plea of satisfaction from a stranger is bad, because the stranger is not privy to the deed. *Olow v. Borst*, 3 Johns. Rep. 37.

(2) Where the rent is payable on a certain day, and the eviction happens before the day, the rent due until the eviction cannot be recovered. *Fitchburgh Cotton Manufacturing Company v. Melvin*, 15 Mass. Rep. 268.

(3) So where the landlord was guilty of a nuisance, by which the tenant was so much annoyed as to be obliged to leave the premises; yet, as the tenant might have caused the nuisance to be abated, it was held, that this was not a sufficient bar to covenant for the rent. *Pendleton v. Dystt*, 4 Cowen, 581. The judgment of the Supreme Court in this case was, however, reversed by the Court of Errors. *Dystt v. Pendleton*, 8 Id. 727.

(4) See *Fitchburgh Manuf. Co. v. Melvin*, 15 Mass 216.

It is to be observed, (n) that if a tenant would excuse *himself [*537] from payment of rent upon an eviction by a stranger, he must show that such stranger had a good title to evict him: and in order to give the plaintiff a proper opportunity of controverting such title, the defendant must show particularly how it arises; for, if it were sufficient to allege that the stranger had a good title, a single issue could not be taken on it; and as the legality, as well as the fact of the title, would be complicated together, the jury would be entangled with questions of law, which are proper for the consideration of the court only. To avoid this inconvenience, it is necessary that the title should be specified.(1)

3. *Illegal Purpose.*

All the decisions show, that at common law, a contract entered into to effect an illegal purpose is void, and cannot be enforced; and it makes no difference that the contract is under seal. Hence where it was pleaded to covenant for non-payment of rent under a lease, that the stat. 25 Geo. III. c. 77, makes it illegal to boil turpentine in any warehouse nearer to any other building than seventy-five feet, and that the premises demised were within that distance, and let for the express purpose of being so used; this was holden, (o) on demurrer, a good plea, although the lease did not mention the purpose for which it was executed, nor was it averred that the unlawful purpose had been carried into effect; for it having been pleaded that such was the purpose, it might have been proved by evidence *dehors* the lease, had issue been joined on the fact.

4. *Infancy.*

At the common law, infants are not bound by covenants which operate to their disadvantage. Hence a defendant may insist on his non-age, as a defence to an action of covenant: but this defence must be pleaded specially, and cannot be given in evidence on *non est factum*. The stat. 5 Eliz. c. 4, (p) whereby infants are enabled to bind themselves apprentices, has not altered the common law as to the binding force of covenants entered into by infants, at least where the covenants are collateral covenants. This point appears to have been doubted formerly, (q) but was finally established in the following case:—

In covenant against an apprentice for departing from the plaintiff's service (r) without license, within the time of his apprenticeship; *the defendant pleaded, that at the time of making the [*538] indenture he was within age. On demurrer, judgment was

(n) Per Lord *Hardwick*, C. J., in *Jordan v. Twells*, B. R. M. 9 Geo. II. MSS. and Ca. Temp. Hardw. 172.

(o) *The Gas Light and Coke Company v. Turner*, 6 Bingh. N. C. 324.

(p) Amended by stat. 54 Geo. III. c. 96.

(q) *Fleming v. Pitman*, Winch, 63; Hutt. 63, S. C., E. T. 21 Jac.

(r) *Gylbert v. Fletcher*, Cro. Car. 179; *Lilly's case*, 7 Mod. 15, S. P.

(1) See Rawle on Cov. 315-318, 2d ed.

given for the defendant; the court being unanimous that, although an infant might voluntarily bind himself an apprentice, and if he continued an apprentice for seven years, might have the benefit to use his trade; yet, neither at the common law, nor by stat. 5 Eliz. c. 4, did a covenant or obligation of an infant, for his apprenticeship, bind him; nor did any remedy lie against an infant, upon such covenant.⁽¹⁾ See a dictum to the same effect, with the exception of special custom, in *Whittingham v. Hill*, Cro. Jac. 494. By the custom of London, an infant may bind himself by covenant in an indenture of apprenticeship. 2 Rol. R. 305; *Code v. Holmes*, Palm. 361; *Anon.* 1 Lev. 12; *Horn v. Chandler*, 1 Mod. 271.

Covenant upon an indenture of apprenticeship(s) by the master against the father; breach, that the apprentice absented himself from the service; plea, that the son faithfully served until he came of age, and that he then avoided the indenture; it was holden, that this was no answer to the action.

5. *Limitation, Statute of.*

By stat. 3 & 4 Will. IV. c. 42, s. 3, "All actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, shall be commenced and sued within ten years after the end of this present session (1833,) or within twenty years after the cause of such action or suit." Covenant for rent arrear(t) or for non-payment of the arrears of a rent-charge,(u) may be brought within the time limited by the foregoing section, and is not limited to six years by 3 & 4 Will. IV. c. 27, s. 42.(x)

6. *Nil habuit in tenementis.*

If a lease be by indenture,(y) the lessor and lessee are concluded from avoiding the lease: and if an action be brought, and the plaintiff declare on the indenture,(z) and the defendant pleads that the lessor *nil habuit in tenementis*, the plaintiff, instead of replying the estoppel, may demur; because the estoppel appears on the record.

Covenant was brought by the assignee of a reversion for non-payment of rent:(a) it was stated in the declaration, that J. P., on a certain day, was seised in fee, and on the same day demised by indenture [*589] to the defendant; that J. P. afterwards assigned the *reversion in fee to the plaintiff. Plea, that before the demise and

(s) *Cuming v. Hill*, 3 B. & A. 59.

(t) *Paget v. Foley*, 2 Bingh. N. C. 679; *Hartshorne v. Watson*, 4 Bingh. N. C. 182, S. P. admitted.

(u) *Strachan v. Thomas*, 12 A. & E. 546; 4 P. & D. 229.

(z) See the observations of Wigram, V. C., on these two statutes in *Du Vigier v. Lee*, 2 Hare, 326.

(y) See stat. 7 & 8 Vict. c. 76, s. 4, *post*, tit. "Debt for Use and Occupation."

(z) *Palmer v. Ekins*, Str. 818; 11 Mod. 411; Leach's edit. Lord Raym. 1550, S. C.

(a) *Palmer v. Ekins*, *ubi supra*.

(1) But see *Powers v. Ware*, 2 Pick. 457, how far this affects the question of consideration in covenant against the master.

assignment of the reversion to the plaintiff, J. P. conveyed the premises to J. S. in fee, and traversed, that at any time after that conveyance J. P. was seised in fee. On general demurrer it was holden, that this plea was a special *nil habuit in tenementis*, which was no more to be allowed, where the demise was by indenture, than a general plea of that kind; and although the plaintiff was an assignee, yet he might take advantage of the estoppel, because it ran with the land.

In covenant by lessor on an indenture of lease for not repairing, (b) the lessee pleaded, that the lessor had an equitable estate only in the thing demised: on special demurrer, the plea was holden bad.

It is an universal rule that a tenant shall not be permitted to set up any objection to the title of his landlord, under whom he holds: this is not a mere technical rule, but one founded in public convenience and policy. Hence a lessee of land in the Bedford Level (c) cannot object to an action by his landlord for a breach of covenant, in not repairing, that the lease was void by the stat. 15 Car. II. c. 17, for want of being registered. The act meant, for the protection of titles, that leases and conveyances, within this district, should be registered, that every person interested in the inquiry might know in whom the title to such land was; and, therefore, as against persons who have been deceived by the omission to register, or even as against those who, without being deceived, knew that the act had not been complied with, and relied on it, the legal objection might prevail at law; but not as between the parties themselves to the lease, between whom the act was not meant to operate.

Covenant for rent was brought on an indenture of lease, (d) by the assignees of a lessor (a bankrupt;) the defendant pleaded, that the lessor *nil habuit in tenementis*; it was holden bad, on general demurrer. In like manner, it has been adjudged, (e) that an assignee of lessee under a lease by indenture cannot plead that the lessor did not demise.

It may be observed that, in the preceding cases, the want of title did not appear on the face of the declaration; and it seems that, in order to give a party the benefit of an estoppel, in all cases where it is necessary to set forth a title, a good title must appear on the face of the declaration; for in *Nokes v. Awdler*, Cro. Eliz. 373, 436, it was resolved, by all the judges, that although they would not intend a lease to be good by estoppel only, yet where it appeared on the face of the declaration to be so, the assignee of such a lease *could not [*540] maintain an action for the breach of any of the covenants contained in the lease. (f) So where covenant was brought against a lessee for years, (g) on an indenture of lease, and it appeared on the declaration, that the lease was executed by a tenant for life, that the plaintiff, the reversioner, who was then under age, was named in the lease, but that the lease had not been executed by him until after the death of the tenant for life, judgment was given for the defendant, on

(b) *Blake v. Foster*, 8 T. R. 487.

(c) *Hodson v. Sharpe*, 10 East, 350.

(d) *Parker and others, Assignees of Steel (a bankrupt), v. Manning*, 7 T. R. 537.

(e) *Taylor v. Needham*, 2 Taunt. 278; *Aveline v. Whisson*, 4 M. & Gr. 801; see *Cooch v. Goodman*, 2 Q. B. 580; 2 G. & D. 159.

(f) See Co. Litt. 352, 6; *Brydges v. Lewis*, 3 Q. B. 603; 2 G. & D. 763.

(g) *Ludford v. Barber*, 1 T. R. 86.

the ground that the lease was void by the death of tenant for life: *Buller, J.*, observing, that the court could not proceed on the doctrine of estoppel in this case, because it was admitted by the plaintiff, on the pleadings, that he did not execute until after the death of the tenant for life. So where the plaintiff declared, that by deed made between her as *attorney for J. S.*(*h*) on the one part, and the defendant on the other part, she demised a house to the defendant, and that he covenanted to pay the rent to J. S., and then assigned a breach in the non-payment of the rent, to the damage of the plaintiff (the attorney.) On demurrer it was objected, that the lease was void, because the plaintiff acting only as attorney to J. S., it should have been made as a lease from him, and in his name,(*i*) and that, the lease being void, the covenant to pay the rent was void also. *E. contra* it was insisted, that the instrument being under seal, the defendant was estopped from saying the plaintiff did not demise. But the court held, that it appearing on the declaration that the lease was void, because it was not made in the name of J. S., whose house it appeared to be, and that the plaintiff only made it as his attorney, there could not be any estoppel, and then the covenant to pay the rent was void, and consequently the plaintiff could not maintain the action.

Where a lease, by indenture, takes effect in point of interest, which interest *may* be co-extensive with the lease in point of duration, but in fact determines before it, the lease may then be avoided, and the parties are not estopped from showing the facts which determined the lease; as where A., lessee for life of B., makes a lease for years,(*k*) by deed indented, and afterwards purchases the reversion in fee; B. dies; A. shall avoid his own lease; for he may confess and avoid the lease, which took effect in point of interest, and determined by the [*541] death of B.(*l*) So *where covenant was brought by plaintiff,(*l*) as heir in reversion in fee to his brother, on an indenture of lease for years, made to defendant by plaintiff's father, and breach assigned for want of repairs; defendant pleaded, that the father was tenant for life only, and that the lease had determined by his death, and traversed, that after the making the lease, the reversion in fee had belonged to the father; on demurrer, judgment was given for the defendant: for, as was said in argument, and adopted by the court, though during the father's life, the lessee would have been estopped from saying that the father had not the reversion in him, yet on his death the lease was at an end; and the lessee was not estopped from pleading the truth by confessing and avoiding the lease; and it was holden, that the traverse was well taken. So where the declaration

(*h*) *Frontin v. Small*, *Ld. Raym.* 1418; *Str.* 705, *S. C.*

(*i*) See *Wilks v. Back*, 2 *East*, 142.

(*k*) 1 *Inst.* 47, b. See *Treport's case*, 6 *Rep.* 15, a, to the same effect, and *Doe v. Barney v. Adams*, 2 *Tyrw.* 289; 2 *Cr. & J.* 232; *Doe v. Seaton*, 2 *Cr. M. & R.* 728.

(*l*) *Brudnell v. Roberts*, 2 *Wils.* 143.

(1) This case having been cited in *Gilman v. Hoare*, *Salk.* 275, *Holt, C. J.*, said that the reason of it was, because tenant for life has a freehold, which is a greater estate, and the lease will not require any estoppel, if the life endure.

stated, that plaintiff and his wife, since deceased, by indenture demised certain premises to defendant for years, yielding and paying to plaintiff and his wife a yearly rent, with a covenant to pay the rent to the plaintiff and his wife, and then averred that on such a day the wife died, and afterwards rent became due and in arrear to plaintiff: defendant cravedoyer of the indenture, (whereby it appeared, that the *reddendum* was to the husband and wife, and the heirs of the wife, and the covenant to pay rent was in the same form,) and then pleaded that the premises were the estate of the wife, and that the plaintiff had nothing in them but in right of his wife; that on, &c., she died without issue, leaving J. S. her heir, whereupon all the estate of the plaintiff ceased, and J. S. threatened to enter and eject defendant, unless he attorned, whereby he was compelled to attorn, and became tenant to J. S. General demurrer and joinder. It was holden,^(m) that the plea was good, and that some interest having passed by the lease from plaintiff and his wife, it could not work by estoppel; and the defendant was therefore entitled to show that plaintiff's interest had ceased.

7. *Non est factum.*

There is not any general issue to an action of covenant,⁽¹⁾ but the defendant may plead that the deed (on which the plaintiff has declared,) is not his deed. This plea puts in issue the execution of the deed in fact only, which it is incumbent on the plaintiff to prove. If there be a subscribing witness to the deed, the execution must be proved by such witness.⁽²⁾ But payment of money into court on one of the breaches assigned in the declaration dispenses⁽ⁿ⁾ with proof of the execution of the deed, although one of the pleas *be the plea [*542] of *non est factum*.⁽³⁾ By R. G. H. T. 4 Will. IV. (Pleadings

^(m) *Hill v. Saunders*, (in error,) affirming judgment of C. B., 4 B. & C. 529. See the decision of C. B. in 2 Bingh. 112.

⁽ⁿ⁾ *Randall v. Lynch*, 2 Camph. 357, Lord *Ellenborough*, C. J.

(1) Although there is no general issue in covenant, yet the practice was, to allow notice of special matter to be given with the plea of *non est factum*, and proved at the trial, under the statute of New York. Vide *Kane v. Sauger*, 14 Johns. Rep. 89; *S. P. Provost v. Calder*, 2 Wend. 221.

The plea of *non infregit conventionem* is not a general issue, but must be pleaded in bar. *Phelps v. Sawyer*, 1 Aik. 150. For covenant upon a warranty, in which one of the breaches assigned is, that the defendant was not seised of a good estate in fee, &c., the plea of *non infregit conventionem*, &c., though it presents an informal issue, is still sufficient for the court to enter judgment on. *Bender v. Fromberger*, 4 Dall. 436. In an action under an agreement by the covenantor to pay, on the delivery and acceptance by him of certain letters patent, the plea of *non infregit conventionem* puts in issue the delivery and acceptance, and the covenantee must prove them on trial. *Roosevelt v. Fulton*, 7 Cow. 71.

(2) For the exceptions to this rule, see *post*, tit. "Debt on Bond," *non est factum*, p. 562.

(3) Prior to the New Rules to support the plea of *non est factum*, the defendant might have given in evidence anything which proved the deed to be void at the time of pleading; as drawing a pen through a line or material word; rasure; addition to, or other alteration of the deed in a material part, &c. *Whelpdale's case*, 5 Rep. 119, b.; *Pigot's case*, 11 Rep. 27, a.

It is no defence *at law*, that a covenant was obtained by false and fraudulent representations as to a particular fact relating to the consideration. *Slocum v. Desparo*, 8

in particular Actions, II. 1.) In covenant the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

The frequent nonsuits which occurred on the ground of fatal variances^{(1)(o)} between the instruments set forth in the declaration and those produced in evidence, have been obviated by stat. 9 Geo. IV. c. 15, which, after reciting that great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances between writings produced in evidence and the setting forth thereof upon the record on which the trial is had, *in matters not material to the merits of the case*,⁽²⁾ and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time; for remedy thereof enacts, "That every court of record holding plea in civil actions, any judge sitting at Nisi Prius, and any court of oyer and terminer and general gaol delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, may cause the record, on which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanour, when any variance shall appear between any matter in writing or in print produced in evidence and the setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party as such judge or court shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea, and returned together with the record; and the papers, rolls, and other records of the court, from which such record issued, shall be amended accordingly." In covenant by lessor against lessee on indenture of demise, the breach alleged was the non-payment of

(o) *Pitt v. Green*, 9 East, 188; *Bowditch v. Mawley*, 1 Campb. 195; *Hoar v. Mill*, 4 M. & S. 470; *Swallow v. Beaumont*, 2 B. & A. 765.

Wend. 615. Where A. as surety, executed a covenant to pay rent, which also the lessee executed, and both without witnesses, and the lessee took the instrument to deliver to plaintiff, and on his objecting to the form, erased his signature, and re-executed it anew in the presence of a witness without A.'s presence or knowledge, it was held to be no such alteration as discharged the surety. *Dusenberry v. O'Shields*, 2 Hall, 379.

The single plea of *non est factum* admits all the material averments in the declaration. *M'Neish v. Stewart*, 7 Cow. 474; *Thomas v. Woods*, 4 Id. 173; *Legg v. Robinson*, 7 Wend. 194; *Cooper v. Watson*, 10 Id. 202. Where in an action on the covenant of warranty, *non est factum* is the only plea, the plaintiff need not prove an eviction by showing a recovery against him or a writ of possession executed. Ib. Notice of special matter to be given in evidence by the defendant on trial, may be subjoined to a plea of *non est factum*. *Provost v. Calder*, 2 Id. 517.

(1) Where defendant craves oyer of the deed and sets it out, the deed becomes part of the declaration and the only question is whether it was executed by defendant. *Snell v. Snell*, 4 B. & C. 741.

(2) "This statute, which is still in force, does not restrict the power of amending to those cases only in which the defect to be amended is not material to the merits: the words 'not material to the merits of the case,' do not appear in the enacting clause." Per Tindal, C. J., in *Smith v. Brandram*, 2 M. & Gr. 250; 2 Scott's N. R. 539. See *Smith v. Knoweldon*, 2 M. & Gr. 561; 2 Scott's N. R. 657.

rent of a toll-house demised to the defendant by indenture, of which profert was made as follows, *which said indenture* plaintiff now brings into court. Plea, *non est factum*; at the trial^(p) the counterpart executed by the lessee was produced. *Holden not to [*543] be a variance; the terms of the declaration were sufficiently answered by the production of the counterpart. The powers given by the foregoing statute are, by express enactment, confined to variances between any matter in writing or in print produced in evidence and the record; but the legislature has deemed it expedient to allow other amendments to be made on the trial; for now by stat. 3 & 4 Will. IV. c. 42, s. 23, it shall be lawful for any court of record holding plea in civil actions, and any judge sitting at Nisi Prius, if such court or judge shall see fit so to do, to cause the record, writ, or document, on which any trial may be pending before any such court or judge, in any civil action or in any information in the nature of a quo warranto, or proceedings on a mandamus, when any variance shall appear between the proof and the recital or setting forth on the record, writ, or document, on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular in the judgment of such court or judge, *not material to the merits of the case*, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular in the judgment of such court or judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury or otherwise, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, or by virtue of such writ, the order for the amendment shall be indorsed on the postea or the writ, as the case may be, and returned together with the record or writ: and thereupon such papers, rolls, and other records of the court, from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had; provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at Nisi Prius, sheriff, or other officer, respecting his allow-

(p) *Pearse v. Morrice*, 3 B. & Ad. 396.

ance of any such amendment, to apply to the court from which [*544] such record or writ *issued for a new trial upon that ground; and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit; or the court shall make such other order as to them may seem meet.(r) And by sect. 24, the said court or judge shall and may, if they think fit, in all such cases of variance, instead of causing the record or document to be amended, direct the jury to find the facts according to the evidence, and thereupon such finding shall be stated on such record or document: and notwithstanding the finding on the issue joined, the said court, or the court from which the record has issued, shall, if they shall think the variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case.(s)

An allegation of a demise being by *indenture*, imports that the demise is by an instrument in *writing* and under seal; consequently to a declaration in covenant upon an *indenture* of lease by the lessor against the assignee of the lessee, a plea, that the indenture was not signed by the plaintiff or by any agent authorized in writing, is bad.(t)

Covenant. The declaration stated, that the plaintiff complained of the defendant B., chairman of the board of directors of a joint-stock company, and then set forth an agreement between plaintiff and the company, sealed with the seal of one J. S., for and on behalf of the company, he, J. S., acting at the time as its chairman. It was holden,(u) that covenant could not be maintained against the defendant.

Coverture of the defendant, at the time of execution, which might have been given in evidence under *non est factum*, must be pleaded. In covenant, the declaration stated a joint demise by husband and wife.(x) Plea, *non est factum*. It appeared in evidence, that the husband was tenant for life, with remainder to the wife for life, and that they had jointly demised to the defendant. After verdict, a motion was made for a new trial, on the ground, that the demise stated was an impossible demise: for the husband alone had the power of demising, and the wife could only confirm; the court discharged the rule: and *Blackstone*, J., said, "The issue is, that there is no such deed as stated in the declaration; if, in fact, such a deed appears, the defendant, who is in possession under it, shall not question the title of the plaintiffs to [*545] make such demise, and *thereby evade the performance of what he himself has stipulated." And *Nares*, J., said, on the issue of *non est factum* in covenant, the deed only must be proved.(1)

(r) See *Atkinson v. Raleigh*, 3 Q. B. 79; 2 G. & D. 811.

(s) See *Knight v. M'Douall*, 12 A. & E. 438; 4 P. & D. 168; and *Smith v. Knowelden*, 2 M. & Gr. 561; 2 Scott's M. R. 657.

(t) *Aveline v. Whisson*, 4 M. & Gr. 801. See the stat. 7 & 8 Vict. c. 76, s. 4, *post*, tit. "Debt," VIII. "Debt for Use and Occupation."

(u) *Hall v. Bainbridge*, 1 M. & Gr. 42; 1 Scott's N. R. 151.

(x) *Friend v. Eastabrook*, 2 Bl. Rep. 1152.

(1) S. P. *M'Neish v. Steward*, 7 Cow. 474, the single plea of *non est factum* admitting the breaches.

If the plaintiff declares for a breach of covenant, and states the covenant, by itself, in its own absolute terms, without the qualifying context which belongs to it, this being an untrue statement, in point of substance and effect, of the deed, will entitle the defendant to a nonsuit on the ground of a variance, on the plea of *non est factum*.^(y) Releasors covenanted that *for and notwithstanding any act, &c., by them or either of them done to the contrary*, they had good title to convey certain lands in fee; *and also*, that they or some or one of them, for and notwithstanding any such matter or thing as aforesaid, had good right and full power to convey, &c.; and likewise, that the releasee should peaceably and quietly enter, hold, and enjoy the premises granted, without the lawful let or disturbance of the releasors or their heirs or assigns, or for or by any other person or persons whatsoever, and that the releasee should be kept harmless and indemnified by the releasors and their heirs against all other titles, charges, &c., save the chief rent payable out of the premises to the lord of the fee. It was holden,^(z) that the generality of the covenant for *quiet enjoyment*, against the releasors and *any other person*, was not restrained by the qualified covenants for *good title and right to convey*; and consequently, although the declaration stated the covenant for quiet enjoyment in its own absolute terms, yet on *non est factum* there was not any variance. The declaration set forth a covenant to repair generally. Plea, *non est factum*. The deed when produced, contained an exception of fire and other casualties. This was holden to be a fatal variance,^(a) before new rules.⁽¹⁾

8. *Non infregit conventionem*.

I am not aware of any case at common law ⁽²⁾ in which *non infregit conventionem* has been holden to be a good plea on demurrer; if it can be pleaded in any case, it must be in the single case where the declaration states a single breach of covenant in the affirmative and concludes with an affirmative allegation, "And so the *defendant [*546] has broken his covenant." In the following cases, the plea of *non infregit conventionem* was holden to be improperly pleaded. In covenant on a lease,^(b) for not repairing the premises demised, the plaintiff assigned several breaches. Plea, *non infregit conventionem*. On demurrer, the court gave judgment for the plaintiff, on these grounds: 1st. That the plea was too general; for several breaches were assigned:

^(y) Adm. per Cur. in *Howell v. Richards*, 11 East, 633. But see *Gordon v. Gordon*, 1 Starkie, N. P. C. 294, and new rules.

^(z) *Howell v. Richards*, 11 East, 633; but it is enough to state truly that part which applies to the breach complained of, if that which is omitted do not qualify that which is stated, 13 East, 20.

^(a) *Tempany v. Burnand*, 4 Campb. 20.

^(b) *Pitt v. Russel*, 3 Lev. 19; *Taylor v. Needham*, 2 Taunt. 278.

(1) If *nil debet* be pleaded to covenant on an indenture of lease for non-payment of rent, the plaintiff may demur. *Tyndal v. Hutchinson*, 3 Lev. 170.

(2) By stat. 11 Geo. I. c. 30, s. 43, in actions of covenant upon policies of insurance under the common seal of either of the two insurance companies (Royal Exchange and London Assurance,) the defendants may plead that "*they have not broke the covenants* in such policy contained, or any of them." See *ante*, p. 541, n. 1.

2nd. That the breach being in *non reparando non infregit conventionem*, could not be a good plea; because two negatives could not make a good issue. So where in covenant, (c) the breach assigned was for non-payment of an annuity; the defendant pleaded that he had not broken his covenant; special demurrer, that the breach and plea both being in the negative, there was not any issue. Judgment for the plaintiff. So where plaintiff declared on a covenant for quiet enjoyment, (d) and assigned several breaches, in which were stated evictions by different persons, and concluded with these words, "And so the defendants have not kept their covenants." The defendants pleaded *non infregit conventionem*. On special demurrer, assigning for causes, that the plea attempted to put in issue several matters, and to make an issue out of two negatives, the court gave judgment for the plaintiff, observing that the plea was only argumentative, and therefore an improper plea.(1)

9. *Payment of Money into Court.*

Money may now be paid into court in this action by stat. 3 & 4 Will. IV. c. 42, s. 21, which see, *ante*, p. 140, with the form of pleading.

10. *Performance.*

If all the covenants be in the affirmative, (e) the defendant may plead generally, performance of all; but if any be in the negative, to so many he must plead specially, (for a negative cannot be performed,) and to the rest generally.(2) So if any of the covenants be in the disjunctive, (f) the defendant must show which of them he hath performed. So if any are to be done of record, (g) he must show that specially, and cannot involve it in general pleading.(3) So if a covenant be [*547] partly affirmative and partly negative; (h) *as where the words of the covenant were, that defendant *decederet procederet, et non deviet*; defendant having pleaded performance generally, the plea was holden bad. Performance must be pleaded in the terms of the covenant; otherwise it will be bad on general demurrer.(i)(4)

(c) *Boone v. Eyre*, 2 Bl. Rep. 1312.

(d) *Hodgson v. The East India Company*, 8 T. R. 278.

(e) 1 Inst. 303, b.

(f) *Ib.*

(g) *Ib.*

(h) *Laughwell v. Palmer*, 1 Sidf. 87.

(i) *Scudamore v. Stratton*, 1 Bos. & Pul. 455.

(1) This plea is bad, but not void, and if issue be taken upon it, the defect is cured by verdict. *Roosevelt v. Fulton*, 7 Cowen, 71. The plea admits the deed, but denies the breaches, and puts in issue all such matters as show that the covenant is not broken, or that the defendant was never under an obligation to fulfil it. *Ib.*

(2) The same rule holds in debt on bond conditioned for the performance of covenants. *Cropwel v. Peachy*, Cro. Eliz. 691. In this case, advantage was taken of the wrong pleading, by demurrer. See *Champ v. Ardery*, 2 Marsh. 246; *Pollard v. Taylor*, 2 Bibb, 234; *Patton v. Robinson*, 1 Id. 285. Evidence of part performance is inadmissible under this plea. *Legrand v. Baker*, 6 Monroe, 245.

(3) See *Finney v. Bochme*, 3 Gill & Johns. 42.

(4) In Pennsylvania, the plea of "performance with leave to give the special matter in evidence," is sanctioned by long usage, and anything may be given in evidence which might have been pleaded. *Bender v. Fromberger*, 4 Dall. 439; *Webster v. Warren*, 2 W. C. C. R. 456. This plea admits the execution of the instrument, but not that the adverse

11. *Release.*

A contract under seal cannot be varied by a parol contract. In the case of a covenant the whole matter is under the seal of the party; and the contract into which he has entered can be discharged only by an instrument of the same nature as that by which the contract was created.(j)(1)

If a man, by deed, covenant to build a house,(k) or make an estate, and, before the covenant broken, the covenantee releaseth to him all actions, suits, and quarrels, this doth not discharge the covenant itself; because, at the time of the release, there was not any duty or cause of action in being. In covenant by assignee of feoffee,(l) against feoffor, for a breach of covenant to make further assurance, in not levying a fine at the request of the assignee; defendant pleaded a release from the feoffee, which release bore date after the commencement of the action by the assignee; on demurrer, it was holden, that the breach

(j) Per *Tindal*, C. J., in *West v. Blakeway*, 2 M. & Gr. 751; 3 Scott's N. R. 199.

(k) 1 Inst. 292, b.

(l) *Middlemore v. Goodale*, Cro. Car. 503.

party has performed his agreement. *Neave v. Jenkins*, 2 Yeates, 107; *Roth v. Miller*, 15 S. & R. 105; *Knox v. Rhinehart*, 9 Id. 45.

Under a plea of "covenants performed," in covenant on an agreement for purchase and sale of land, defendant may give in evidence a tender before suit brought of the purchase money. *McCormick v. Crall*, 6 Watts, 207. And the jury may certify a balance due to defendant. *Vicary v. Moore*, 2 Id. 451. The covenant on a promise to pay "at any time when lawfully required," defendant cannot avail himself on plea of "covenants performed" of the defence that he was not lawfully required, &c., before suit brought. *Rangler v. Morton*, 4 Id. 265. "There is, in Pennsylvania, a plea in covenant, which is peculiarly of the nature of a plea of the general issue; it is that of covenants performed with leave, &c., that is, with leave to give in evidence everything that amounts to a legal defence. This plea is peculiar to Pennsylvania, and has been sanctioned by very long usage. Under this plea, upon notice to the plaintiff without form, the defendant may give anything in evidence which he might have pleaded. The plea of covenants performed admits the execution of the instrument, and supercedes the necessity of other proof, but it does not admit that the adverse party had performed his agreement. In covenant on articles of agreement, where the covenants are independent, evidence on the part of the defendant of breaches by the plaintiff, are inadmissible either by way of bar, offset, or in mitigation of damages. In a case of this description, it was determined by the Supreme Court, that a release of the cause of action cannot be given in evidence, without having been pleaded.

"The plea of covenants performed is not altogether equivalent to the plea of payment, but it admits the foundation of the suit. The usual mode of putting a plaintiff on proof of performance, is by the addition of *absque hoc*, &c., to the plea of covenants performed.

"Covenants performed, though not strictly the general issue, is yet in the nature of the general issue. Under it, without notice of special matter, it is not competent (under a rule of court requiring notice of the special matter,) to show a breach of contract between the covenantor and a stranger, which, if performed, would have enured to the benefit of the covenantor.

"Under the plea of 'covenants performed,' with notice, &c., to an action of covenant on a ground rent, evidence of the breach of a collateral agreement at the time of the execution of the deed, but not appearing on its face that the grantor, within a certain time afterwards, should do certain acts to improve the value of the property, is inadmissible, and it seems, generally, that under this plea, with notice, &c., the defendant may give evidence of a failure of consideration, which would entitle him to relief in equity." 1 Troubat & Haley's Pract. 397, 3rd ed.

(1) See *Reed v. McGrew*, 5 Ohio, 381.

being in the time of the assignee, and the action brought by him, and so attached in his person, the covenantee could not release this action, wherein the assignee was interested : Judgment for plaintiff. N. Rolle, in his Abridgment, states the opinion of the court to have been as reported by Croke; but adds, that judgment was given *against* plaintiff *per auter cause*. See 2 Roll. Abr. 411, Release, D. pl. 11. To covenant for non-payment of rent, *(m)* the defendant cannot plead a release, by the plaintiff, of all demands, at a day before the rent in question became due. Where the party takes a bond, and also a deed of covenant, to secure an annuity, although the bond was forfeited before a discharge under the Insolvent Debtors Act (15 Geo. III. c. 3,) yet the covenantor might have been sued on the covenant, for payments becoming due, after his discharge. *(n)* So the Insolvent Debtors Act, 34 Geo. III. c. 69, was holden not to discharge an insolvent, entitled to the benefit of that act, *(o)* from the payment of the arrears of an annuity becoming due, after his discharge, on a covenant made before that act. But now by stat. 1 & 2 Vict. c. 110, s. 80, the discharge of an insolvent is extended to sums payable by way of annuity, or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities. *(1)*

[*548]

*12. Set-Off.

In covenant upon an indenture for non-payment of rent, *(p)* the defendant pleaded *non est factum*, and gave a notice of set-off; Mr. J. Denton, at the assizes, was of opinion, that he could not do so upon this issue: upon a motion for a new trial, the court held the evidence admissible; for the general issue mentioned in the act *(q)* must be understood, to mean any general issue. But this case has been since overruled; and the court of B. R., in *Oldenshaw v. Thompson*, 5 M. & S. 164, decided that there is not any general issue in this action, and thereby confirmed the opinion of *Denton, J.* Unliquidated damages, *(r)* arising from the breach of other covenants to be performed by the

(m) *Henn v. Hanson*, 1 Lev. 99.

(n) *Cotterel v. Hooks*, Doug. 97.

(o) *Marks v. Upton*, 7 T. R. 305.

(p) *Gower and another v. Hunt*, Bull. N. P. 181; Barnes, 291, S. C.

(q) 2 Geo. II. c. 22.

(r) *Howlet v. Strickland*, Cowp. 56.

(1) In an action by administrators for breach of covenant of seisin, defendant pleaded a subsequent conveyance of the estate to himself, free and clear from the intestate, his heirs, assigns, &c. It was holden, that if this reconveyance could have any operation to discharge defendant, it must be as a release; but that it did not operate as a release. The covenant of seisin is a personal covenant, and does not run with the land; and this right acquired by the intestate under the covenants in the deed, was unconnected with, and independent of, the right to the land; and a release of his right to the land, where he had no right, could not operate as a release of the covenants of seisin. *Bennet v. Irwin*, 3 Johns. Rep. 359.

If one buy land, and covenant to pay for it, and the seller will not make an assurance when reasonably demanded, the purchaser is discharged from his covenant; for he ought not to be perpetually bound, without having a performance. *Van Benthuysen v. Crapen*, 8 Id. 257.

plaintiff, cannot be pleaded by way of set-off.(1) To covenant on an indenture of lease of a house for non-payment of rent, the defendant pleaded, that by the indenture he covenanted to repair, and to surrender to the plaintiff, at the end of the term, the premises in good repair,(s) "casualties by fire and tempest excepted;" that a stack of chimneys belonging to the house had been thrown down by a tempest, which had damaged the house so much that it would soon have become uninhabitable, if the defendant had not immediately repaired it; that he had been obliged to lay out, in repairs, a sum of money (exceeding the amount of the rent in arrear,) which the plaintiff became liable to repay to him, and that he was ready to set off the same according to the statute, &c. On special demurrer, it was holden, that the plea could not be supported; for admitting that the defendant could maintain any action against the plaintiff (his landlord), yet the sum to be recovered could only be ascertained by a jury; and consequently, the damages being uncertain, they could not be set off to the present action.

IX. Evidence.

As there is not any general issue in this action, the evidence will depend entirely upon the pleadings. That, which most usually is pleaded, viz. that the deed is not the deed of the defendant, has been already discussed; see *ante*, p. 541. It remains only to remark, that the plaintiff can recover only *secundum allegata et probata*; hence where plaintiff covenanted for a sum of money to build a house within a certain time,(t) and averred in an action for non-payment of the money, that the house was built within the time; it was holden, that evidence that the time had been enlarged by parol agreement, and the house finished within the enlarged time, did not support the declaration.(2) So where the breach assigned was,(u) that the defendant had not used the premises in an husband-like *manner, but *on the* [*549] *contrary* had committed waste. Plea, that defendant had not committed waste. At the trial, the plaintiff offered evidence to show, that the defendant had not used the premises in an husband-like manner, which did not however amount to waste: the judge rejected the evidence; being of opinion, that on this issue it was not competent to the plaintiff to prove any thing which fell short

(s) *Weigall v. Waters*, 6 T. R. 488.

(t) *Little v. Holland*, 3 T. R. 590.

(u) *Harris v. Mantle*, 3 T. R. 307; and see *Hawkes v. Orton*, 5 A. & E. 367.

(1) See *Tuttle v. Tompkins*, 2 Wend. 407. Where the covenants are independent, evidence of breaches on the part of the plaintiff is inadmissible, either by way of bar, off-set, or in mitigation of damages. *Webster v. Warren*, 2 W. C. C. R. 456; *McCampbell v. Miller*, 1 Bibb, 453.

(2) See *Phillips v. Rose*, 3 Johns. Rep. 392; *Jordan v. Cooper*, 3 S. & R. 564. If the covenant is alleged in the declaration to have been made with the defendant, his heirs, executors, and administrators, but the covenant does not mention heirs, the variance is not material. *Ib.*

of waste. This opinion was afterwards confirmed by the court. In an action on a covenant to keep premises in repair and deliver them up in repair, the breach assigned was, that defendant did not repair nor deliver up in repair, *but on the contrary thereof, suffered and permitted* the premises to be and continue, and the same were ruinous and in decay, *for want of needful and necessary reparations, &c.*, and the defendant at the end of the term left them so out of repair; it was holden, that under this breach the lessor could not recover for *voluntary waste*, as by removing windows, &c.(x)(1)

X. Damages ; Costs ; Judgment.

Damages.(2)—Defendant, by a settlement made on his marriage,

(x) *Edge v. Pemberton*, 12 M. & W. 187.

(1) In covenant for rent upon a lease by plaintiff to defendant, the point in issue was, whether J. S. (whose title was admitted by plaintiff and defendant) demised first to the plaintiff, or to another person; it was holden that J. S. was a competent witness to prove the point in issue. In a covenant on an agreement by defendant to raise a dam beyond its then height, and to keep it in good order, casualties excepted, plaintiff cannot show its condition previous to the agreement. *McCredy v. Sch. Nav. Co.*, 3 Whart. 424.

In an action on the covenant of seisin in a deed, the defendant is not allowed to give in evidence a title acquired by him subsequently to bringing the action, but the rights of the parties must be determined according to their existence and extent, at the time when the action was commenced. *Morris v. Phelps*, 5 Johns. Rep. 49.

In order to prove that he was seised at the execution of the deed, defendant need not show a seisin under an indefeasible title; a seisin in fact is sufficient, whether gained by his own disseisin, or whether he was in under a disseisin. If, at the time he executed the deed, he had the exclusive possession of the premises, claiming the same in fee simple, by a title adverse to the owner, he was seised in fee, and had a right to convey. Per C. J. *Parsons*, in *Marston v. Hobbs*, 2 Mass. Rep. 433; *contra*, *Lockwood v. Sturdivant*, 6 Conn. Rep. 373.

(2) In covenant for breach of warranty of title, the uniform rule of damages is the consideration money with interest and costs, and no more. *Holmes v. Sinnickson*, 3 Green, 313; *Threckels v. Fitzhugh*, 2 Leigh, 451; and it matters not whether the warranty is founded on valuable or good consideration merely. The grantor's estimate is the same as an actual consideration. *Hanson v. Buckner*, 4 Dana, 253. Vendee of land may recover of vendor on eviction, the amount of the consideration specified, although it was paid in land at an exorbitant price. *Taylor v. Knox*, 1 Id. 396. Where grantee is evicted under covenant of warranty by a paramount title, and extinguishes the title, the measure of damages is the amount paid by him, as well after as before suit, with reasonable compensation for costs and expenses, but not including counsel fees. *Leffingwell v. Elliott*, 10 Pick. 204; *S. C.* 9 Id. 455. The covenant of warranty applies as well to the possession as title, and is broken by the recovery of possession, under an unexpired term. And the measure of damages is not the consideration money paid for the land, but the annual value or the interest of the money, together with costs and counsel fees. *Rickert v. Snyder*, 9 Wend. 416. On covenant against incumbrances, the grantee recovers only the consideration money paid for the portion lost, with interests and costs, and not the enhanced value of the land, unless there be fraud, when grantor is liable, in case, to the full extent of the loss. *Dimmick v. Lockwood*, 10 Id. 142. Where land is conveyed to B. in fee and in mortgage, with covenants of warranty, and is afterwards conveyed by grantor to another, without notice of the mortgage, who has his deed first recorded, the grantor is liable to the first grantee on the covenant of warranty, and the measure of damages is the amount due on the mortgage. *Curtis v. Deering*, 3 Fairf. 499. Covenant against incumbrances is broken as soon as made, by an existing mortgage without eviction or disturbance, and may at once be sued on. *Garrison v. Sandford*, 7 Halst. 261; *Tufts v. Adams*, 8 Pick. 547. On a breach of covenants of seisin, and right to convey land, situate in another state, the damages in Massachusetts are to be

conveyed estates upon certain trusts, and covenanted with the trustees to pay off incumbrances on the estates, to the amount of 19,000*l.*,

assessed according to the *lex fori*; and the rule is the consideration money and interest from the date of the deed: or if that cannot be ascertained, the value of the land at the time of the intended conveyance, with interest as above. *Smith v. Strong*, 14 Pick. 128. In an action of covenant on an agreement to convey land, the measure of damages is the purchase money and interest, and there can be at law no deduction for rents and profits received by covenantee, while in possession. This must be settled in chancery. *Combs v. Tarlton*, 2 Dana, 466. A judgment in an action on a covenant against incumbrances in which nominal damages are recovered during the pendency of a suit, for recovery of dower, is no bar to an action on a covenant of warranty, after the dower is extinguished by purchase. *Donnell v. Thompson*, 1 Fairf. 174. In covenant for refusal to convey lands, where defendant has no title, and there is no fraud, the rate of damages is their value at the time the contract was entered into. *Letcher v. Woodson*, 1 Brock. C. C. R. 212. No subject has ever been more fully and ably considered by the courts in this country, than the proper measure of damages, for the breach of covenants in a deed. Where the covenant of seisin is the only covenant, there has been no diversity of opinion among the judges. The measure of damages has been holden to be the purchase money paid for the land, with interest, and the costs of the ejectment suit by which the plaintiff was evicted. *Fine v. Drake*, 4 Halst. 139. See *Thomas v. Perry*, 1 Peters's C. C. Rep. 49; *King v. Pyle*, 8 S. & R. 166. Where, however, the breach arises solely from a prior mortgage, the damages will be determined by the amount due on such mortgage. *Gilbert v. Bulkley*, 4 Conn. Rep. 262. And if the grantor was seised of a life estate, the value of that estate must be deducted. *Lockwood v. Sturdivant*, 6 Id. 373. Of the measure of damages where one-third of the premises has been evicted by a tenant in dower, see *Wager v. Schuyler*, 1 Wend. 553; *Backus v. McCoy*, 3 Ohio, 221. In an action on the covenant of seisin, plaintiff may show by extrinsic evidence the payment of a greater consideration than is expressed in the deed. *Beloer v. Seymour*, 8 Conn. 304. The principles on which this rule is grounded are, that the covenant of seisin is broken as soon as made, and the right to the damages already sustained (which of course are only the money paid for the land) is then complete. That no land passing by the defendant's deed to the plaintiff, he has lost no land by the breach of the covenant: And that the *intention* of the covenant of seisin is only to indemnify the grantor for the consideration. With regard to the recovery of interest, it is allowed on the ground that the vendee is liable for the mesne profits: But his right to interest is only commensurate with such liability, and he can therefore recover but six years' interest, if that time had elapsed between the making of the deed and his eviction. *Caulkins v. Harris*, 9 Johns. Rep. 324. For a like reason interest will not be allowed where plaintiff is entitled to, and cannot be deprived of, the mesne profits. *Guthrie v. Pugsley*, 12 Id. 126. The grantee is entitled to recover the costs of suit attending his eviction; for at common law the grantor might have been vouched to come in, and been substituted as a real defendant in the suit; and, in costs, are included reasonable fees of counsel, (*Ricketts v. Snyder*, 9 Wend. 416; *Leffingwell v. Elliott*, 10 Pick. 204,) as well as those which are taxable, (Per *Livingston*, J.) See *Fulweiler v. Baugher*, 15 S. & R. 45. But the grantor is not answerable for the costs of the suit for mesne profits, as there he is not bound to defend. *Staats v. Executors of Ten Eyck*, 3 Caines' Rep. 115. As to the grantees liability for breach of covenant of seisin *only*, vide cases above cited, and *Bennet v. Jenkins*, 13 Johns. Rep. 50; *Pitcher v. Livingston*, 4 Id. 1; *Marston v. Hobbs*, 2 Mass. Rep. 433; *Bickford v. Page*, Ib. 455; *Bender v. Fromberger*, 4 Dall. Rep. 436. But there has been some difficulty in settling the rule of damages, where there has been a breach of other covenants in the same deed with the covenant of seisin. See *Pitcher v. Livingston*, 4 Johns. Rep. 1; where there was a breach of covenant for quiet enjoyment, as well as the covenant of seisin, (as was also the case in *Staats v. Executors of Ten Eyck*,) and plaintiff claimed damages for improvements made by him on the land. But it was holden (*Spencer*, J. *dissentiente*), that the covenant for quiet enjoyment was ancillary and inferior to the covenant of seisin, and that the breach of it was merged in the breach of the covenant of seisin. *Kent*, C. J. expressed his opinion, that if the covenant for quiet enjoyment had stood alone in the deed, the rule of damages would have been the same; and that in case of the breach of a covenant for further assurance, in the same deed with a covenant of seisin, defendant could not be called upon in damages for further assurance, that covenant being secondary to the covenant of seisin. It was decided in this case that plaintiff was no more entitled to damages for improvements made on the land than for its increased value. A similar decision to the last was made in *Sumner v. Williams*,

within a year; it was holden, (y) that on his failing to do so, the trustees were entitled to recover the whole 19,000*l.* in covenant, though no special damage was laid or proved. Defendant had conveyed premises to the plaintiff under a covenant for a good title. A formedon was afterwards brought against plaintiff by a party having better title, and the plaintiff compromised it for a large sum. It was holden, (z) that in an action for breach of the covenant for good title, the plaintiff might recover the whole sum so paid, and also his costs as between attorney and client, in the compromised suit, although he had not given any notice of that suit to the defendant; for the only effect of want of notice in such a case is to let in the party called upon for an indemnity, to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged, or that he made an improvident bargain, and that defendant might have obtained better terms, if the opportunity had been given him.

Costs.—The plaintiff is entitled to full costs, although the damages recovered be under 40*s.*, unless the judge certify under the stat. 43 Eliz. c. 6, s. 2.

Judgment.—The judgment is for the recovery of the damages sustained. (a) (1) If the defendant has judgment against him upon nil dicit, confession, or demurrer, a writ of inquiry shall be [*550] awarded *to inquire of the damages. (b) Where the breach was assigned on two covenants, (c) and plaintiff had good cause of action only on one, and issue was joined on both, and verdict for plaintiff on both, and damages entirely assessed; it was holden, that plaintiff could not have judgment. (2) Covenant was brought

(y) *Lethbridge v. Mytton*, 2 B. & Ad. 772.

(z) *Smith v. Compton*, 3 B. & Ad. 407; see *Short v. Kalloway*, 11 A. & E. 28.

(a) See the form, Townesend, 2 Bk. Judg. 55.

(b) See the form, 1 Saund. 47.

(c) *Anon. Cro. Eliz.* 685.

8 Mass. Rep. 221, where there was a breach of covenants of warranty and seisin; also in *Nicholas v. Walter*, Ib. 243. But in *Gore v. Brazier*, 3 Id. 543; and *Caswell v. Wendell*, 4 Id. 108, where there were covenants of seisin and warranty, it was holden that there being no breach of the covenant of seisin, but only of the covenant of warranty, the measure of damages was the value of the estate at the time of the eviction, and not the money paid for it. *Sweet v. Patrick*, 3 Fairf. 9. In *Delavergne v. Norris*, 7 Johns. Rep. 358; *Prescott v. Truman*, 4 Mass. Rep. 627; *Hall v. Dean*, 13 Johns. Rep. 105; *Stanard v. Eldridge*, 16 Id. 254, it has been holden, that, in an action on a covenant against incumbrances, plaintiff may recover so far as he has paid off incumbrances, but not for outstanding incumbrances which he has not paid off. *S. P. Davis v. Lyman*, 6 Conn. Rep. 254; *Tufts v. Adams*, 8 Pick. 547. But the fact of his having discharged the incumbrances should be specially alleged, for it is not a damage necessarily arising from the act complained of, and consequently implied by law, but it is a particular damage, which should be stated in order to prevent surprise. *De Forest v. Lee*, 16 Johns. Rep. 122.

If A. conveys land to B. with covenant of seisin, and the title to part only of the land fails, the sale will not be rescinded, so as to give the vendee a right of action to recover back the whole consideration money; but the plaintiff is only entitled to recover damages in proportion to the defect of title, on the value of the part lost; and the measure of damages is the value of the part for which the title has failed, taken in proportion to the price of the whole. *Morris v. Phelps*, 5 Johns. Rep. 49; *Guthrie v. Pugsley*, 12 Id. 126. See *Duval v. Craig*, 2 Wheat. Rep. 62, note c.

(1) See Rawle on Cov. 319-339, 2d ed., for a full discussion of the cases and principles.

(2) Where there are several counts or causes of action, and one of them is bad, (as

against two defendants for not building a house ;(d) one suffered judgment to go by default, the other pleaded performance, which was found for him : it was holden, that the plaintiff could not have a writ of inquiry of damages, or judgment against that defendant who had suffered judgment by default ; because the covenant being joint, and the performance of it having been established by the verdict, it appeared that plaintiff had not any cause of action.

If on the whole record it appears, that the defendant has committed a breach of the covenant declared on, although the plaintiff states his real *gravamen* informally, judgment cannot be arrested ; for, however defective the pleadings are, the court are bound *ex officio* to give such judgment as the law requires them to do.(1)

As where A. declared that B., before her intermarriage with C.,(e) by deed covenanted with A. to leave certain matters to arbitration, and to abide by the award, provided it were made during their lives ; *and protesting that B. had not before her intermarriage performed her part of the covenant, averred that after making of the indenture and the intermarriage of the defendants, the arbitrator awarded B. to pay a certain sum :* and the breach assigned was the non-payment of the sum so awarded. After verdict for plaintiff, on *non est factum* pleaded, it was moved, in arrest of judgment, that the marriage of B., after entering into the covenant, and before award made, was a revocation of the arbitrator's authority, and consequently there could not be any breach of an award which he had not any authority to make. Lord *Ellenborough*, C. J., said, that if the case had come on upon a special demurrer, as for a defective allegation of the breach of covenant by marrying, there would have been good ground for the defendants' objection to the manner of declaring : but although the plaintiff had stated his *gravamen* informally, yet there was a sufficient allegation of the fact of the marriage being before the award, which constituted a breach of covenant, to warrant the court in giving judgment for the plaintiff on that ground. Rule discharged.(2)

(d) *Porter v. Harris*, 1 Lev. 63.

(e) *Charnley v. Winstanley and Wife*, 5 East, 266.

where executors sued for rent accrued in the lifetime, and also after the death of their testator,) and the damages are entire, judgment will be arrested. So, where the right of action accrues periodically, or depends on time, the plaintiff's declaration embraces a period for which he cannot be entitled to recover, and entire damages are given. *Executors of Van Rensselaer v. Executors of Planter*, 2 Johns. Cas. 17.

(1) The court, however, can only give such judgment as the law requires upon the whole record, with respect to the cause of action there stated. The court cannot pick out of various parts of the record a different cause of action from that for which the plaintiff proceeds. *Denman*, C. J., delivering judgment. *Head v. Baldrey*, 6 A. & E. 469 ; 2 Nev. & P. 217.

(2) In an action of covenant, where some of the breaches are well assigned, and others not, and there is a demurrer to the whole declaration, the plaintiff will have judgment for the breaches which are well assigned. *Adams v. Willoughby*, 6 Johns. Rep. 65.

*CHAPTER XIV.

DEBT.

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I. *Of the Action of Debt, and in what Cases it may be maintained.*

AN action of debt lies for the recovery of a sum certain upon simple contract, bond, other specialty, or record; for rent arrear; (a) upon a statute by the party grieved, or common informer. If a statute prohibit the doing an act under a certain penalty, (b) but does not prescribe any mode for recovering the penalty, the party entitled may recover the penalty by action of debt. (1) Debt also lies for the recovery of a sum of money due under an award. (c) So on the decree (d) of a colonial court for payment of the balance due on a *partner- [*553] ship account. But debt will not lie for money, ascertained by the master's report and ordered to be paid by a decree of a court of equity for interest and costs, on bill filed for specific performance. (e) (2) The foregoing decree was by the V. C. of England; but in a late case it has been holden, (f) that an action may be sustained on a decree of the equity side of the Supreme Court of Newfoundland, to recover a sum of money awarded thereby to be paid by the defendant to the plaintiff; and that in an action brought in the courts of this country on such a decree, the judgment of the colonial court is not open to examination as to the merits of it.

Debt lies for an amerciamment in a court leet. (g) In this case it ought to be alleged in the declaration, that the defendant was an inhabitant, as well at the time of the amerciamment, as of the offence; but the omission of this averment will be cured by verdict. (3) The plaintiff declared

(a) Carth. 161, 2.

(b) 1 Rol. Abr. 598, pl. 18, 19.

(c) Adm. 2 Saund. 66.

(d) *Henley v. Soper*, 8 B. & C. 16.

(e) *Carpenter v. Thornton*, 3 B. & A. 52. See the remarks of Ld. Denman, C. J., on this case, and *Henley v. Soper*, in *Henderson v. Henderson*, 13 Law J. (N. S.) Q. B. 274; and see *Russell v. Smyth*, 9 M. & W. 810.

(f) *Henderson v. Henderson*, 13 L. J., (N. S.) Q. B. 274.

(g) *Wicker v. Norris*, Bull. N. P. 167; Ca. Temp. Hardw. 116, S. C.

(1) See *M'Kean v. Caherty*, 3 Wend. 494; *Rockwell v. The State*, 11 Ohio, 130.

(2) Debt, not assumpsit, lies on a decree of Chancery in a sister state. *M'Kim v. O'Dom*, 3 Fairf. 94; *Williams v. Preston*, 3 J. J. Marsh, 600; *Draper v. Rook*, 2 Root, 188; *Post v. Neafee*, 3 Caines, 22. Debt is the proper remedy in a foreign judgment. *M'Intire v. Carruth*, 1 Const. Ct. Rep. 457; *Headley v. Roby*, 6 Ham. 527; *Carter v. Crain*, 2 Port. 81.

(3) Debt lies against an executor for a legacy, in Connecticut and Alabama. *Knapp v. Hanford*, 6 Conn. Rep. 170; *Pettegrew v. Pettegrew*, 1 Stew. 580.

in debt on a deed, (h) whereby the defendant *covenanted* to pay the plaintiff so much per hundred for every hundred stacks of wood in such a place, and bound himself in a penalty for the performance; it was averred, that there were so many stacks, which amounted to a sum exceeding the penalty, for which sum the plaintiff brought his action. On demurrer it was objected, that, as there was a penalty for a certain sum, the plaintiff could not have an action for more than that sum; but the objection was overruled, *Holt*, C. J., observing, that the plaintiff had an election either to sue for the penalty, or for the rate agreed on, although it exceed the penalty; for the penalty was inserted only to enforce payment. It was then objected, that the proper form of action was covenant, and not debt; but per *Cur.*, the plaintiff may have covenant or debt at his election; for the rate being certain, when the defendant has the wood, the agreement becomes certain, for which debt lies. (1) An absolute covenant to pay a sum certain on a given day is

(h) *Ingledeu v. Cripps*, *Ld. Raym.* 814; *Salk.* 658, *S. C.*

(1) Where covenants are secured by a penalty or forfeiture, the obligee at his election may bring debt for the penalty, or may proceed upon the covenant and recover more or less than the penalty *toties quoties*. *Stearns v. Barrett*, 1 *Pick.* 449; *Fountainne v. Areta*, 2 *McClean*, 127. Debt lies against a stockholder of a joint company, by the charter of which the stockholders are individually liable, to the nominal amount of each one's stock respectively. *Simonson v. Spencer*, 15 *Wend.* 548. Debt does not lie for a stipulated penalty on a lease not under seal; the agreement being to pay as rent a part of the crop. *Nelson v. Ford*, 5 *Ohio*, 476. Debt lies on a sealed note payable on demand without a previous demand. *Bradfield v. McCormick*, 3 *Black.* 161. But not on a writing obligatory for a sum payable in lumber. *Cassady v. Laughlin*, *Ib.* 134. But see *Nelson v. Ford*, 5 *Ohio*, 475. Nor on a sealed note, for a sum payable by instalments, until the last payment is due. *Farham v. Hay*, 3 *Black.* 167. Nor on a writing obligatory for payment "in U. S. Bank notes or its branches." *Wilson v. Hickson*, 1 *Blackf.* 230; *Osborne v. Fulton*, *Ib.* 233. Nor if payable in *bankable* money. *Harper v. Levy*, *Ib.* 294.

In *The United States v. Colt*, 1 *Peters's C. C. Rep.* 149, Judge *Washington*, after a careful examination of the authorities, laid it down, that debt would lie on an implied contract, although the sum might not be certain, but depended on something extrinsic. So for a penalty given by statute, which is to be ascertained by the jury. In South Carolina, it has been held, that debt lies on a single bill for a sum certain, though it be payable in *produce*. *Bollinger v. Thurston*, 2 *Rep. Con. Ct.* 447. But see *Watson v. McNairy*, 1 *Bibb*, 584; *January v. Henry*, 3 *Monr.* 8. An action of debt will lie for the payment of a stipulated sum in property. *Snell v. Kirby*, 3 *Mis.* 21; *Dorsey v. Laurence*, *Hardin*, 508. Or on a specialty for the payment of a sum certain, with the privilege to the obligor to discharge the same in cotton. *Bradford v. Stewart*, *Minor*, 46. Or on a single bond, payable in cotton. *Bollinger v. Thurston*, 2 *Rep. Con. Ct.* 447.

Debt lies to recover the purchase money of lands sold under articles of agreement, and such articles should be set forth in the declaration. *Huller v. Burke*, 11 *S. & R.* 238. It also lies to recover the land damages assessed against a turnpike, under the statute, no specific remedy being provided therein. *Bigelen v. Cambridge Turnpike*, 7 *Mass.* 201; *Jeffrey v. Bluehill Turnpike*, 10 *Id.* 368; *Rice v. Barre Turnpike*, 4 *Pick.* 130. But not to recover them against a town where a statute has provided a specific remedy by distress. *Gedney v. Tewksbury*, 3 *Mass.* 367. Or to recover the treble damages given to the owner of stolen goods by statute, a specific remedy therefor being given by such statute. *Smith v. Drew*, 5 *Id.* 514. Or against a jailor, for a wrongful escape. *Porter v. Sayward*, 7 *Id.* 377. It will not lie, it seems, on a writing obligatory for the payment of a certain sum in *bank notes*. *Wilson v. Hickson*, 1 *Blackf.* 230; *Osborne v. Fulton*, *Ib.* 234; *Scott v. Conover*, 1 *Hals.* 22; *Campbell v. Weisler*, 1 *Litt.* 30. Or on an obligation for the payment of \$100, to be paid in money receivable in the United States land office. *Sinclair v. Peirce*, 5 *J. J. Marsh.* 63. Nor on a note for so many dollars, payable in Louisiana funds. *Hudspeth v. Gray*, 5 *Pike*, 157. Nor on an obligation to pay so many dollars in Philadelphia funds. *January v. Henry*, 2 *Monr.* 58; *S. C.*, 3 *Id.* 8. Nor in Tennessee, on a note to be paid in "North Carolina bank notes." *Deberry v. Darnell*, 5

a good foundation for an action of debt; hence, debt lies on an absolute covenant by A. to pay on a certain day a sum certain due from B. on mortgage;(i) but it is quite a different case where there is a collateral and independent covenant to pay the debt of another person on non-performance by him; and where an action was brought on a mere collateral covenant, by which the defendant, jointly with another, undertook to secure the payment of an annuity issuing out of land, it was holden,(k) that the defendant was only suable in covenant, and not in debt. In the action of debt, the plaintiff is to recover the sum in numero, and not a *compensation in damages, as in those [*554] actions which sound in damages only; such as assumpsit,(l) &c. The damages given in the action of debt, for the detention of the debt, are merely nominal.(1)

II. *Debt on Simple Contract.*(2) p. 554; *New Rules.* p. 556.

Debt lies upon a simple contract, either express or implied,(m) to pay a sum certain. Where goods are sold for ready money, and payment is made accordingly, no debt arises; and such payment is therefore proveable under the general issue.(n) Debt lies by the payee against the maker of a promissory note, or by the drawer of a bill payable to himself against the acceptor,(3) although the instrument expresses no consideration either by the words "value received" or otherwise,(o) and debt lies by the indorsee of a bill against his immediate

(i) *Evans v. Jones*, 5 M. & W. 295, recognized in *Harrison v. Matthews*, 10 M. & W. 768; and *Sison v. Kidman*, 3 M. & Gr. 810; 4 Scott's N. R. 429.

(k) *Randall v. Rigby*, 4 M. & W. 130.

(l) Bull. N. P. 167.

(m) *Speake v. Richards*, Hob. 206.

(n) *Bussey v. Barnett*, 9 M. & W. 312.

(o) *Hatch v. Traves*, 3 P. & D. 408; 11 A. & E. 702. See *Bishop v. Young*, 2 Bos. & Pul. 78, cited in *Cresswell v. Crisp*, 4 Tyr. 991.

Yerg. 451. Nor in Alabama, upon a promise under seal, to pay a sum of money in "current bank notes." *Young v. Scott*, 5 Ala. 475. But it has been held, in Tennessee, that an action of debt can be maintained upon a single bill, though it is payable in a particular description of money. *Geft v. Hall*, 1 Humph. 484.

It is the only action which can be maintained on a sealed instrument, unattested by a subscribing witness. *Ingram v. Hall*, Martin, 1. It is the proper form of action on a sealed instrument, where an unliquidated demand, which can readily be reduced to certainty, is sought to be recovered. *Wetumpka R. R. Co. v. Hill*, 7 Ala. 772. It has been held to be the proper form of action in the *debet* and *detinet* upon an instrument to pay a given sum of money lent, which might be discharged on or before the day of payment, in articles of merchandise. *Young v. Hawkins*, 4 Yerg. 171. It is also the proper remedy on a bond, conditioned for the performance of covenants. *Meakings v. Ochiltree*, 5 Port. 395.

(1) See *People v. Hallett*, 4 Cow. 67.

(2) In debt on simple contract, the *wager of law* has been allowed in Pennsylvania. Per *Gibson, C. J. Barnet v. Ihrie*, 17 S. & R. 212. But not in Ohio, and therefore debt on simple contract lies against executors. *Tupper v. Tupper*, 3 Ohio, 387. It has been abolished in Mississippi by the constitution. *Jennings v. Gibson*, Walker, 234.

Debt lies by assignee against the maker of a note. *Taylor v. Walpole*, 1 Blackf. 378. In *debt* on a promissory note, an acknowledgment by defendant that the debt was honest, does not take it out of the statute of limitations. *Rice v. Wilder*, 4 N. H. R. 336.

(3) See *Anderson v. Anderson*, 4 Dana, 353.

indorser ;(*p*) for an action of debt will lie, where the debt has been transferred from one party to a bill to another *between whom privity exists* ; but where there is no privity between the parties, debt cannot be maintained ; hence, debt does not lie for the indorsee against the acceptor of a bill of exchange ;(*q*) for, though the acceptance binds by the custom of merchants, yet it does not create a duty any more than a promise made by a stranger to pay, &c., if the creditor will forbear his debt ; the drawer of the bill is the debtor, and continues to be the debtor, notwithstanding the acceptance ; for that is a collateral engagement only.(1) So where the drawer of a bill indorses it in blank, and delivers it to A., who transfers it by delivery, and without a fresh indorsement to B., B. cannot maintain an action of debt on it against the drawer, for in such a case there is no privity of contract.(*r*) Debt will not lie on a promissory note payable by instalments until the last day of payment be past.(*s*) Debt will not lie for a wager.(*t*) Debt lies upon a foreign judgment ;(*u*)(2) as upon a judgment of the Supreme Court of

(*p*) *Watkins v. Wake*, 7 M. & W. 488, recognizing *Stratton v. Hill*, 3 Price, 253.

(*q*) *Cloves v. Williams*, 3 Bingh. N. C. 868 ; 5 Scott, 68 ; *Powell v. Ancell*, 3 M. & Gr. 171 ; 3 Scott's N. R. 444.

(*r*) *Lewin v. Edwards*, 9 M. & W. 720, recognized in *Burmester v. Hogarth*, 11 M. & W. 97.

(*s*) *Rudder v. Price*, 1 H. Bl. 557.

(*t*) *Ld. Raym.* 69.

(*u*) *Walker v. Witter*, Doug. 1.

(1) "*Indebitatus assumpsit* will not lie in any case except where debt lies ; therefore it lies not against the acceptor of a bill of exchange ; for the acceptance is merely a collateral engagement ; but *indebitatus assumpsit* lies against the drawer, who is really the debtor by the receipt of the money ; and debt will lie against the drawer." *Hard's case*, Salk. 23. Vide *Smith v. Segan*, 3 Hen. & Mun. Rep. 394 ; *Wilson v. Crowdhill*, 2 Munf. Rep. 302. In the Supreme Court of the United States it has been determined that debt lies by the indorser against the acceptor of a bill of exchange, expressed to be for value received, and by the payee of a promissory note against the maker, where the note is expressed to be for value received. *Rabourg v. Peyton*, 2 Wheat. Rep. 385. See *Olive v. Napier*, Cooke's Rep. 11 ; *Smith v. Segan*, 3 Hen. & Mun. 394 ; *Wilson v. Crowdhill*, 2 Munf. 302. The reasons given for the opinion that debt in general will not lie against the acceptor are, first, that there is no privity of contract between the parties ; and secondly, that an acceptance is only in the nature of a collateral promise or engagement to pay the debt of another, which does not create a duty. Judge *Story* thinks that these reasons are not satisfactory, and that the decision that the acceptor was not liable in an action of debt, was made at a time when the principles respecting mercantile contracts were not generally understood. *Rayborg v. Peyton*, 2 Wheat. 385. It was decided in that case, that an action of debt will lie by the payee or indorsee of a bill of exchange against the acceptor, where it is expressed to be for value received. *Ib.* *Kirkham v. Hamilton*, 6 Peters, 24.

(2) By Art. IV. Sec. 1, of the Constitution of the U. States, it was provided that full faith and credit should be given in each state to the public acts, records, and judicial proceedings of every other state. And that Congress might, by general laws, prescribe the manner in which such acts, records and proceedings should be proved, and the effect thereof.

Congress accordingly, by the Act of May 26, 1790, provided the mode by which records and judicial proceedings should be authenticated, and then declared that they should have such faith and credit given to them in every court within the United States, as they had by law or usage in the courts of the state from whence the records were taken.

It has been settled, that if a judgment has, in the courts of the state where it was rendered, faith and credit of the highest nature, viz. : record evidence, it must have the same faith and credit in every other court. A judgment is therefore conclusive in every other state, if the court in which it was obtained had jurisdiction, and the parties were served with process. *Nil debet* is not, therefore, a good plea to an action on such judgment. The only proper pleas are *nul tiel record*, but any special plea may be pleaded,

Jamaica; and in an action of this kind it is not necessary *for the plaintiff to state the grounds of the judgment, the [*555] judgment being of itself *prima facie* evidence of a simple contract debt: it is competent, however, to the defendant, to impeach the judgment by showing it to have been irregularly or unduly obtained. To support an action on a foreign judgment,(x) it is not sufficient to prove the judge's hand-writing subscribed to it; the seal affixed thereto

(x) *Henry v. Adey*, 3 East, 221. See *Buchanan v. Rucker*, 1 Campb. 63; *Appleton v. Lord Braybrook*, 2 Stark. N. P. C. 6; 6 M. & S. 34; *Brown v. Thornton*, 6 A. & E. 191.

which would be available to avoid the judgment in the courts of the state where it was pronounced. *Mills v. Duryee*, 7 Cranch, 481; *Kampton v. M'Connell*, 3 Wheat. 234; *Mayhew v. Thatcher*, 6 Id. 129; *Wernway v. Pawling*, 5 Gill & Johns. 500; *Shumway v. Stillman*, 4 Cowen, 292; *Thurber v. Blackbourne*, 1 N. Hamp. 242; *Cunningham v. Buckingham*, 1 Ohio, 264; *Holt v. Alloway*, 2 Blackf. 108; *Hoxie v. Wright*, 2 Verm. 263; *Kelburn v. Woodworth*, 5 Johns. 37; *Aldrich v. Kinney*, 4 Conn. 380; *Bissell v. Briggs*, 9 Mass. 462; *Pawling v. Bird*, 13 Johns. 192; *Earthman v. Jones*, 2 Yerger, 484; *Miller v. Miller*, 1 Bail. 242; *Benton v. Burgot*, 10 Serg. & R. 240; *Rogers v. Coleman*, Hardin, 413; *Borden v. Pitch*, 15 Johns. 121; *Hall v. Williams*, 6 Pick. 232; *Bates v. Delavan*, 5 Paige, 305; *Bradshaw v. Heath*, 13 Wend. 407; *Starbuck v. Murray*, 5 Id. 148; *Shumway v. Stillman*, 6 Id. 447; *Wilson v. Niles*, 2 Hall, 358; *Harrod v. Barretto*, 1 Id. 155; *Evens v. Tatem*, 9 S. & R. 252; *Armstrong v. Carson's ex'rs*, 2 Dall. 302; *Field v. Gibbs*, Peters, C. C. Rep. 155; *Green v. Sarmiento*, Ib. 74; *Phelps v. Holher*, 1 Dall. 261; *Bartlet v. Knight*, 1 Mass. 401; *Noble v. Good*, Ib. 410; *Mervin v. Kumbel*, 23 Wend. 293; *Goodrich v. Jenkins*, 6 Ohio, 44; *Silver Lake Bank v. Harding*, 5 Id. 576; *Thomas v. Robinson*, 3 Wend. 267; *Kealy v. Root*, 11 Pick. 389; *Spencer v. Brockway*, 1 Ohio, 124.

Debt lies on a foreign judgment. *Jordan v. Robinson*, 3 Shep. 167; *M'Intire v. Carruth*, 3 Brevard, 395. In *Pierson v. Mudget*, (Addison county, Vermont, 1831,) it was determined, that a judgment rendered in another state against a citizen of Vermont, who was not within the jurisdiction of the court rendering the judgment, and who had no notice of the suit, and did not appear, could not be enforced in Vermont by an action of debt on the judgment. *Williams, C. J., Jordan v. Robinson, supra*. An action of debt may be founded upon a judgment of a court of New York, where the exemplification of the record sets out that a copy of the declaration and note with a rule to plead, had been served upon the defendant's attorney, and that afterwards the defendant appeared in person, the Chief Justice of the New York court certifying that the attestation was in due form. *Letson v. Wadsworth*, 2 Speers, 277.

Where by the statutes of another state where the judgment is rendered, the plaintiff may agree, after he is arrested on a *ca. sa.*, that he may go at large without payment of the debt, with the right of subsequently proceeding against him by a new execution, or such process as the nature of the case may require, it was held, that the plaintiff could maintain an action of debt on the judgment where the defendant had left the state where the judgment was rendered, and come to reside in New York. *Simmonton v. Barroll*, 21 Wend. 262.

Debt lies on the record of a recovery in a sister state, if only certified exemplification is produced of a judgment valid in the state where rendered, though not founded on personal service. *Hunt v. Mayfield*, 2 Stew. 124; *M'Intire v. Carruth*, 1 Const. Rep. 457; *Headly v. Roby*, 6 Ham. 527.

Debt will lie as well on a decree of a court of chancery in another state, as on a judgment of a court whose proceedings are according to the court of the common law. *M'Kim v. Odom*, 3 Fairf. 94; *Williams v. Preston*, 3 J. J. Marsh, 600; *Drakely v. Kook*, 2 Root, 138. Debt lies in another state on a decree of the Chancellor of New Jersey, for the payment of a specific sum under the New Jersey Act of 13th June, 1779. *Post v. Neafie*, 3 Caines, 22. The action of debt is maintainable in Alabama, on a decree of chancery in another state for the payment of money. *Green v. Folley*, 2 Stew. & Port. 441. Whether the action would lie on such decree passed in a country foreign to the United States—*quære*. Ib. In such action judgment must be for interest, at the same rate allowed in the decree. Ib. A judgment of a justice in a sister state is treated as a foreign judgment. *Robinson v. Prescott*, 4 N. H. R. 450; *Fritz v. Fisher*, 3 Am. Law Reg. 243. Debt lies in the Superior Court on a judgment in the Marine Court. *Bennet v. Moody*, 2 Hall, 471. As to the authentication of records, see *Ohio v. Hinchman*, 5 Am. Law Reg. 424.

must also be authenticated; or evidence must be given that the court has not any seal; and then the judgment may be established by proving the signature of the judge.^(y) In debt on judgment of inferior court, the declaration must contain an averment, that the cause of action arose within the jurisdiction of the inferior court; otherwise it will be bad, on demurrer.^(z) It will not suffice to allege that the plaintiff recovered his damages within that jurisdiction. A declaration in debt for goods sold and delivered,^(a) stating that the defendant at W., in the county of M., was indebted to the plaintiff in a certain sum for goods sold and delivered, is sufficient; for the words "sold and delivered," imply a contract; as there cannot be a sale, unless two parties agree; and as the venue goes to the whole declaration, the venue laid must be taken to be the place where the contract was made for the sale of the goods.

Formerly it was considered as necessary that the amount of the sums claimed to be due in the several counts of the declaration should correspond exactly with the sum demanded in the recital of the writ, and neither exceed^(b) nor fall short of it.^(c) But this is not now considered as requisite:⁽¹⁾ and in a case,^(d) where debt was brought on simple contract; it was holden, on special demurrer to the declaration, that the declaration was good, although the sums claimed to be due in the several counts did *not amount* to the sum demanded in the recital of the writ; and although the breach was assigned for non-payment of the sum demanded; the court observing, that in debt on simple contract the plaintiff might prove and recover a less sum than he demanded in the writ. In like manner, where an action of debt was brought in the Court of King's Bench,^(e) on a bond and several simple contracts, and the amount of the sums claimed to be due in the several counts *exceeded* the sum demanded in the beginning of the declaration; it was holden, on special demurrer, that the declaration was good; for the words "of a plea that he render £" in the King's Bench, at least are superfluous words, and being rejected there will not be any repugnance on the face of the declaration. See also the opinion expressed by Lord Mansfield, C. J., in *Walker v. Witter*, 1 Doug. 3rd. edit, 6, "it is [*556] not necessary that the plaintiff should recover in debt the *exact sum demanded.⁽²⁾ See also *Aylett v. Lowe*, 2 Bl. R. 1221, where in debt on a mutuatus for 200*l.* and verdict for 100*l.*, the court

(y) *Alves v. Bunbury*, 4 Campb. 28.

(z) *Read v. Pope*, 4 Tyrw. 403.

(a) *Emery v. Fell*, 2 T. R. 28.

(b) *Hulme v. Saunders*, 2 Lev. 4.

(c) *Smith v. Vowe*, Moore, 298.

(d) *M'Quillin v. Cox*, 1 H. Bl. 249, recognized in *Gardner v. Bowman*, 4 Tyrw. 412.

(e) *Lord v. Houstoun*, 11 East, 62.

(1) See *Hampton v. Barr*, 3 Dana, 578.

(2) A verdict in debt for plaintiff without naming a sum is bad on error. *Miller v. Hower*, 2 Rawle, 52. If for a larger sum than that demanded it is good if the excess appear to be interest. *Graff v. Grayville*, 1 Watts, 428. But a count on a specialty and one on a simple contract may be joined. *Farnham v. Hay*, 3 Blackf. 167; *Smith v. First Cong. Church*, 8 Pick. 178; *Gibb v. Pindall*, 5 Leigh, 109; *Davis v. Shoemaker*, 1 Rawle, 135.

refused a new trial; although it was urged, that debt being an entire thing, it could not be recovered in part.⁽¹⁾

With every declaration, if delivered, or with notice of declaration, if filed, containing counts in indebitatus assumpsit, or debt on simple contract, the plaintiff shall deliver full particulars of his demand under those counts, where such particulars can be comprised within three folios, and where the same cannot be so comprised, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios; R. G. T. T. 1 Will. IV. The rule is not imperative; but if plaintiff omit to deliver particulars, he will not be allowed for them in costs, if afterwards called for and delivered. See Jervis's New Rules, p. 28, n. A copy of the particulars shall be annexed to the record by plaintiff's attorney: when so annexed, the delivery of them need not be proved at the trial. See *ante*, p. 71.

By R. G. H. T. 4 Will. IV., in actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead, that "he never was indebted in manner and form as in the declaration alleged," and such plea shall have the same operation, as the plea of non assumpsit in indebitatus assumpsit; and all matters in confession and avoidance shall be pleaded specially, as above directed, in actions of assumpsit. See *ante*, p. 122. In other actions of debt in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specially some particular matter of fact alleged in the declaration or plead specially in confession and avoidance.

In debt for goods sold and delivered, the defendant under the general issue may show that the goods were sold on a credit, which has not expired,^(f) for if the credit was not expired when the action was commenced, the plaintiff proves a different contract from that which he has stated in the declaration, *viz.* to pay on request. Under the general issue to an action for goods sold and delivered, or for work and labour done, the defendant may prove that the goods delivered were not such as were contracted for, or that the work was done in an unworkmanlike manner, although there was a special contract to pay for the goods or work at a certain price; and the plaintiff can then recover only on the quantum meruit.^(g) The form given, "that the defendant never **was* indebted," must be strictly pursued,^(h) where the [*557] defendant denies the sale and delivery.

Where in debt on simple contract the defendant pleads payment of a certain sum, he must prove payment of that sum (even though it be laid

(f) *Broomfield v. Smith*, 1 M. & W. 542; 1 Tyrw. & Gr. 929, denying the authority of *Edmunds v. Harris*, 2 A. & E. 414. See also *Taylor v. Hilary*, 1 Cr. M. & R. 743, and *Alexander v. Gardner*, 1 Bingh. N. C. 671; *Hayselden v. Staff*, 5 A. & E. 159; 6 Nev. & M. 659.

(g) *Cousins v. Paddon*, 2 Cr. M. & R. 570; 5 Tyrw. 536; *Turner v. Diaper*, 2 Scott's N. R. 447; and 2 M. & Gr. 241.

(h) *Smedley v. Joyce*, 2 Cr. M. & R. 721; 1 Tyrw. & Gr. 84.

(1) See *U. S. v. Colt*, 1 Pet. C. C. R. 154.

under a *videlicet*,) in order to entitle him to a verdict on that plea. But the plea may be taken distributively, and the issue found for the defendant as to the amount proved to be paid, and as to the residue for the plaintiff, &c. "Whilst it was considered to be law, that an action of debt on simple contract was founded on one entire single contract, and that the plaintiff could not recover less than the whole, a special plea of payment was also entire; and if the full amount was not proved to be paid, the plaintiff was entitled to a verdict; but since it has been established, that the demand in debt on simple contract is divisible, and the plaintiff may recover less, and since several contracts may be included in one sum in debt on simple contract, as well as *indebitatus assumpsit*, and since a plea of payment, whether pleaded to a declaration in one form or other, must have the same meaning, and does not of necessity import that one entire sum was paid at one time, there is not any satisfactory reason why it may not be considered as capable of being severed in one case as well as the other, whether pleaded to the whole declaration, or to part. The only difference between the two actions will therefore be, that in *assumpsit* the plea to the whole declaration admits no certain sum to have been originally due from the defendant to the plaintiff, whilst the plea to the whole declaration in debt admits the sum nominally claimed to have been originally due. In either, the verdict may be found for the whole, or for the part actually paid, according to the fact.(i)

Where several pleas are pleaded, which altogether cover the whole cause of action, the verdict should be entered for the defendant;(k) but when a defendant, under a plea of set-off(l) to the whole declaration, proves a sum of money owing to him from the plaintiff, less than the amount of the claim which the plaintiff has established, the defendant is not entitled to have a verdict entered for him or that issue for the amount which he has so proved, but the issue must be found for the plaintiff, unless where the defendant by all his pleas taken together covers the whole cause of action.

By R. G. T. T. 1 Viot. (*ante*, p. 136,) payment shall not, in any case, be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar. In any case in which the plaintiff, in order to avoid the expense of a plea of payment, shall have given credit in the particulars of his demand for any sum of money therein [*558] *admitted to have been paid to the plaintiff, it is not necessary for the defendant to plead the payment of such sum. But this rule does not apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance without giving credit for any particular sum.

(i) Per *Parks*, B., delivering judgment, *Cousins v. Paddon*, 2 Cr. M. & R. 660.

(k) Per *Alderson*, B., in *Kilner v. Bailey*, 5 M. & W. 385.

(l) *Tuck v. Tuck*, 5 M. & W. 109, recognized in *Falcon v. Benn*, 2 Q. B. 314; 1 G. & D. 646. See *Moore v. Butlin*, 7 A. & E. 595; 2 Nev. & P. 436; *post*, III. "Debt on Bond," 8; "Set-off," p. 593.

III. Debt on Bond, p. 558; Of the Pleadings, p. 560.

1. *General Issue, non est factum, and Evidence thereon—New Rules.* p. 560.
2. *Accord and Satisfaction.* p. 565.
3. *Duress.* p. 566.
4. *Illegal Consideration.* p. 567.
 1. *By the Common Law.* p. 567; *Immoral.* p. 567; *in Restraint of Trade, &c.* p. 567.
 2. *By Statute.* p. 572; *Gaming.* p. 572; *Sale of Office.* p. 573; *Simony.* p. 576; *Usury.* p. 582.
5. *Infancy.* p. 585.
6. *Payment.* p. 585; *Solvit ad Diem.* p. 586; *Solvit post Diem.* p. 587; and *Evidence thereon.* p. 587.
7. *Release.* p. 588.
8. *Set-off.* p. 591.

Debt on Bond.(1)—If a bond be dated on a day certain, with a penalty conditioned for the payment of the lesser sum, (m) and there be not any day fixed for the payment of the lesser sum, such sum is payable on the day of the date; and if an action be brought upon the bond, the court will refer it to the master to compute principal, inte-

(m) *Farquhar v. Morris*, 7 T. R. 124. See also *Nose v. Bacon*, Cro. Eliz. 798; 1 Inst. 208, a.

(1) The legal effect and operation of a bond is for the court and not the jury. *Butler v. The State*, 5 Gill & J. 511. A bond may be good in part and bad in part. *Ordinary v. Smith*, 2 Green, 479; *U. S. v. Bradley*, 10 Pet. 343; *U. S. v. Brown*, Gilpin, 174. The obligors in a bond may with others be obligees also, and the bond still obligatory. *Daniel v. Crooks*, 3 Dana, 64. On a penal bond to joint obligees with a condition several in its legal effect, debt for the penalty lies by the survivor for the benefit of himself and the representatives of the deceased obligee. *Aliter*, as to covenant. *Wallace v. Hanley*, 3 Dana, 72. A refunding bond executed by virtue of a power of attorney not under seal is not valid. *Harman v. Harman*, 1 Bald. 131. Where there is an obligation to pay in notes of a specific bank, it must be in notes of that bank, or their numerical value in money. *Edwards v. Morris*, 1 Ohio, 242. Such condition written on the margin is part of the obligation. *Osburn v. Stutton*, 1 Blackf. 234. A recital in the condition of a bond may restrain indefinite expressions in it and adapt them to the intention of the party. *State v. Wayman*, 2 Gill & J. 254. Obligations in which many persons are interested may be taken in the name of the State, wherever the law is silent as to whom they are to be given. *Riessted v. The State*, 1 Id. 231. In a suit or a specialty executed to one in trust for another, the action must be in the name of the person who has the legal title. *Chaplin v. Canada*, 8 Conn. 286; *Potter v. Yale College*, Ib. 52. So on a bond to A. conditioned to support B., no action lies in the name of B. *Sanders v. Filley*, 12 Pick. 554. A declaration on a bond securing costs for plaintiff and others, officers of the court, is bad. Any person interested should sue and obtain judgment for the penalty, and others should bring *scire facias* on the judgment. *Glisewell v. M'Gaighay*, 2 Blackf. 359. Where defendant sent by mail to B., one of the plaintiffs, a bond in which he bound himself to pay to B. and R., the other plaintiff, all the moneys which they might have to pay in consequence of becoming bail for a prisoner charged with larceny, and R. declined to do so, and B. and a stranger indemnified by him become bail, and the whole amount of the recognizance is paid by B. to whom R. afterwards assigns all his interest in the bond: Held, that B. and R. might jointly sue on the bond for the benefit of B. *Bird v. Washburn*, 10 Pick. 223. Counts on joint and several bonds given to the same obligee by different obligors may be joined in a writ against one obligor whose name is on all the bonds. *Wood v. Hayward*, 13 Id. 269. Debt on a bastardy bond to A. and B., as overseers of the poor, must be in the name of the overseers at the time suit is brought. *Armoir v. Spencer*, 4 Wend. 406. If the name of a person in a delivery bond be not specified, but it is mentioned that the property is to be delivered to him to whom the execution was directed, the bond is not void, and the ambiguity may be explained. *Evans v. Shoemaker*, 2 Blackf. 237.

rest, and costs, and on payment of the same, will stay the proceedings under the stat. 4 Ann. c. 16, s. 13. Interest will become due on such bond, (n) although not expressly reserved, and is to be computed from the day on which the money secured by the bond becomes payable, viz. the day of the date. Where the condition is general, to pay a sum of money with interest, no demand is necessary; (o) but if by the condition the money is payable on demand, a demand must be proved. (p) At law and in equity the penalty is the debt, (q) and interest cannot be recovered beyond the penalty, except under special circumstances. (1) In an action upon the bond, interest cannot be recovered beyond the penalty; but after judgment recovered, transit in rem judicatam; the nature of the demand is altered, and in an action on the judgment, (r) it is competent *to the jury to allow interest to the amount of what is due, although such amount exceed the penalty of the bond and costs of the judgment; and in this respect there is not any difference between a foreign judgment and a judgment in a court of record here.

If a person be bound to pay a certain sum of money at several days, (rr) the obligee cannot maintain an action of debt until the last day be past. (2) But upon a bond with a penalty conditioned to pay several sums of money at different days, (s) debt will lie immediately on default of payment at either of the days; (3) for the condition is thereby broken, and consequently the bond becomes absolute. (4) And this rule holds, although the condition of the bond does not expressly provide, "that in default of payment at any of the said times, the bond shall be in force." (5) If A. enter into a bond to pay money on two several contingencies, the obligee may maintain debt on the happening of either contingency. (t) If an instalment of an annuity, (u) secured by bond,

(n) 7 T. R. 124.

(o) *Gibbs v. Southam*, 5 B. & Ad. 911.

(p) *Carter v. Ring*, 3 Campb. 459.

(q) Per Sir W. Grant, *Clark v. Seton*, 6 Ves. jun. 411.

(r) *McClure v. Dunkin*, 1 East, 436.

(rr) 1 Inst. 47, b, 292, b; F. N. B. 304.

(s) *Coates v. Hewitt*, 1 Wils. 80; Bull. N. P. 168, S. C.; *Hallett v. Hodges*, cited by the Reporter, 1 Wils. 80, and Say. R. 29, S. P.

(t) 1 Lev. 54.

(u) *Judd v. Erans*, 6 T. R. 399.

(1) A surety is liable only to the amount of penalty and legal interest thereon. *Stat v. Wayman*, 2 Gill & J. 279.

(2) See the elaborate judgment of the court in *Rudder v. Price*, 1 H. Bl. 547, and the distinction there taken between debt and assumpsit in this respect. Not even if under seal. *Farham v. Hay*, 3 Blackf. 167. See also *ante*, 553, note (1).

(3) So on a covenant or promise to pay a sum of money by instalments, an action of covenant or assumpsit will lie immediately on the non-payment of the first instalment. 1 Inst. 292, b; *Milles v. Milles*, Cro. Car. 241. So if money is awarded to be paid at different days, assumpsit will lie on the award for each sum as it becomes due, and the plaintiff shall recover damages accordingly; and when another sum of the money awarded shall become due, the plaintiff may commence a new action for that also, and so on, *toties quoties*. *Cooke v. Whorwood*, 2 Saund. 337. The same rule holds in respect of duties which touch the realty. 1 Inst. 292, b.

(4) See *Hopkins v. Deares*, 2 Browne, 97.

(5) Where the condition of a bond is for the payment of interest annually, and of the principal at a distant day, the interest may be recovered before the principal is due, by an action of debt on the bond. *Sparkes v. Garrigues*, 1 Binn. 152.

be not paid on the day, the bond is forfeited, and the penalty is the debt in law, for which judgment may be entered, which shall stand as a security for the growing arrears of the annuity. Where a place of date is mentioned in the bond,(x) it is incumbent on the plaintiff to set it forth in the declaration, so that the bond produced in evidence may agree with the bond declared on. Hence if a bond be dated abroad, the declaration must state the place of such date, and then the venue must be added for a place of trial. But where a promissory note was dated at Paris, and the declaration merely stated that it was made at London, omitting the place of date, Lord *Ellenborough* held the omission to be immaterial.(y) In debt(z) upon bond, the court *would not permit money to be paid into court, but would [*560] refer it to the master to compute what was due for principal and interest. But see stat. 3 & 4 Will. IV. c. 42, s. 21, *ante*, p. 140.

Of the Pleadings.

1. General Issue, *non est factum*, and Evidence thereon—New Rules.

The general issue to an action of debt on bond is *non est factum*, because the action is grounded upon the specialty.(1) But by R. G. H. T. 4 Will. IV. in debt on specialty or covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.(2) Under the operation of this rule, many grounds

(x) *Robert v. Harnage*, Lord Raym. 1043; Salk. 659, S. C.; 1 Inst. 261, b. See also *Dutch W. I. Company v. Van Moses*, 1 Str. 612.

(y) *Houriet v. Morris*, 3 Campb. 303.

(z) *Anon.* E. 25 Geo. III. B. R. MSS.; and see *England v. Watson*, 9 M. & W. 337.

(1) If the defendant plead *nil debet* instead of *non est factum*, the plaintiff may take advantage of it on general demurrer. *Anon.*, 2 Wilson, 10; *Bullis v. Giddens*, 8 Johns. 82; *Boynston v. Reynolds*, 3 Mis. 379; *Smith v. Stewart*, 6 Blackf. 162. In debt on bond of indemnity, *nil debet* is bad. *Bauer v. Roth*, 4 Rawle, 83. *Nil debet* is not a good plea to debt on bond setting out the condition and breach. *Allen v. Smith*, 7 Halst. 160. So also, if not set forth. *Barfield v. Reamy*, Walker, 504. *Nil debet* is not a good plea to an action founded on a judgment of another state. *Mills v. Duryee*, 7 Cranch, 481; *St. Alban v. Bush*, 4 Verm. 58; *Curtis v. Gibbs*, 1 Penn. 399; *Larmings v. Shute*, 2 South. 728; *Chippis v. Yancey*, Breese, 2; *Clark v. Day*, 2 Leigh, 172. But see *Williams v. Preston*, 3 J. J. Marsh, 600. Nor is it a good plea to an action of debt on a recognizance, nor to any action founded on a record or specialty. *Bullis v. Giddens*, 8 Johns. 82. But when the record or specialty is only inducement to the action, which is grounded on matter of fact, as in debt for rent, for an escape, or on a *devastavit*, *nil debet* may be pleaded. *Ib.* *Niblo v. Clarke*, 3 Wend. 24. In debt on a judgment or recognizance, the defendant can plead no matter inconsistent with the record; but if the record be untruly stated in the declaration, he may plead *nul tiel record*. *Green v. Ovington*, 16 Johns. 55; *White v. Cowruse*, 20 Wend. 266.

Nil debet cannot be pleaded to an action on a judgment. *Jacquette v. Hugunon*, 2 M'Lean, 129; *Newcomb v. Peck*, 17 Verm. 302. The plea of *nil debet* to debt on a specialty, is bad on general demurrer. *Smith v. Stewart*, 6 Blackf. 162. Or to a declaration on debt, founded on a sealed instrument, is not good, though extrinsic facts are alleged. *Gates v. Wheeler*, 2 Hill, 232. Under a plea of *nil debet* in an action for an escape, any matter in discharge of the action may be given in evidence; as that the defendant at the time of the alleged escape, was not a lawful prisoner in the custody of the sheriff. *Brown v. Littlefield*, 7 Wend. 454.

(2) By the rules of court, cited in the text, the plea of *non est factum* is made a special

of defence, of which the defendant might heretofore have availed himself, by evidence upon *non est factum*, must now be pleaded specially; as coverture or lunacy, at the time of the execution, or that the bond was delivered as an escrow, or that defendant was made to execute it when he was so drunk, that he did not know what he did.(1) If the defendant crave oyer of the bond and condition, and does not set out them or either of them truly, and then pleads *non est factum*, the plaintiff ought to pray to have the bond and condition, or either, (as the case may be,) enrolled and then demur,(a) or sign judgment for want of a plea,(b) or move to quash the plea,(c) for if the plaintiff omits to take the foregoing steps, and joins issue on the *non est factum*, the defendant may take advantage of the variance.(d) But see stat. 9 Geo. IV. c. 15, ante, p. 542. Upon the issue of *non est factum*, the plaintiff must prove the execution of the bond *by the defendant*. Proof that one, who called himself D., executed, is not sufficient, if the witness did not know it to be the defendant.(e)(2) Upon this issue, the question is, whether it was the defendant's deed at the time of plea pleaded.(f) Thus, where to a plea of release by the plaintiffs of a co-contractor with the defendants, the plaintiffs replied *non est factum*, to which the defendants rejoined, that the said deed is the deed of the plaintiffs, on which issue was joined; it was holden, that the issue was proved by the production of the deed in a cancelled state, which had operated as a release, it having been cancelled by the releasee after plea pleaded but before issue joined.(g)

(a) Com. Dig. Pleader, P. 1; *Ferguson v. Mackreth*, 4 T. R. 371, n.

(b) Per Cur., *Wallace v. Duchess of Cumberland*, 4 T. R. 371.

(c) *Id.*

(d) *Gunter v. Smith*, Peake's Ad. Cases, edited by Peake, Junr. 1.

(e) *Memot v. Bates*, H. 4 Geo. II. Bull. N. P. 171.

(f) *Nichols v. Haywood*, Dyer, 59, a; *Whelpdale's case*, 3rd Resol. 5 Rep. 119; *Michael v. Scorkwith*, Cro. Eliz. 120.

(g) *Todd v. Emly*, 11 M. & W. 1.

plea. Under the general plea of *non est factum*, the defendant may give in evidence anything which shows that the instrument was originally void at common law; as coverture, fraud, &c., or that it has become void since its execution; as by erasures, alterations, &c. *Union Bank v. Ridgely*, 1 Har. & Gill, 314; *Dorr v. Mansell*, 13 Johns. 430; *Van Valkenburg v. Rouk*, 12 Id. 337; 2 N. Hamp. 74.

(1) As to this defence, see *Lacy v. Ganard*, 1 Ohio, 275; *Burroughs v. Rickman*, 1 Green, 233; 1 Parsons on Contr. 310; Addison on Contr. 91.

(2) A bond is binding on all who execute, as well those not named in the body of it, as those who are. *Blakey v. Blakey*, 2 Dana, 463; *Reynolds v. Gere*, 4 Leigh, 276. Two persons may make use of one seal in the execution of a bond, and it will be the deed of both. *Flood v. Yander*, 1 Blackf. 102. Bond by two, beginning "I promise," and concluding "witness my hand and seal," may be considered several. *Lambert v. Lagon*, Ib. 388. Where the subscribing witness to a bond testified that at the execution of it the defendant said it was not to be delivered till signed by all named in it, and one of the obligors did not sign it, held no delivery. *State Bank v. Evans*, 3 Green, 155. An instrument signed, sealed, attested, and delivered in blank to obligee, who afterwards filled it up, is not operative as a deed. *Ayres v. Harness*, 1 Ohio, 174; *United States v. Nelson*, 2 Brock. 64. But see *Fullerton v. Harris*, 8 Greenl. 393. A bond with sureties, by postmaster, does not bind till approved by the postmaster-general. *P. M. v. Norvell*, Gilpin, 121. A bond voluntarily given to the United States, although not prescribed by law, is valid. *United States v. Tingley*, 5 Peters, 115.

In debt on bond, the plaintiff, by his declaration, complained *against "W. F. B., sued by the name of W. B." The [*561] defendant pleaded *non est factum*. At the trial, it appeared that the defendant did, in fact, execute a bond agreeing with that described in the declaration by the name of W. B., and that at the time of the execution he was known by that name; it was objected, that the issue was not maintained: but the court held: (h) first, that the proof was sufficient to sustain the issue, and that it was no variance; secondly, that even if the objection were valid, it was not one, of which the defendant could avail himself under the plea of *non est factum*.

To prove the execution of a bond, the sealing *and* delivery must be proved. (1) Proof of the sealing only is not sufficient. (2) Hence, in a

(h) *Williams v. Bryant*, 5 M. & W. 447.

(1) It is sufficient that the scrawl should be fixed at the time of execution or delivery, and that is presumed from the possession of the instrument; and it is not necessary it should be adopted by any declaration in the body of it. *Trasher v. Everhart*, 3 Gill & J. 234. But see *contra*, *Bohannon v. Hough*, Walker, 461. A mark in ink of L. S., instead of a wax seal, on a bond executed in Pennsylvania, where such seals are valid, was holden a sufficient sealing in New York. *Mendith v. Hinsdale*, 2 Caines' Rep. 262; *McDill v. McDill*, 1 Dall. 63; *Long v. Ramsey*, 1 S. & R. 72. The rule is the same in Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Kentucky, Tennessee, Ohio, Indiana, Illinois, Mississippi, and Missouri. See next note.

(2) "The nature of a seal, and the object of the law in requiring its use, was discussed by Kent, C. J., with his usual affluence of learning, in *Warren v. Lynch*, 5 Johns. 245-247. 'A seal,' says he, 'according to Lord Coke, (3 Inst. 169,) is a wax impression, *sigillum est cera impressa, quia cera sine impressione non est sigillum*. A scrawl with the pen is not a seal, and deserves no notice. The law has not, indeed, declared of what precise materials the wax shall consist; and whether it be a wafer or any other paste or matter sufficiently tenacious to adhere and receive an impression, is perhaps not material. But the scrawl has no one property of a seal. *Multum abludit imago*. To adopt it as such would be at once to abolish the immemorial distinction between writings sealed, and writings not sealed. Forms will frequently, and especially when they are consecrated by time and usage, become substance. The calling a paper a deed will not make it one, if it want the requisite formalities.' 'Notwithstanding,' says Perkins, (sect. 129,) 'that words obligatory are written on parchment or paper, and the obligor delivereth the same as his deed, yet if it be not sealed at the time of the delivery, it is but an escrow, though the name of the obligor be subscribed.' I am aware that ingenious criticism may be indulged at the expense of this and of many of our legal usages; but we ought to require evidence of some positive and serious public inconvenience before we, at one stroke, annihilate so well established and venerable a practice as the use of seals, in the authentication of deeds. The object in requiring seals, as I humbly presume, was misapprehended, both by President *Pendleton*, and by Mr. Justice *Livingston*. It was not, as they seem to suppose, because the seal helped to designate the party who affixed it to his name. '*Ista ratio nullius pretii*,' (says Vinnius, in Inst. 2, 10, 5,) '*nam et alieno annulo signare licet*.' Seals were never introduced or tolerated in any code of law, because of any family impression, or image, or initials, which they might contain. One person might always use another's seal, both in the English and in the Roman law. The policy of the rule consists in giving ceremony and solemnity to the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed, and frauds less likely to be practised upon the unwary. President *Pendleton*, in the case of *Jones and Temple v. Lockwood*, 1 Wash. Rep. 42, which was cited upon the argument, said that he did not know of any adjudged case that determines that a seal must necessarily be something impressed on wax; and he seemed to think that there was nothing but Lord Coke's opinion to govern the question. He certainly could not have examined this point with his usual diligence. The ancient authorities are explicit, that a seal does, in legal contemplation, mean an impression upon wax. It is not requisite, according to Perkins, (sect. 134,) that there be for every grantor who is named in the deed, a several

case(i) where the jury found that the defendant sealed the bond and cast it upon the table, and the plaintiff took it without any other deli-

(i) *Chamberlain v. Stanton*, Cro Eliz. 122; 1 Leon. 140; Dyer, in marg. 192, S. C.

piece of wax, for one piece of wax may serve for all the grantors, if every one put his seal upon the same piece of wax. And Brooke, (tit. Faits, 30, and 17,) uses the same language. In *Lightfoot* and *Butler's* case, which was in the Exchequer, (29 Eliz. 2 Leon, 21,) the Barons were equally explicit as to the essence of a seal, though they did not all concur upon the point as stated in Perkins. One of them said that twenty men may seal with one seal upon one piece of wax only, and that should serve for them all, if they all laid their hands upon the seal; but the other two Barons held, that though they might all seal a deed with one seal, yet it must be upon several pieces of wax. Indeed, this point, that the seal was an impression upon wax, seems to be necessarily assumed and taken for granted in several other passages which might be cited from Perkins and Brooke, and also in Mr. Seldon's Notes to Fortesque De Land. 72. And the nature of a seal is no more a matter of doubt in the old English law, than it is, that a deed must be written upon paper or parchment, and not upon wood or stone. Nor has the common law ever been altered in Westminster Hall upon this subject; for in the case of *Adam v. Keer*, 1 Bos. & Pul. 360, it was made a question whether a bond, executed in Jamaica with a scrawl of the pen, according to the custom of that island, should operate as such in England, even upon the strength of that usage.

"The civil law understood the distinction and solemnity of seals as well as the common law of England. Testaments were required not only to be subscribed, but to be sealed by the witnesses. *Subscriptionem testium et ex edicto prætoris signacula testamentis imponerentur*. Inst. 2, 10, 3. The Romans generally used a ring, but the seal was valid in law, if made with one's own or another's ring; and, according to Heineccius, (*Elementa Juris Civilis Secundum. Ord. Inst.* 497,) with any other instrument which would make an impression; and this, he says, is the law to this day throughout Germany. And, let me add, that we have the highest and purest classical authority for Lord Coke's definition of a seal: *Quid si in ejusmodi cera centum sigilla hoc annullo impressero. Cicero Academ. Quæst. Lucul. 4, 26.*" See also *Bradford v. Randall*, 5 Pick. 496; 4 Kent's Com. 452.

The common law, however, in regard to the manner of sealing, has been considerably changed in the United States, both by statute and by usage; it being the practice in many states to make a circular scrawl with ink, with or without the letters L. S., or the word seal within it, to serve instead of an impression on wax or a wafer; and on legal processes and official documents, the official seal, impressed on the paper alone, is in many states practised, and deemed sufficient.

In Maine, New Hampshire, Vermont, and Massachusetts, the impression of the seal on the paper only, without wax or wafer, is made sufficient by statute in all legal processes and official documents. Maine Rev. Stat. 1840, ch. 1, § 15; N. Hamp. Rev. Stat. 1842, ch. 1, § 9; Vermont Rev. Stat. 1839, ch. 4, § 13; Mass. Rev. Stat. 1836, ch. 2, § 15. In New York, this method is allowed by statute on the acts and deeds of corporations. New York Stat., April 7, 1848, ch. 197.

In New Jersey, the scrawl or scroll is a sufficient seal on "any instrument for the payment of money." N. Jersey Rev. Stat. 1846, tit. 29, ch. 2, p. 201.

But in all the above named states, as well as in Connecticut and Rhode Island, the common law idea of a seal, in regard to private instruments of conveyance, admitting, however, the use of a wafer instead of wax, universally prevails.

By the statute of Ohio, Michigan, Indiana, Illinois, Missouri, Kentucky, Florida, Arkansas, Tennessee, and Virginia, and by the usage and common law of Pennsylvania, Delaware, both the Carolinas, Georgia, and Mississippi, a scroll affixed or added, by way of seal, is a sufficient seal on any private instrument of writing. Ohio Rev. Stat. 1841, ch. 103; Mich. Rev. Stat. 1846, ch. 65, § 39; Ind. Rev. Stat. 1843, ch. 33, § 25; Ill. Rev. Stat. 1839, p. 536; Ken. Rev. Stat. 1834, vol. 1, p. 326; Florida, Thompson's Dig. 348; Tenn. Rev. Stat. 1836, p. 64, stat. 1801, ch. 6; Griffith's Law Register, vol. 3, p. 200, 222, 245, 433; Ib. vol. 4, p. 659, 833, 1034; *United States v. Coffin*, Bee, 140; *McDill v. McDill*, Dall. 63; *Long v. Ramsey*, 1 S. & R. 72.

But in Virginia, Georgia, Missouri, and Arkansas, it is necessary that the scroll be expressly recognized as the seal in the body of the instrument. Tate's Dig. 125, 160; *Cromwell v. Tate*, 7 Leigh, 301; *Parks v. Hewlett*, 9 Id. 54; Missouri Rev. Stat. 1845, ch. 31, § 5; *Cartnaill v. Hopkins*, 2 Mis. Rep. 79; Arkansas Rev. Stat. 1837, ch. 30, § 3; Georgia Rev. Stat. 1845, p. 408, (by Hotchkiss); 4 Cruise's Dig. 27, note to Greenl. ed.

very, or any other thing amounting to a delivery, the court were of opinion, that this was insufficient; observing, that it was not like the case which had then lately been adjudged, *(k)* where the obligor had sealed the bond, and cast it upon the table, saying, "This will serve," which was holden a good delivery; because, from the expressions used by the obligor, it appeared to be his intention that it should be his deed. If the obligor says to the obligee, "It is sufficient for you," or, "Take it as my deed," or the like words, it is a sufficient delivery. *(l)* If a person deliver a writing sealed *to the party to whom it is made*, as an escrow, that is, to be his deed upon certain conditions, that is an absolute delivery of the deed, being made to the party himself. *(m)* But a deed may be delivered to a stranger as an escrow. *(n)* It is not necessary that the delivery of a deed as an escrow should be by express words; although it is in form an absolute delivery, yet if it can reasonably be inferred from the facts attending the execution, that it was delivered not to take effect as a deed until a certain condition was performed, it will operate as an escrow. *(o)* *(1)*

Where a party to any instrument seals it, and declares, in the presence of a witness, that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping the deed in his hands, it is a valid and effectual deed; *(p)* and delivery to the party, who is to take by the deed, or to any person for his use, is not essential. Delivery to a third person for the use of the party in whose favour the deed is executed, where the grantor parts with all control over the deed, makes the *deed effectual [*562] from the instant of such delivery, *(q)* although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made.

If there is a subscribing witness to the bond who is living, and capable of being examined, such witness alone is competent to prove the execution; because he may know and be able to explain the circumstances of the transaction, of which a stranger may be ignorant; *(2)*

(k) 1 Inst. 36, a.

(l) *Ib.*

(m) *Ib.*

(n) *Ib.*

(o) *Johnson v. Baker*, 4 B. & A. 440; *Murray v. Earl of Stair*, 2 B. & C. 82; 3 D. & R. 278, recognized by *Parke, B.*, in *Bowker v. Burdekin*, 11 M. & W. 147.

(p) *Doe d. Garmons v. Knight*, 5 B. & C. 671.

(q) *S. C.*

(1) Where a bond, duly sealed, &c., is put into the possession of the obligee by a person who has no authority to deliver it, the obligee cannot maintain an action upon it. *Fay v. Richardson*, 7 Pick. 91. See *Lovett v. Adams*, 3 Wend. 380; *Folly v. Vantuyt*, 4 Halst. 153; *Sigfried v. Levan*, 6 S. & R. 308; *Wiley v. Moor*, 17 Id. 438; *Harrison v. Tierman*, 4 Rand. 177; *Stahl v. Berger*, 10 S. & R. 170.

(2) This rule is religiously adhered to, nor can it be dispensed with, even where the instrument is not the foundation of the action, but only given in evidence collaterally. See the opinion of Lord *Alvanley*, O. J., in *Manners, q. t. v. Postan*, 4 Esp. N. P. C. 240. And it is not sufficient ground for receiving evidence of the handwriting of the witness, (which would be receivable if he were dead,) that he is unable to attend the trial from illness, and lies without hope of recovery. *Harrison v. Blades*, 3 Campb. 457.

and for this reason it has been holden, (r) that a confession or acknowledgment of the party executing the bond will not dispense with this testimony. Even the admission of the obligor of the execution of a bond in an answer to a bill in chancery, (s) filed for the express purpose of obtaining such admission, has been adjudged to be insufficient without evidence to account for the non-production of the subscribing witness. (1) It is not necessary that the subscribing witness should actually see the party execute the bond; (t) for if the witness be in an adjoining room, and the obligor, after the execution, brings the bond to the witness, and says that he has executed it, and desires the witness to subscribe his name as a witness, this is sufficient. (2) If there be two or more subscribing witnesses, it will only be necessary to call one of them. If it can be proved, that the subscribing witness is dead, or has become insane, (u) or blind, (x) or is domiciled, (y) or absent in a foreign country, and out of the jurisdiction of the court, (z) (3) at the time of trial; or that intelligence cannot be obtained of him after reasonable inquiry [*563] has been made; (a) proof of his hand-writing *will in such cases be sufficient. (4) If the subscribing witness deny having

(r) *Abbot v. Plumbs*, Doug. 215.

(s) *Call v. Dunning*, 4 East, 53.

(t) *Parke v. Mears*, 2 Bos. & Pul. 217.

(u) *Currie v. Child*, 3 Campb. 283.

(x) Per *Holt*, C. J., at Nisi Prius, *Wood v. Drury*, 1 Ld. Raym. 734, and S. P., per *Parke*, J., Devon Lent Ass. 1833, on the authority of the foregoing case; *Pedler v. Paige*, 1 M. & Rob. 258.

(y) *Coghlan v. Williamson*, Doug. 93.

(z) *Prince v. Blackburn*, 2 East's R. 250. [And see *Slaby v. Blackburn*, 4 Johns. Rep. 461.]

(a) *Cunliffe v. Sefton*, 2 East, 183; *Crosby v. Percy*, 1 Taunt. 364; *Wardell v. Fernor*, 3 Campb. 282; S. P., *Parker v. Hoskins*, 2 Taunt. 223; *Burt v. Walker*, 4 B. & A. 697; *Doe d. Johnson v. Johnson*, Leicester Lent Ass. 1818, and B. R. Trin. T. 1818, 1 Phillippa, Ev. 472, n.

(1) But in a case where the defendant's attorney had admitted the signature of the defendant, and the subscribing witness to the bond, Lord *Ellenborough* ruled, that this must be taken as a presumptive admission of all the subscribing witness professed to attest, and would have been called to prove, and consequently, that it was not necessary to bring proof of delivery. *Milward v. Temple*, 1 Campb. 375.

(2) In Pennsylvania, it has been held, that if the witness has become interested since the time of the execution, though by his own voluntary act, his handwriting may be proved. *Hamilton v. Marsden*, 6 Binn. 45; *Lautermilch v. Kneagy*, 3 S. & R. 202.

(3) See *Clark v. Sanderson*, 3 Binn. 192; *Peters v. Condron*, 2 S. & R. 80; *Hants v. Rough*, Ib. 349; *Hamilton v. McGuire*, Ib. 478. See 1 Greenl. on Evid. § 575.

(4) In debt on bond, without defence. *Willes*, C. J. "If both witnesses to the bond are dead, one would think the plaintiff ought to prove the obligor's hand; but the established rule of evidence is otherwise, and it is sufficient for plaintiff to prove both the witnesses dead, and the hand of one of them;" which the plaintiff did, and had a verdict. *Tomlins v. Talbot*, London Sittings, C. B. M. 18 Geo. II. MSS. 10 Leeds, 202, part of Serjt. Hill's collection in Lincoln's Inn library. So where a bond is attested by two witnesses, and one is dead, and the other beyond the reach of the process of the court, proof of the handwriting of the witness that is dead is sufficient. *Adam v. Kerr*, 1 Bos. & Pul. 360. But see 1 Cr. & M. 511, *post*, p. 564, n. And the rule holds, even where the party executing the deed is a marksman. *Mitchell v. Johnson*, M. & Malk. 176.

It appeared from *Wallis v. Delaney*, 7 T. R. 266, n., that Lord *Kenyon*, thought it necessary, in cases of this kind, that the hand-writing of the obligor should be proved, as well as the hand-writing of the subscribing witness. But although this point was doubtful formerly, it appears to have been solemnly decided in the following case:

Debt on bond: (*Gough v. Cecil*, C. B. Trin. 24 Geo. III., Serjt. Hill's MS. 21, p. 78; &

seen the deed executed, the case stands as if there were no subscribing witness, and other evidence may be admitted.(b)

By stat. 26 Geo. III. c. 57, s. 38, deeds executed in the East *Indies, and attested by witnesses *there*, are made evi- [*564] dence on proof of the hand-writing of the parties, and of the witnesses, and also that the witnesses are resident in the East Indies.

If the bond be thirty years old or upwards,(c) it may be given in evidence without any proof of the execution;(1) for it proves itself without calling the subscribing witness, even if he is alive;(d)(2)

(b) *Talbot v. Hodson*, 7 Taunt. 251. See *infra*, n. (6).

(c) Bull, N. P. 255.

(d) *Doe d. Spilsbury v. Burdett*, 4 A. & E. 19.

C., shortly reported in 1 *Luders on Elections*, 317;) there was one witness to the bond who was dead; his handwriting was proved, but not the handwriting of the obligor. On Serjt. Kerby's objecting, that handwriting of obligor was not proved, Lord *Loughborough* directed a nonsuit. Walker, Serjt., moved to set aside the nonsuit; because signature is not necessary, and if subscribing witness had been dead he need not have proved handwriting of obligor. Cited 2 Rep. 5, 2 Salk. 642, and Ford's MS. note of case before *Eyre*, C. J., where a deed was attested by two witnesses who were dead, the handwriting of one of the witnesses only was proved, and not the handwriting of the other witness, or of the party executing deed. Kerby, Serjt. The obligor need not have signed, but having signed the bond, his handwriting ought to have been proved; the ancient reason (3 Lev. 1,) for sealing is now at an end; the most satisfactory proof is the handwriting, instead of sealing—the witness's attestation is not the only evidence; and after his death, there being no opportunity of cross-examining him as to the execution, the best evidence is that of the obligor's handwriting—relied on the practice. Lord *Loughborough* thought the proof of obligor's handwriting much the most satisfactory to court and jury. *Gould*, J., thought so too, and according to his memory it was the practice on the Western Circuit. *Nares*, J., differed on principle and practice of Oxford Circuit. *Heath*, J., concurred with *Nares*, J., on principle and practice—said that it was good *prima facie* evidence. Lord *Loughborough*, C. J., thought the practice ought to decide, and would take time to inquire of it—afterwards the court granted a new trial. N. in conversation a few days after, *Gould*, J., expressed his dissatisfaction to Serjt. Kerby.

In addition to the preceding decision it may be observed, that Mr. J. *Buller*, in *Adam v. Kerr*, 1 Bos. & Pul. 360, held, "that the handwriting of the obligor need not be proved; that of the subscribing witness, when proved, is evidence of everything on the face of the paper, which imports to be sealed by the party." The same doctrine may be inferred from the cases of *Cunliffe v. Sefton*, 2 East, 183; *Prince v. Blackburn*, Ib. 250; *Page v. Mann*, 1 M. & Malk. 79; *Kay v. Brookman*, Ib. 286, S. P. per *Best*, C. J.

The doctrine contained in the foregoing cases was much discussed in *Whitlocke v. Musgrove*, in the Exchequer, in Easter T. 1833, 1 Cr. & M. 511, when it was solemnly determined, after consideration, that the naked evidence of the handwriting of the subscribing witness, is not sufficient to fix a defendant in such case; there must also be reasonable evidence of the identity of the party sued with the party executing the instrument.

If the subscribing witness swears that he did not see the deed executed, then the execution may be proved by evidence of the handwriting of the party. *Fitzgerald v. Elsee*, 2 Campb. 635, *Lawrence*, J. The same rule holds with respect to a promissory note. *Lemon v. Dean*, 2 Campb. 636, n., *Le Blanc*, J. See 1 Greenl. Ev. 570-576.

(1) This rule extends to other paper writings, as well as deeds, e. g. old receipts. *Fry v. Wood*, M. 11; Geo. II. B. R. MSS.; *Bertie v. Beaumont*, 2 Price, 308; and *Wynn v. Tyrwhitt*, 4 B. & A. 376; *Barr v. Gratz*, 4 Wheat. 221.

(2) It is worthy of remark, that in *Rees v. Mansell*, Hereford Sum. Ass., 1765, MSS., *Perrot*, Baron, held, that if a deed is read in evidence on account of its antiquity, yet if, on the other side, it is shown that one of the witnesses is alive, he must be produced; or the deed must be rejected. And he said, a deed being produced in B. R. and going to be read, it appeared that Sir J. Jekyll was a subscribing witness; upon which the court said, they knew he was alive, and if he did not come to prove it, plaintiff must be nonsuited. It was mentioned to have been said by *Yates*, J., on a former circuit, that, for

[*565] some account, however, ought to be given of it where *found, &c.,(e) in order to raise the presumption, that it was regularly executed. The custody to be shown for the purpose of making a document evidence without proof of execution is not necessarily that of a person strictly entitled to the possession; it is sufficient if it is produced by persons, whose possession of it may be reasonably accounted for; although their custody be not the strictly proper one.(f) But if there be any blemish in the bond by rasure or interlineation, the execution ought to be proved, although the bond be above thirty years old, by the subscribing witness, if living, and if he is dead, by proving his hand-writing, in order to encounter the presumption arising from the rasure, &c.(g)(1)

(e) *Governor and Company of Chelsea Waterworks v. Cowper*, 1 Esp. N. P. C. 275.

(f) *Doe d. Neale v. Samples*, 8 A. & E. 151, recognizing *Bishop of Meath v. M. of Winchester*, 3 Bingh. N. C. 202; 3 Scott, 561; *Croughton v. Blake*, 12 M. & W. 208.

(g) Bull. N. P. 255.

the sake of practice, the witness should not be admitted to prove an old deed, even if he attended for that purpose: but *Perrot*, B., retained his opinion, and said, that an old deed is admitted, only on a presumption that the witnesses are dead; but when the contrary is made to appear, they must be called. But it is now clearly settled that the witnesses need not be called; see *Doe d. Oldham and Wife v. Wolley*, 8 B. & C. 24, and *Doe d. Spilsbury v. Burdett*, 4 A. & E. 19.

(1) An alteration or addition in a bond or other deed, as by adding a new obligor, or an erasure, as by striking out an old obligor, if done with the consent of all the parties to the deed, does not avoid it; and that whether the alteration or erasure be made in pursuance of an agreement and consent, prior or subsequent to the execution of the deed; and such consent may be proved by parol evidence. *Speake v. United States*, 9 Cranch's Rep. 28. Any alteration of a bond after execution, in absence of obligor, and without his consent, especially if he be a surety, renders it void. *Bell v. Quick*, 1 Green, 312. But if by a stranger, though material, it will not; nor if immaterial, though by a party interested. *Nichols v. Johnson*, 10 Conn. 192. An alteration even in a material part of a bond by consent, does not avoid it. *Camden Bank v. Hall*, 2 Green, 583. Erasing the alteration or addition will not do away its effect. *Cotton v. Edwards*, 2 Dana, 106. A person entitled to a bond is not obliged to receive it if there are rasures or interlineations. *Garcen v. Bean*, 3 Green, 460. Whether an erasure is material is matter of law. *Love v. Shops*, Walker, 510; 1 Greenl. Ev. §§ 564, 568. See *sup.* 339, n. (1). When the seal is torn off, or the bond cancelled by mistake, fraud, &c., yet such mutilated instrument may be declared on as the obligor's deed, and the special facts be set out in the profert. *United States v. Spalding*, 2 Mason, 478. The declaration on a bond alleged to be lost, must set out the substance of the condition thereof, or proof of a bond with condition will not support it. *Rand v. Rand*, 4 N. Hamp. 267.

The defendant, on the general issue of *non est factum*, (*Pigot's case*, 11 Rep. 27, a. 5 Rep. 119, b.,) may give in evidence anything which proves the deed to be void at the time of pleading; as rasure, interlineation, addition to, or other alteration of the deed in a material point by the obligee, or even by a stranger without the privity of the obligee. See *Prevost v. Gratz*, 1 Peters' C. C. Rep. 369; *Moore v. Bickham*, 4 Binn. 1; *Stahl v. Berger*, 10 S. & R. 170; *Barrington v. Bank of Washington*, 14 Id. 405; *Heffelfinger v. Shutz*, 16 Id. 46; *Wickes v. Caulk*, 5 Har. & J. 36; *Union Bank v. Ridgely*, 1 Har. & Gill, 324. A bond is not avoidable by the seals being torn off fraudulently or innocently by the obligor; but it may be declared on as a subsisting bond. *Cutts v. The United States*, 1 Gallis. 69; *United States v. Spalding*, 2 Mason, 478; *United States v. Hatch*, 1 Paine, 336. In like manner the defendant, on *non est factum*, may give in evidence coverture; 12 Mod. 609, Per *Holt*, C. J., *Lambert v. Atkins*, 2 Campb. N. P. C. 272, S. P.; or lunacy at the time of execution; *Fates v. Boen*, Str. 1104; Per *Lee*, C. J., on the authority of *Smith v. Carr*, by *Pengelly*, C. B. See *Faulder v. Silk*, 3 Campb. N. P. C. 126; or that the bond was given to a feme covert, and that her husband disagreed to it; or that the bond was delivered as an escrow; *Stoytes v. Pearson*, 4 Esp. N. P. C. 255, *Ellenborough*, C. J.; *Union Bank v. Ridgely*, 1 Har. & Gill, 324; or that he was made to execute it when he was so drunk that he did not know what he did. *Cole v. Robins*, per

In the case of a joint bond, if one obligor only be sued, he must plead the matter in abatement, *(h)* for he cannot take advantage of it in evidence on the general issue *non est factum*, *(i)* although it appear upon the declaration that there are other obligors, *(k)* nor can he demur upon over. *(l)* So where the bond is executed by three obligors, and two only are sued. *(m)* ⁽¹⁾ [See the new provision as to pleas in abatement under stat. 3 & 4 Will. IV. c. 42, s. 8, *ante*, p. 482.] But where it appears on the record, the objection may be taken in arrest of judgment. *(n)* ⁽²⁾

2. Accord and Satisfaction. ⁽³⁾

It appears from some of the books, *(o)* that to debt on bond an accord executed *before the day of payment* may be pleaded. I am not, however, aware of any case, in which this point has been expressly determined. ⁽⁴⁾ If such plea can be pleaded, the following rules ought to be attended to: first, that the thing given in satisfaction be of some value in contemplation of law, *(p)* hence, a release of an equity of redemption is not sufficient; secondly, if the debt arises by the performance or breach of the condition, *(q)* and not by virtue of the bond, the accord and satisfaction must be pleaded in discharge of the condition, and not of the bond; lastly, if the debt arises upon an obligation without a con-

(h) *Watts v. Goodman*, *Ld. Raym.* 1460.

(i) *Whelpdale's case*, 5 *Rep.* 119, a; *Stead v. Moon*, *Cro. Jac.* 152.

(k) *South v. Tanner*, 2 *Taunt.* 254.

(l) *Gilbert v. Bath*, *Str.* 503.

(m) *South v. Tanner*, 2 *Taunt.* 254; *Gaulton v. Challiner and Wilkinson*, 1 *Wms. Saund.* 291, e, n.

(n) *Horner v. Moor*, *B. R. M.* 24 *Geo. II.*, cited by *Ashton*, *J.*, 5 *Burr.* 2614.

(o) *Anon.* *Cro. Eliz.* 46, cited in *Com. Dig. Accord*, (A. 1.)

(p) *Preston v. Christmas*, 2 *Wils.* 86.

(q) *Neale v. Sheffield*, *Yelv.* 192.

Holt, *C. J.*, *Salk. MSS. Bull. N. P.* 172; *Pitt v. Smith*, 3 *Campb. N. P. C.* 33. But if the deed is voidable only, as by reason of infancy or duress, in these, and the like cases, the obligee cannot plead *non est factum*: for it is his deed at the time of action brought, and must be avoided by special pleading. 5 *Rep.* 119, a. So if the bond is avoidable by statute, that must be pleaded specially. In debt by assignee of a sealed note, defendant may plead specially that there was no assignment. *Gully v. Remy*, 1 *Blackf.* 69. A plea showing that the consideration of a bond was the making of a good and sufficient deed for land on a day prior to that fixed for payment, and averring that plaintiff had no title, is a good bar. *Leonard v. Bates*, 1 *Blackf.* 172; *Muchmore v. Bates*, *Ib.* 248; *Patterson v. Salmon*, 3 *Id.* 131.

⁽¹⁾ See *Minor v. Mechanics' Bank*, 1 *Pet. R.* 73.

⁽²⁾ On a joint and several bond a joint or several action lies. If the latter be brought, the executor of defendant is liable as well as the survivor. If the former, the executor is discharged, and the survivor alone is liable. *Walter v. Ginrich*, 2 *Watts*, 204. In debt against one of two joint and several obligors, no notice need be taken of the other. *Crane v. Alling*, 3 *Green*, 423. A previous demand on the surety in a bond is not necessary in order to an action against him. *Wood v. Barstow*, 10 *Pick.* 368.

⁽³⁾ In debt on bond, an agreement for a sale to plaintiff of personal property in consideration of his paying defendant's debts should be pleaded as an accord and satisfaction. *M'Creary v. M'Creary*, 5 *Gill & J.* 147.

⁽⁴⁾ Under a statute of New York it has been held, that accord and satisfaction of the condition of a bond is valid either *before* or *after* the day of payment. *Strang v. Holmes*, 7 *Cowen*, 224. An accord and satisfaction by one of several joint obligors is valid. *Ib.*

dition,(r) satisfaction by deed only can be pleaded; for the bond itself cannot be discharged without specialty.

[*566] *Accord and payment of part before the day,(s) with a promise to pay the residue at a future day, which promise the obligee accepted in full satisfaction of the debt, is not a good plea; because the promise to pay is executory.

Although one bond cannot be pleaded in satisfaction of another,(t)(1) yet payment of a less sum *before* the day in full satisfaction, and acceptance thereof in full satisfaction, may be pleaded in bar to debt on bond; because parcel of the debt, before the day, may be more beneficial to the obligee than the whole, at the day, and the value of the satisfaction is not material. But care must be taken in this case to plead the payment of part to have been made in *full satisfaction*;(u) for if the plea states the payment of part *generally*, it will be bad.

8. Duress.

To debt on bond the defendant may plead, that it was obtained by duress of imprisonment.(2) This plea admits the deed, and the proof of the issue lies on the defendant. If the defendant can prove that he was compelled to execute the bond, when he was under an arrest, without legal process,(x) or by the process, or warrant of a person not having legal authority,(y) it is sufficient.(3) So if the arrest was by warrant from a justice of the peace, on a charge of felony, where there had not been any felony committed;(z) or if the defendant, having been arrested under legal process,(4) was forced by tortious usage in prison,(a) it will be construed a duress. The duress must be of the *person*(5) of the *defendant* or *his wife*;(b) one, who is a surety only, cannot plead that the bond was obtained by duress of the principal,(c) where the bond is

(r) S. C., Cro. Jac. 254; *Preston v. Christmas*, 2 Wils. 86.

(s) *Balston v. Baxter*, Cro. Eliz. 304.

(t) Cro. Eliz. 716; Hob. 68, 9; Cro. Car. 85. Admitted in *Finnel's* case, 5 Rep. 117, a.

(u) *Id.* Resolved.

(x) Com. Dig. Plead. (2 W. 19.)

(y) *Id.*

(z) Aley, 92.

(a) 2 Inst. 482.

(b) Bro. Abr. Duress, pl. 18.

(c) *Huscombe v. Standing*, 1 Cro. Jac. 187. Adjudged on demurrer.

(1) See *Burnside v. Smith*, 3 Monr. 465. The giving and receiving one obligation in lieu of another, the parties or some of them being different, may be pleaded as an accord and satisfaction. *Bullen v. M'Gillienddy*, 2 Dana, 92.

(2) See the form of this plea in the Clerk's Assistant, p. 77. See *Evans v. Begley*, 2 Wend. 243.

(3) The legality or illegality of an arrest is determinable according to the laws of the state where made, and will be presumed to be justifiable, without proof to the contrary. *Stouffer v. Latshaw*, 2 Watts, 165.

(4) Bond to sheriff to answer an attachment is good. *Morris v. Maicy*, 4 Ohio, 83.

(5) In 1 Roll. Abr. 687, pl. 3, it is said, that if a person executes a deed by duress of his goods, he may avoid the deed; and 20 Ass. pl. 14, is cited, where a release made by an abbott, by duress, of his cattle, was holden void. But in *Sumner and Fryman*, Hil. 1708, cited in 2 Str. 917, it is said to have been holden, that a bond could not be avoided by duress of goods. See also Bro. Abr. Duress, pl. 16, S. P.; *Skeats v. Beale*, 3 P. & D. 597, 11 A. & E. 983, S. P., on agreement not under seal; there not being any distinction in this respect, *ante*, p. 89.

joint and several.(d)(1) To the plea of duress the plaintiff may reply that the defendant was at large at the time of the execution,(e) and that he sealed and delivered the bond voluntarily, and not by duress of imprisonment.

*4. *Illegal Consideration.*

[*567]

1. *By the Common Law.* p. 567; *Immoral.* p. 567; *In Restraint of Trade, &c.* p. 567.
2. *By Statute.* p. 572; *Gaming.* p. 572; *Sale of Office.* p. 573; *Simony.* p. 576; *Usury.* p. 582.

1. *By the Common Law.—Immoral.*—A bond may be avoided, if it has been made on an immoral consideration; as where the condition of the bond was, that the obligee and obligor should live together in a state of fornication.(f) But a bond given by a single man,(g) or a married man,(h) in consideration of past cohabitation with an unmarried woman, is good; because it shall be intended as a compensation for the wrong done.(2)

In Restraint of Trade.—With respect to bonds made in restraint of trade, it may be observed, that wherever a sufficient consideration appears to make it a proper and useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained, provided the restraint is limited to a particular place; but if the restraint is general, that is, not to exercise a trade throughout a kingdom, the bond is void.(3) In debt upon bond, the defendant prayed oyer of the

(d) 1 Rol. Abr. 687, pl. 6.

(e) Cl. Ass. 77.

(f) *Walker v. Perkins*, 3 Burr. 1568; 1 Bl. Rep. 517, S. C.

(g) *Turner v. Vaughan*, 2 Wils. 339.

(h) *Nye v. Mosley*, 6 B. & C. 133.

(1) But where a sheriff, after a voluntary escape, retook the prisoner, and exacted a bond with a surety from him, for the gaol liberties, in an action against the surety on the bond, it was holden that he could set up the duress of his principal, the taking of the bond having been unlawful, and the condition void. *Thompson v. Lockwood*, 15 Johns. Rep. 256.

A constable having an execution in his hands took an obligation from a stranger, conditioned for payment of debt, interest and costs, or delivery of property to satisfy the same. Held, although void as a statutory obligation, yet it was good at common law, and he might sue on it to the use of the plaintiff in the execution. *Claasen v. Shaw*, 5 Watts, 468.

(2) See *Marchioness of Annandale v. Harris*, 2 P. Wms. 432; *Priest v. Parrot*, 2 Ves. 160; *Gray v. Mathias*, 5 Ves. Jun. 286; *Shenk v. Mongle*, 13 S. & R. 29. A bond given to a sheriff to indemnify him for an escape already happened, is good. *Given v. Driggs*, 1 Caines' Rep. 450; *Doty v. Wilson*, 14 Johns. Rep. 378. If a bond be taken by the sheriff, for the ease and convenience of the prisoner, so that he may go at large within the walls of the prison, and conditioned that he shall remain a true and faithful prisoner, it is not a bond for ease and favor, nor void, though not taken in the manner directed by the act relative to gaol liberties. *Dols v. Bull*, 2 Johns. Cas. 239; *Winthrop v. Dockendorff*, 3 Greenl. 156; *Baker v. Haley*, 5 Id. 240. If one in custody on a *ca. sa.*, give a bond to the plaintiff, conditioned for his surrender on or before a certain day, such bond is good. *Holdship v. Jaudon*, 16 S. & R. 307.

(3) "The general rule is, that all restraints of trade (which the law so much favors,) if nothing more appear, are bad. This is the rule which is laid down in the famous case of *Mitchel v. Reynolds*, (which is well reported in 1 P. Wms. 181; in which Lord *Macclesfield* took such great pains, and in which all the cases and arguments in relation to this matter are thoroughly weighed and considered.) But to this general rule there are some exceptions; as, first, that if the restraint be only particular in respect to the time and

condition,⁽ⁱ⁾ which recited, that the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in Lignorpond Street, [*568] in the parish of St. *Andrew, Holborn, for the term of five years; and provided, that the defendant should not exercise the trade of a baker within that parish, during the same term; or, in case he did, should within three days after proof thereof made, pay to the plaintiff the sum of 50*l.*, then the bond should be void. The defendant then pleaded, that he was a baker by trade, that he had served an apprenticeship to it, by reason whereof the bond was void; wherefore he traded, as it was lawful for him to do. On demurrer, the court adjudged the bond to be good, on the ground, that from the particular circumstances and consideration set forth, the contract appeared to be lawful and useful, and that the restraint was a particular restraint, founded on a valuable consideration. See also the case of *Chesman v. Nainby*, 2 Str. 739; 3 Bro. P. C. 349, in which the Courts of Common Pleas, King's Bench, and House of Lords, successively recognized the same principle, viz. that contracts entered into between two persons, to restrain one of them from setting up or exercising a particular trade or employment *within a certain limited district*, and for a valuable consideration, were valid in law.

Where the restraint of a party from carrying on a trade is larger and wider than the protection of the party, with whom the contract is made, can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must therefore be void.^(k) A general restriction limited only as to *time* falls within this rule, and is illegal; but a restraint prohibiting a party from carrying on trade within certain limits of *space*, though unlimited as to *time*, may be good; and the limit of the space is that which, according to the trade he carries on, is necessary for the protection of the party by whom the contract was made.^(l) In *Chesman v. Nainby*, the distance within which the obligor agreed not to exercise the same trade with the obligee, was half a mile only from the place where the obligee resided. In *Clerk v. Comer*, Cas. Temp. Hardw. 53, and 7 Mod. 230, 8vo. edit. *S. C.*, by the name of *Colmer v. Clark*, the condition was, not to carry on trade

(i) *Mitchel v. Reynolds*, 1 P. Wms. 181, cited in *Homer v. Ashford*, 3 Bingh. 328, and commented on in *Horner v. Graves*, 7 Bingh. 743.

(k) *Hitchcock v. Coker*, 6 A. & E. 454; per Tindal, C. J., delivering judgment of court; *Hitchcock v. Coker*, was recognized in *Archer v. Marsh*, Ib. 967; 2 Nev. & P. 562.

(l) *Ward v. Byrne*, 5 M. & W. 548, recognized in *Proctor v. Sargent*, 2 M. & Gr. 20; 2 Scott's N. R. 289.

place, and there be a good consideration given to the person restrained, a contract or agreement upon such consideration so restraining a particular person, may be good and valid in law, notwithstanding the general rule; and this was the very case of *Mitchel v. Reynolds*." Per Willes, C. J., in the *Master, &c. of Gunmakers v. Fell*, Willes, 388. See further on this subject *Gale v. Reed*, 8 East, 86; *Young v. Timmins*, 1 Cr. & J. 331; 1 Tyr. 226. Exclusive rights of trading in cities, towns, and boroughs, were abolished by stat. 5 & 6 Will. IV. c. 76, s. 14. See *Nobles v. Bates*, 7 Cowen, 307; *Stearns v. Barrett*, 1 Pick. 443. A bond conditioned that the obligor shall give the obligee all the freighting of the obligor's goods, up and down the Connecticut river, at the customary price, to be paid in goods at the usual price, and that he shall not encourage any other boatmen to compete with the obligee in the business of boating, was held not to be void, as made in restraint of trade. *Palmer v. Stebbins*, 3 Id. 188.

within the city of Westminster, or bills of mortality, and the bond was holden to be good. And in a later case of *Davis v. Mason*, 5 T. R. 118, where the defendant had bound himself not to practise as a surgeon within ten miles of the plaintiff's residence, the court did not think the limits unreasonable, and on the authority of *Mitchel v. Reynolds*, the bond being founded on a valuable consideration, was adjudged good.⁽¹⁾ In *Leigh v. Hind*, 9 B. * & C. 774, where the assignor [*569] of the lease of a public house in London had covenanted that he would not keep a public house within the distance of half a mile from the premises assigned; it was holden, that the true principle of admeasurement was, to take the nearest mode of access. The court will not enter into the question, whether the consideration given is equal in value to the restraint agreed to.^(m) Where the covenant was not to practise as a surgeon-dentist in London, the court thought that the limit of London was not too large for the profession in question; but that a stipulation as to not practising in towns, where the plaintiff or defendant on their account might have been practising during his service, was an unreasonable restriction.⁽ⁿ⁾

It is impossible to enumerate every species of illegality, for which a bond may be avoided: but, before I close this head, I cannot forbear to mention one case relative to it, which underwent a long and serious discussion. The case alluded to is that of *Collins v. Blantern*,^(o) reported in 2 Wils. 347. It was an action of debt on bond, dated the 6th of April, 1765, in which defendant was jointly and severally bound with A. and B. in the penal sum of 700*l.*, conditioned for the payment by A. and B. and the defendant, of the sum of 350*l.* on the 6th of May following. The defendant, having prayed oyer of the bond and condition, pleaded that two of the obligors, A. and B., and three other persons, stood indicted by John Rudge, on five several indictments, for wilful and corrupt perjury, and had severally pleaded not guilty; that the several traverses on the indictment were coming on to be tried at the assizes in Stafford, whereupon it was unlawfully and corruptly agreed, between Rudge the prosecutor, the plaintiff, and the five persons indicted, that the plaintiff should give Rudge his notes for 350*l.*, payable one month after date, for not appearing to give evidence at the trial, and the obligors should execute a bond to the plaintiff, of the same date with the note, as an indemnity to the plaintiff for giving such note. The

^(m) *Hitchcock v. Coker*, 6 A. & E. 438.

⁽ⁿ⁾ *Mallan v. May*, 11 M. & W. 653.

^(o) Cited in 5 East, 298, recognized in *Prole v. Wiggins*, 3 Bingham N. C. 235; 3 Sc. 601.

(1) In *Bunn v. Guy*, 4 East, 190, an agreement entered into by a practising attorney in London, to relinquish his business and recommend his clients to two other attorneys, and that he would not himself practise in such business *within London and 150 miles from thence*; and that he would permit them to make use of his name in their firm for one year; was holden to be a valid agreement. N. The restriction here was indefinite as to time, as was remarked by Tindal, C. J., delivering judgment of court of error, in *Hitchcock v. Coker*, 6 A. & E. 455, cited by Parke, B., in *Leighton v. Wales*, 3 M. & W. 551. See also *Whittaker v. Howe*, 3 Beav. 383, where the agreement was not to practise as a solicitor in any part of Great Britain for 20 years.

plea then stated the carrying this agreement into effect, on [*570] the 6th of April, 1765, and concluded *with an averment, that the bond was given for the said consideration, and no other, and that the obligors were not indebted to the plaintiff in any sum of money, and therefore the bond was void in law. On demurrer, the court gave judgment for the defendant on these grounds: 1st. That the whole transaction was to be considered as one entire agreement; for the bond and note were both dated upon the same day, for payment of the same sum of money on the same day; that it was an agreement to stifle a prosecution for wilful and corrupt perjury,—a crime most detrimental to the commonwealth: that the promissory note was certainly void, and consequently the plaintiff was not entitled to recover upon the bond which was given to indemnify him from such note: they were both bad, (p) the consideration for giving them being wicked and unlawful. 2ndly. That the bond was void, because it was given for the purpose of tempting a man to transgress the law. 3dly. That the special matter might be pleaded; although it was objected, that the law would not endure a fact in *pais dehors* a specialty to be averred against it, and that a deed could not be defeated by any thing less than a deed; for the condition in this case, was for the payment of a sum of money; but, *that* payment to be made, was grounded upon a vicious consideration, which was not inconsistent with the condition, (1) but struck at the contract itself, in such a manner as showed that the bond never had any legal entity; and if it never had any being at all, then the maxim, that a deed must be defeated by a deed of equal strength, did not apply to this case. The averment pleaded in this case was not contradictory to, but *explanatory of, the condition: as to the argument, that if there was not any consideration for the bond, it was a gift; that was to be repelled by showing it was given upon a bad consideration: this destroyed the presumption of donation. 4thly. That the plea was properly concluded, “and so the said bond is void,” or at least this conclusion was well enough upon general demurrer.

In debt on bond, conditioned for the payment of a sum of money in case the defendant did not procure I. S. then *impressed*, to appear and

(p) S. P. admitted per *Cur.* in *Cuthbert v. Haley*, 8 T. R. 390.

(1) “The general rule, that matters *dehors* the deed cannot be pleaded, does not apply to this case; the true meaning of that rule is, that matter inconsistent with or contrary to the deed, cannot be alleged, (*Buchler v. Millerd*, 2 Ventr. 107; *Mease v. Mease*, Cowp. 47,) but matter consistent with the deed may: the bond in the present case is for the payment of money; the plea admits this, and the averment alleges upon what consideration that money was to be paid, and therefore is not inconsistent with or contradictory to the condition of the bond; this rule of pleading applied to the cases of simony, duress, coverture, infancy, &c.” Argument for defendant, *S. C.* 2 Wils. 347. “Since the case of *Pole v. Harrobin*, E. 22 Geo. III. B. R., it has been generally understood, that an obligor is not restrained from pleading any matter which shows that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond.” Per Lord *Ellenborough*, C. J., in *Paxton v. Popham*, 9 East, 421, 2. “It is true, that you cannot add to a contract under seal any thing to vary the contract; but you may show *dehors* the instrument, that such contract was entered into for an illegal purpose.” Per Lord *Abinger*, C. B. *The Gaslight and Coke Company v. Turner*, 6 Bingh. N. C. 327.

deliver himself to the plaintiff when called upon: (q) the defendant pleaded that I. S. having been *unlawfully impressed*, the plaintiff was unwilling to discharge him, unless he would agree to pay a certain sum of money, and would procure the defendant to become bound; and thereupon it was unlawfully agreed, that the plaintiff should discharge I. S. on the defendant becoming bound for that sum, and therefore the bond was void. To this plea there was a general demurrer, which was endeavoured to be supported, on the ground that the defendant could not aver matter inconsistent with the condition of the bond; that it appeared by the condition, that the party was impressed, which meant legally *ex vi termini*. But the court overruled the demurrer, and held the plea to be good. So where the condition of the bond stated, that the defendants had *taken up, borrowed, and received* of the plaintiffs a sum of money, which was to run at *respondentia* interest, (r) on the security of certain goods shipped from Calcutta to Ostend. The defendants pleaded, that the bond was given to cover the price of goods sold by the plaintiffs to the defendants, for the purpose of an illegal traffic from the East Indies, and that the plaintiffs knowingly assisted in preparing the goods for carriage upon such illegal voyage. On demurrer to this plea, it was urged, in support of the demurrer, that the matter in the plea being directly inconsistent with the matter stated in the condition, it ought to have been averred in the plea, that the statement in the condition was merely colourable; but the court overruled the objection, and held the plea to be good: Lord *Ellenborough*, C. J., observing, that upon the adjustment of the account, after the goods were sold, the parties might have calculated upon the debt as upon a loan to that amount, and therefore there was not any necessary inconsistency between the two statements; even taking the case upon the strict rule of law, as it had been generally considered before the case of *Collins v. Blantern*; but since that case there could not be any doubt upon it. And *Le Blanc*, J., observed, that after the cases, breaking in upon the old rule, had determined, that though the bond state nothing illegal upon the face of it, the obligor may show by his plea, that it was given for an illegal consideration, they had, in effect, decided, that he may show an illegal consideration different from the consideration *stated in the condition. And when the plea states, [*572] that the bond was given to cover the price of goods illegally contracted to be sold and shipped, it does in effect deny that it was given for money borrowed; and it shows that the statement in the condition was made colourable in order to cover the illegal agreement.

2. *By Statute*.—Where the consideration on which the bond is given is illegal by statute, the defendant may take advantage of it by pleading. And if the bond contain several conditions, although one of the conditions only be void by a statute, yet the whole bond is void. (s)

Gaming.—By stat 16 Car. II. c. 7, s. 3, (t) if any person shall play

(q) *Pole v. Harrobin*, E. 22 Geo. III. B. R., 9 East, 416, n., more fully reported in 3 Doug. 91.

(r) *Paxton v. Popham*, 9 East, 408.

(s) *Norton v. Syme*, Moore, 856.

(t) For the construction which has been put upon this statute, see *post*, tit. "Wager."

at any pastime or game, other than with and for ready money, or shall bet on the sides or hands of such as play thereat, and shall lose any sum of money, or other thing so played for, exceeding the sum of 100*l.* at any one time or meeting, upon ticket or credit, or otherwise, and shall not pay down the same at the time, the party who loseth shall not, in that case, be bound to pay or make good the same, and the contract, and all judgments, bonds, promises, deeds and securities, given for security or satisfaction of the same, shall be void. By stat. 9 Anne, c. 14, s. 1, "All bonds executed by any person, where the whole or any part of the consideration is for money, or other valuable thing, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game; or by betting on the sides or hands of such as game at any of the said games; or for repaying any money knowingly lent or advanced for such gaming or betting; or lent and advanced at the time and place of such play, to any person so gaming or betting, or that shall during such play so game or bet, shall be void." In a plea upon this statute, it must be shown at what play or game the money was lost; because that is matter of law and not merely evidence;^(u) and the particular game specified must be proved.^(x) The stat. 5 & 6 Will. IV. c. 41, repeals the foregoing statute of Anne, as far as respects the rendering void of *bills, notes, or mortgages*, given for money won by gaming, &c., and enacts, that it shall have the same effect as if it had provided that such note, bill, or mortgage, should be deemed to have been made for an illegal consideration; but bonds are not mentioned. The statute of Anne, in connexion with the stat. 5 & 6 Will. IV. c. 41, must be taken to avoid all contracts for the payment of money won at play. One great object of the statutes of Charles II. and Anne (both of which must be construed together,) was to prevent gaming on credit, and to confine parties who were playing for money to such sums as they should pay down at the time of the play.^(y) Hazard, roulet,

[*573] and certain other games, are declared to *be illegal, by stat. 12 Geo. II. c. 28, s. 2 and 3, and stat. 18 Geo. II. c. 34. See further on this subject, *M'Kinnell v. Robinson*, 3 M. & W. 434; *ante*, p. 91; and *Applegarth v. Colley*, 10 M. & W. 723.

Sale of Office.—By stat. 5 & 6 Edw. VI. c. 16, s. 2 and 3,^(z) "If any person take any bond to receive any money, fee, reward, or other profit, directly or indirectly, for any office or offices, or any part of them, or to the intent that any person should enjoy any office, or the deputation of any office, or any part thereof, which office, or any part, shall in any wise touch the administration or execution of justice; or the receipt, controlment, or payment of any of the king's money, revenue, account, aulnage, auditorship, or surveying any of the king's lands, tenements, or hereditaments; or any of the king's customs, or any

(u) *Colborne v. Stockdale*, 1 Str. 493.

(x) *Mazzinghi v. Stephenson*, 1 Campb. 291.

(y) Per. *Rolfe*, B., delivering judgment of the court in *Applegarth v. Colley*, 10 M. & W. 732.

(z) Extended by stat. 49 Geo. III. c. 126, to Scotland and Ireland, and to all offices in the gift of the crown, or of any office appointed by the crown, and to all commissions civil, naval, or military; but by sect. 7, the sale of certain offices in the palace, and of commissions in the army at the regulated prices, by authorized agents, are excepted.

other administration or necessary attendance in any of the king's custom-houses; or the keep of any of the king's towns, castles, or fortresses, being used or appointed for a place of strength and defence; or which shall touch any clerkship to be occupied in any manner of court of record, wherein justice is to be ministered: every such bond shall be void against the person making it." The 4th section provides against the extension of this act to any office, whereof any person is seised of any estate of inheritance, and any office of parkership, or of the keeping of any park, house, manor, garden, chase, or forest.

If defendant is desirous of taking advantage of the preceding statute, (a) he must plead it specially, in order that the plaintiff may have an opportunity of showing that he is within the exceptions of the statute. There were two principal reasons for making this statute, (b) 1st, that offices might be exercised by persons of skill and integrity; 2ndly, that they might take only the legal fees: for, those who buy their offices will be apt to take more than their legal fees, according to what is said in 3 Inst. 148, "they that buy will sell." The office of registry of an archdeaconry is an office within this statute, (c) because it is an office concerning the administration of justice. So is the office of auditor of Wales: (d) so, as it seems, is the office of under-sheriff. (e) (1) Where an office is within the statute, and the salary is certain, if the principal makes a deputation, reserving a lesser sum out of the salary, and take a bond conditioned for the payment of such lesser sum, such bond is not within the statute. (f) So if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a sum certain *out of the fees and profits of the office, it is good; (g) [*574] for in these cases the deputy is not to pay, unless the profits amount to so much; and though a deputy, by his constitution, is in place of his principal, yet he has not any right to the fees, which still continue to be the principal's; so that, as to him, it is only reserving a part of his own, and giving away the rest to another; (h) but where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events, and a bond conditioned for the payment of such a sum is void by the statute. So where, by the condition of the bond, it appeared that A. had granted to B. and C. (i) (the son of A.) the office of register of an archdeaconry for their lives, and the terms of the condition were; 1st, that B.

- (a) *Hornby v. Cornford*, Fitzgib. 45. (b) *Willes*, 573, 4.
 (c) *Woodward v. Foze*, 3 Lev. 289; *Layng v. Paine*, *Willes*, 571, S. P.
 (d) *Godolphin v. Tudor*, Salk. 468. (e) *Browning v. Halford*, Freem. 19.
 (f) Per *Cur.*, in *Godolphin v. Tudor*, Salk. 468.
 (g) *Godolphin v. Tudor*, Salk. 468, and *Gulliford v. De Cardonell*, Salk. 466.
 (h) Adjudged in *Godolphin v. Tudor*, Salk. 468.
 (i) *Layng v. Payne*, *Willes*, 571.

(1) A bond given in consideration of the sale of the office of *deputy sheriff*, is void; and it is immaterial whether the fact appear on the face of the bond or by averment in a plea which is demurred to. *Davis v. Hull*, 1 Littell, 9. A sheriff farmed his shrievalty to one whom he appointed his deputy for a sum certain, to be paid by the deputy, who agreed to perform all the duties, and was to receive all the emoluments of the office. Held, that it was not within the Virginia act against buying and selling offices. *Galling v. M'Kinney*, 1 Leigh, 42.

should permit C. to receive *all* the profits of the office: and 2ndly, that B. should surrender the office and profits whenever C. should require it; it was holden, that this condition was within the provision of the statute, and made the bond void; first, because an agreement to have all the profits was an agreement to receive *some* profit, which was contrary to the words of the statute; secondly, because either B. must execute the office for nothing, or that he must take more than his legal fees; that a person of skill, and of integrity, would not execute such an office for nothing; and if he had anything for it, it must be by extortion, and by taking illegal fees, and thereby the principal end of the statute would be eluded. As to the second branch of the condition, *viz.* that B. should surrender the office at the request of C.; the court said it was unnecessary to decide upon that, inasmuch as it had been holden in *Norton v. Syms*, Moore, 856, and *Lee v. Colshill*, Cro. Eliz. 529, that if any of the conditions are void *by statute*, the whole bond is void. They intimated, however, a clear opinion that this branch of the condition was void also: for the donor thereby reserved to himself an absolute power over his officer, which he ought not to do. Besides, if this were allowed, there would be a plain method chalked out to evade the statute; for any one by this means might sell an office for the full value. For let such a condition be put in, let the bond be given for the full value of the office, and let it be agreed between them, that the officer shall refuse to surrender upon request, and then the grantor will recover on the bond, and so have the full value of the office.

A., by the interest which he had with the commissioners of excise,^(k) procured for B., his brother, a supervisor's place in that office, and, in consideration thereof, B. gave a bond for the payment of 10*l.* per annum to A., by half-yearly payments, as long as B. should continue in the office. B. died, having for some years omitted the [*575] payment of this annual sum of 10*l.*; whereupon A. *brought an action on the bond against the widow and executrix of B., who pleaded a sham plea of payment, and brought a bill in equity to be relieved against the bond. For the defendant it was objected, that the bond was admitted to be good at law, by the plaintiff's not having been advised to plead the statute of 5 & 6 Edw. VI. against the sale of offices; neither truly in this case could the statute have been pleaded, being made long before the excise became a branch of the revenue; that the law being with the defendant, it would be hard to take the benefit thereof from him, especially when he was not plaintiff in equity, did not pray any aid of that court, and had not been guilty of any fraud. But by Lord *Talbot*, Ch., bonds of this nature are highly to be discouraged; merit, industry, and fidelity, ought to recommend persons to these places, and not interest with commissioners, who, it is to be presumed, had they known from what motive the plaintiff at law applied to them on behalf of his brother, would have rejected him. The officer's giving money to a friend of the commissioners, for his interest, is altogether as bad as giving money, or a bond for money, to

(k) *Law v. Law*, 3 P. Wms. 391, and Ca. Temp. Talb. 140.

the commissioners themselves, which undoubtedly would have been relieved against. It is a fraud on the public, and would open a door for the sale of offices relating to the revenue. The taking away from the officer, what the commissioners and the treasury think to be but a reasonable reward for his care and trouble, and an encouragement to his fidelity, must needs be of the most pernicious consequence, and induce him to make it up by some unlawful means, such as corruption and extortion; and though the excise was no part of the revenue at the time of making the statute of 5 & 6 Edw. IV., yet there may be good ground to construe it within the⁽¹⁾ reason and mischief of the law, which is rather remedial than penal.

**Simony.*—Simony is the corrupt presentation of a person [*576] to an ecclesiastical benefice for money, &c. Every contract made for or about any matter or thing, which is prohibited and made unlawful by any statute,⁽¹⁾ is a void contract, although the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are not any prohibitory words in the statute. Hence, in the case of simony, although the statute (31 Eliz. c. 6) only inflicts a penalty by way of forfeiture, and does not mention any avoiding of the simoniacal contract, yet it has been always holden, that such contracts, being against law, are void.

For the better understanding the nature of simoniacal contracts, it will be proper to set forth the legislative provisions against simony. By stat. 31 Eliz. c. 6, for the avoiding simony and corruption in presentations, collations, and donations of and to benefices, dignities, prebends, and other livings and promotions ecclesiastical, and in admissions, institutions, and inductions to the same, it is enacted, that, “if any per-

⁽¹⁾ 31 Eliz. c. 6; 12 Ann. statute 2, c. 12; per *Holt*, C. J., in *Bartlett v. Vinor*, Carth. 252; cited by *Tindal*, C. J., in *De Begnis v. Armistead*, 10 Bingh. 110, and by Lord *Cottenham*, C., in *Ewing v. Osbaldiston*, 2 M. & Cr. 86; which last case was recognized by *Denman*, C. J., in *Levy v. Yates*, 8 A. & E. 134. These cases related to unlicensed theatres.

⁽¹⁾ It is no new thing, but usual, that an interest raised by a subsequent statute, should be under the same remedy and advantage as an interest existing before. Thus, at common law, no acceptance of a collateral recompense could bar a wife of her dower; but the stat. of 27 Hen. VIII. made a jointure to be a bar, which at that time extended only to a jointure made by act executed in the husband's life-time. Afterwards the 32 of Hen. VIII. enabled a man to devise his lands; when it was holden, that if a man were to devise lands to his wife in satisfaction of her dower, and she should accept them, this would be a bar within stat. 27 Hen. VIII. 4 Rep. 4, a, b, because it is within the same equity and reason, and the diversity is in the manner only, not in the thing. So exchequer bills, though created and made valuable by a statute subsequent to that of 12 Car. II. c. 30, for erecting the post-office, yet are postable within the intent of the said act of 12 Car. II.; and on a letter in which such bills were inclosed being lost out of the office, the postmasters were holden chargeable. From the Lord Ch. Justice *Holt's* argument in the case of *Lane v. Cotton and Franklin*, in the reporter's (P. Wms.) MSS. See also *Salk.* 17. And it is observable, that though, the other three judges of B. R. differing in opinion with the Chief Justice, judgment was given in that case for the defendants, yet on a writ of error being brought in the Exchequer Chamber, the defendants are said to have made satisfaction to the plaintiff, which put an end to all further proceedings.

the patron, in order that the patron's son may be presented, and to keep the buildings in repair;(y) to reside on the living, or to resign in case of not returning after notice, and also not to commit waste, &c., on the parsonage-house;(z) it has been holden, that such a bond was good, and that it could not be avoided on the ground of simony.

With respect to general resignation bonds, or bonds by a clergyman, conditioned to resign at the request of the patron, without [*579] *expressing the object for which such resignation was intended, the history of the law is very curious. A long train of solemn decisions, commencing with *Johnes v. Lawrence*, which was adjudged on error in the Exchequer Chamber, in the 8th of James I.,(a) had established, that such bonds were legal. Bishop Stillingfleet, however, had, in 1698, written an elaborate discourse against these decisions; and, when the case of the *Bishop of London* *ata. Ffytche*, occurred, Mr. J. *Buller* declared, that he had searched with little effect to find out on what principle those decisions were founded; and that, after all the labour he had bestowed upon the subject, it did seem to him that they were destitute of all sense, reason, or principle. But still *they were so numerous,—they had arisen at so many different periods,—all the judges for near two centuries past had been so uniformly of the same opinion,—the law had been received not only in Westminster Hall, but through the whole kingdom as so firmly settled, and mankind had so universally acted upon that idea,—that he thought it would be very dangerous to overturn or even to shake it.* Whilst, however, the courts of common law upheld these bonds, the courts of equity took care that an improper use should not be made of them; and whenever the patron put such bond in suit for an illegal purpose, *e. g.* to discharge himself from a claim of tithe,(b) or the like purpose, injunctions were granted to stay proceedings in the actions on the bond. The validity of a general resignation bond by a clergyman was agitated for the last time in the case alluded to, of *Ffytche v. The Bishop of London*: and, although the Court of Common Pleas and King's Bench,(c) as the case came respectively before them, considered themselves as bound by the unbroken chain of authorities, and decided in favour of the bond, yet upon a writ of error being brought in parliament, their judgment was reversed, on the 30th of May, 1783, (although all the judges, except *Eyre*, C. B., had declared their opinion in favour of the bond,) upon the motion of Lord *Thurlow*, Ch., the division being nineteen against eighteen peers. The ground of this decision appears to have been, that such a bond was simoniacal and against the statute of 31 Eliz., and not that it was contrary to the general principles of the common law.(d) Hence, notwithstanding this decision in the House of

(y) *Partridge v. Whiston*, 4 T. R. 359. (z) *Bagshaw v. Bossley*, 4 T. R. 78.

(a) Cro. Jac. 248-274; *Babington v. Wood*, Cro. Car. 180; Sir W. Jones, 220; *Watson v. Baker*, T. Raym. 175; *Peele v. Com. Carlisle*, 6 Geo. Str. 227; *Windham v. Boyer*, T. 27 Geo. II.; *Hesketh v. Gray*, Hil. 28 Geo. II., Sayer's R. 185; Amb. 268.

(b) *Durston v. Sandys*, 1 Vern. 411, 412; 2 Rep. in Ch. 181; 2 Ch. Cas. 186; *Hilliard v. Stapleton*, 1 Eq. Ca. Abr. 86.

(c) 1 East's R. 487.

(d) See Cunningham's Law of Simony, in which the proceedings in the House of Lords

Lords, the judges, afterwards, in cases to which the statute against simony did not apply, considered themselves as bound by prior authorities.^(e) *Therefore it was holden, that a bond given [*580] by a schoolmaster of an ancient public school,^(f) to resign at the request of his patron, was good. *Lawrence, J.*, however, entertained considerable doubts upon this question, influenced, as it appears, by the arguments which had prevailed against the validity of general resignation bonds by clergymen. After the case of *The Bishop of London v. Ffytche*, bonds of resignation in favour of a particular person, or of one of two specified persons, or special bonds of resignation, were for some time considered as legal;^(g) this point, however, like the general resignation bond, came under the review of the House of Lords, in the case of *Brice William Fletcher, Clerk, v. Lord Sondes*, on the 1st and 2nd May, 1826: Fletcher had given a bond to the patron of the living, Lord Sondes, in the penal sum of 12,000*l.* The declaration was in the usual form on the bond, without setting out the condition. Fletcher having suffered judgment by default, Lord Sondes made a suggestion, as was necessary under the statute of Will. III., setting out the condition, which commenced with a recital, that the obligee, Lord Sondes, was the patron of the rectory of Kettering, which rectory was then vacant by the death of the late incumbent thereof; that Lord Sondes had, by writing under his hand and seal, presented Fletcher, the obligor, to supply the vacancy, and that Fletcher had agreed to resign upon request so as that the rectory might become vacant, *for the sole purpose that the owner of the advowson might be enabled to present thereto anew either one of two brothers of Lord Sondes, Henry Watson, or Richard Watson, when the party to be presented should be capable of taking an ecclesiastical benefice.* It then assigned as a breach, that Henry Watson became capable on the 11th of October, 1820; that thereupon Lord Sondes requested Fletcher to resign, but that he refused so to do. Upon this suggestion, a writ of inquiry was executed before the chief justice,^(h) and a special jury assessed the damages at 10,000*l.*, for which judgment was entered. Upon this judgment Fletcher brought a writ of error in the Exchequer Chamber, where judgment was affirmed without argument. Fletcher then brought a writ of error before the House of Lords.⁽ⁱ⁾ Nine of the judges delivered their opinion, three in favour of the bond, and six against it. The case was adjourned; and on the 9th of April, 1827, Lord *Eldon*, Ch., delivered the decision of the House, that the bond in question was void, and that the judgment of the court below should be reversed; he being of opinion that the decision in the *Bishop of London v. Ffytche*, governed this case. After the judgment, Sutton, Archbishop of Canterbury, having observed that, according to the existing laws, a *great number [*581] of patrons and incumbents had exposed themselves to severe

are reported very fully and accurately, according to Mr. East, who had an opportunity of comparing it with a MS. note of the late Mr. J. Buller. See 1 East's R. 487, n. a.

(e) See *Bagshaw v. Bossley*, 4 T. R. 78; *Partridge v. Whiston*, 4 T. R. 359.

(f) *Legh v. Lewis*, 1 East's R. 391, affirmed on error, 3 Bos. & Pul. 231.

(g) See the opinion of *Dampier, J.*, in *Newman v. Newman*, 4 M. & S. 71.

(h) 1st June, 1822. See Annual Register for the year 1822; Chronicle, p. 109.

(i) 1 Bligh, New Reports, p. 144; 3 Bingham. 501.

penalties, brought in a bill, the substance of which was afterwards passed into a law, by the stat. 7 & 8 Geo. IV. c. 25, by which after reciting the statute 31 Eliz. c. 6, and that since the passing of that act a practice had generally prevailed of giving and taking special bonds, &c., for resignation of spiritual offices, and reciting also, that it had been adjudged that such engagements came within the intent and meaning of the aforesaid statute of Elizabeth, and that the parties thereto would suffer great hardship unless they were relieved from the penalties to which they had erroneously but not wilfully become liable; it was enacted, *(k)* that no presentation to any spiritual office should be void, on account of any agreement to resign, when some person specially named, or one of two persons specially named, should become qualified to take the office, and that the parties to the agreement should not be subject to any penalties on account of the agreement; and that *(l)* engagements made before the 9th of April, 1827, for the resignation of any benefice, &c., in favour of some person specially named, or one of two persons so specially named, when such person or persons should become qualified, should be valid; provided *(m)* such engagements were *bond fide*; and that it should not be compulsory on the ordinary to accept the resignation: and further, *(n)* if the person specially named were not presented within six months, then the resignation was to be void. In the following year (28 July, 1828) an act (9 Geo. IV. c. 94) was passed for rendering valid bonds, covenants, and other assurances, for the resignation of ecclesiastical preferments in certain specified cases. The material provisions of this statute are, that the engagement must be *bond fide*,—the purpose must be manifested in the terms of the engagement; the engagement must be entered into before the appointment to the benefice; and the resignation must be in favour of any one person named and described, or of one of two persons named and described, each of whom shall be, either by blood or marriage, an uncle, son, grandson, brother, or nephew, or grand-nephew of the patron, or one of the patrons, not being merely a trustee, or of one of the persons for whom the patron is trustee, or of the person, by whose appointment the presentation is made, or of any married woman, whose husband in her right shall be patron, or one of the patrons, or of any other person, in whose right the presentation is made. And, further, *(o)* the instrument, by which the engagement is entered into, must be deposited within two calendar months next after the date in the office of the registrar of the diocese, wherein the benefice is locally situate; and shall be open to inspection, and an office-copy thereof shall be admitted in evidence. The resignation must refer to the engagement [*582] in pursuance of which it is made, *and must state the name of the person for whose benefit it is made; and such person must be presented within six calendar months after notice of the resignation. *(p)* This statute, however, is confined *(q)* to such persons only as are entitled to the patronage of the spiritual office as private property.

(k) 7 & 8 Geo. IV. c. 25, s. 1.

(m) Sect. 3.

(o) 9 Geo. IV. c. 94, s. 4.

(l) Sect. 2.

(n) Sect. 4.

(p) Sect. 5.

(q) Sect. 6.

It does not extend to cases where the presentation, &c., is made by the King in right of his crown, or the Duchy of Lancaster, or by any ecclesiastical person, in right of his office or dignity, or by any other body politic or corporate, or by any other person in right of any office or dignity, or by any company, or any trustees for charitable or other public purposes.

Usury.(1)—To debt upon bond the defendant may plead that the bond was given upon an usurious contract.(2) The statute against usury cannot be given in evidence on the general issue, but must be pleaded;(r) for although it may appear to be usury on the condition, yet plaintiff may rectify it by his replication. The provisions of the legislature relating to usury are as follow:—By stat. 37 Hen. VIII. c. 9, (by which all former statutes against usury are repealed,) sect. 3, “no person by way of corrupt bargain, loan, &c., or other means, shall take for forbearance of 100*l.* or other thing due for wares, &c., for one whole year, above 10*l.* per centum, and so *pro rata*, &c.” By stat. 13 Eliz. c. 8, (by which 5 & 6 Edw. VI. c. 20, for repeal of the stat. 37 Hen. VIII. c. 9, is repealed, and consequently, stat. 37 Hen. VIII. c. 9, is revived,) “all bonds, contracts, and assurances,(s) collateral, or other, to be made for payment of any principal, or money to be lent, or covenant to be performed upon, or of any usury in lending or doing any thing against the act 37 Hen. VIII. c. 9, upon or by which loan, &c., there shall be reserved or taken above the rate of ten pounds for the hundred for one year, shall be utterly void.” In stat. 21 Jac. I. c. 17, s. 2, this clause is repeated almost verbatim; but the rate of interest allowed to be taken is reduced to 8*l.* in the hundred. The same clause is again repeated in stat. 12 Car. II. c. 13, s. 2, where the rate of interest is reduced to 6*l.* per centum. And lastly, by stat. 12 Ann. stat. 2, c. 16, (the principal statute on this subject,) all bonds, contracts, and assurances, for payment of any principal or money to be lent, or covenanted(3) to be performed upon or for any usury, whereupon or whereby there shall be reserved or taken *above the [*583] rate of 5*l.* in the hundred, shall be utterly void. Where the lender of stock reserved to himself the dividend by way of interest, and the option of deciding, at a future day, whether he would have the stock replaced, or the sum produced by the sale of it repaid to him in money, with five per cent. interest; it was holden,(t) that this bargain was usurious. A bargain upon a hazard is not usurious,—as where an agreement for the loan of money is subject to a risk, so that the lender may make more or less than 5*l.* per cent. Hence, it is not usurious for an

(r) Per Cur. Hob. 72; 5 Rep. 119, a; *Geang v. Swaine*, 1 Lutw. 466.

(s) 13 Eliz. c. 8, s. 3.

(t) *White v. Wright*, 3 B. & C. 273.

(1) Compound interest is not usury. *Otis v. Lindsey*, 1 Fairf. 316.

(2) Where one party delivers depreciated bank notes to another, and takes an obligation for the nominal amount payable in specie, it is *prima facie*, usury. *Warfield v. Boswell*, 2 Dana, 225; Addison on Contracts, 417, 2nd Am. ed.

(3) Should it not be printed “covenant?” See the stat. 13 Eliz. c. 8. The stat. 12 Ann. stat. 2, c. 16, is partially repealed by later statutes, 3 & 4 Will. IV. c. 98; 1 Vict. c. 80; 2 & 3 Vict. c. 37; 6 & 7 Vict. c. 45, *ante*, p. 343, 4. See stat. 5 & 6 Will. IV. c. 41, as to bills, notes, and mortgages, *ante*, p. 342.

insurance company to take, by way of collateral security for a loan made by them, upon a bond, a life policy effected in their own office, to a greater amount than is necessary to secure the repayment of the loan. It is a contract which may be prejudicial or may be beneficial to the office. If the agreement were for an excessive amount of premium, it would be colourable, and would raise the question,—whether it was corruptly made, in order to evade the statute.^(u) In pleading usury, it is not necessary to recite the statute:^(x) but, in framing the plea, care must be taken: 1st, that it should state, “that it was corruptly agreed,^(y) &c. :” 2ndly, that the usurious agreement be particularly set forth, and the quantum of interest agreed to be given:^(z) 3dly, that the same exactness be observed in stating the agreement, so that it may correspond with the evidence, as in other cases of contract; for in a case where the agreement was for the forbearance of money until one or other of two days, and the plea, instead of stating it in the alternative, stated it was an absolute forbearance until one of those days; the variance was holden fatal:^(a) 4thly, the plea must aver, that the agreement was to pay such a sum for giving day of payment; merely stating, that the sum agreed to be given, for giving day of payment, exceeded the rate of legal interest, is not sufficient.^(b)

It is to be observed,^(c) that although a security tainted with usury in its inception may be avoided, even in the hands of an innocent purchaser, for a valuable consideration without notice, yet a subsequent usurious contract will not avoid a security, which was good at the time when it was made.⁽¹⁾ A substituted security, which has been [*584] given for a security contaminated by usury, is void, *if such substituted security be given either to the party to the original contract, or to his personal representative.^(d)⁽²⁾ But, where the original usurious security has been transferred by the party to whom it was given to another person, ignorant of the usury, and such other person accepts from the original debtor another security, which renders the first security void, the second security is available in the hands of such innocent person. Hence, where A., for an usurious consideration,^(e) gave his promissory note to B., who transferred it to C. for a valuable consideration without notice of the usury, and afterwards A. gave C. a bond for the amount; it was holden, that in an action brought by C.

(u) *Downes v. Green*, 12 M. & W. 481, and see *Flight v. Chaplin*, 2 B. & Ad. 113.

(x) Bro. V. M. 255, cited in Com. Dig. (Pleader, 2 W. 23.)

(y) *Nevison v. Whitley*, Cro. Car. 501.

(z) *Hinton v. Roffee*, 2 Show. 329.

(a) *Tate v. Wellings*, 3 T. R. 538.

(b) *Swales v. Bateman*, W. Jones, 409.

(c) *Ferrall v. Shaen*, 1 Saund. 294.

(d) Admitted per Cur. in *Cuthbert v. Haley*, 8 T. R. 392, 394.

(e) *Cuthbert v. Haley*, 8 T. R. 390.

(1) The same rule holds in the case of a bill of exchange; if good in its inception, usury in the intermediate indorsements will not avoid it in the hands of a *bonâ fide* holder. *Parr v. Eliason*, 1 East's Rep. 95; *Daniel v. Cartony*, 1 Esp. N. P. C. 274, S. P. ante, p. 344. See late statutes referred to ante, n. 3, p. 582; *Sloan v. Somers*, 2 Green, R. 510.

(2) Usury is a question of fact for the jury. A note made and indorsed in execution of a previous usurious agreement, is void. *Thomas v. Catherall*, 5 Gill & J. 23.

against A. on the bond, the bond could not be avoided on the ground of the usurious contract between A. and B. In an action of debt on a bond, (f) to which usury was pleaded, it appeared that the plaintiff had lent the defendant 1,000*l.*, for the securing of which, with lawful interest, a bond was given; and the defendant also agreed to give the plaintiff a salary of so much a year, as a clerk in his brewery. It was not intended that the plaintiff should perform any service for the defendant there, but the salary was a mere shift, to give the plaintiff more than five per cent. interest for his money. One year's salary having been paid, the parties agreed, that it should be deducted from the principal, the deed securing the salary cancelled, and a fresh bond taken for the remaining principal with 5 per cent. interest; and on this bond the action was brought. *Lawrence, J.*, "The original contract between these parties was certainly usurious, and no action could have been maintained on the first bond: but there was nothing illegal in the last bond: it was not made to assure the performance of the first contract: nor does it secure more than 5 per cent. interest to the plaintiff. The parties saw they had before done wrong: they rectified the error they had committed, and substituted, for an illegal contract, one that was perfectly fair and legal. I see no objection to their doing that; and therefore am of opinion, that the present action is maintainable." Verdict for plaintiff. The reader should be apprised, that there was a contrary decision by *Chambre, J.*, on this point, *viz. Barnes v. Headley*, 1 Campb. 157; but the preceding opinion of *Lawrence, J.*, seems to be the better opinion: and the case of *Barnes v. Headley*, having been brought under consideration in the Court of Common Pleas, it was solemnly determined, that after the usurious securities had been cancelled by consent, a promise by the borrower to repay the principal and legal interest was binding. (g)(1) See further on the subject of "Usury, and the New Statutes relating thereto," *ante*, p. 342, 3, 4.

*5. Infancy.

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An infant may bind himself by a single bill(h) to pay for necessaries;

(f) *Wright v. Wheeler*, 1 Campb. 165, n.

(g) *Barnes v. Headley*, 2 Taunt. 184.

(h) 1 Inst. 172, a; *Russell v. Lee*, 1 Lev. 86.

(1) A judgment in the hands of a *bonâ fide* assignee is not affected by usury between the original parties. *Wandel v. Eden*, 2 Johns. Cas. 268; 1 Johns. Rep. 531, n. A note given as collateral security for a judgment recovered, will not be affected by usury in the transaction upon which that judgment was obtained. *Stewart v. Eden*, 2 Caines' Rep. 150. And generally, wherever a usurious security is transferred to a third person for a valuable consideration, without notice of the usury, and the borrower afterwards gives a new security to such third person for the amount, the latter security is good. *Bearce v. Bantor*, 9 Mass. Rep. 45; *Stewart v. Eden*, 2 Caines' Rep. 152. So also, if a security, legal in its inception, is transferred on a usurious agreement, and afterwards comes into the hands of a *bonâ fide* holder without notice, it cannot be avoided by the intermediate transaction. *Bush v. Livingston*, 2 Caines' Cas. 66. And see the cases and authorities collected in Metcalf's edition of Yelverton's Reports, 47, note (1). *Musgrove v. Gibbs*, 1 Dall. 216; *Shoemaker v. Shirtliffe*, *ib.* 127; *Lyle v. Williams*, 15 S. & R. 135; *Taylor v. Bruce*, Gilmer, 42; *Ruffin v. Armstrong*, 2 Hawks, 411; *Chiles v. Coleman*, 2 Marsh. 300.

but if he enters into an obligation with a penalty, such obligation may be avoided by a *plea of infancy*; (i)(1) but infancy cannot be given in evidence under the general issue *non est factum*. (k) Upon the principle which exempts an infant from a penalty; it has been holden, (l) that plaintiff may recover in an action for money had and received, a sum, which while an infant, he had paid in advance towards the purchase of a share in defendant's trade, to be retained by defendant as a forfeiture, if plaintiff failed to fulfil an agreement to enter into partnership with the defendant.

An infant cannot give a security for interest; (m) consequently to a bond with a penalty conditioned for payment of interest as well as principal, infancy may be pleaded in bar.

6. *Payment*. p. 585; *Solvit ad Diem*. p. 586; *Solvit post Diem*. p. 587; and *Evidence thereon*. p. 587.

Payment. (2)—At the common law, it was a general rule, that where an action was grounded on a deed, the defendant could avoid it by matter of as high a nature only, as by an acquaintance under seal. Hence to debt on a single bill, payment merely without an acquittance [*586] *could not properly (3) be pleaded. (n) But now, by stat. 4 Ann. c. 16, s. 12, where debt is brought on any single bill, if the defendant has paid the money due thereon, such payment may be pleaded in bar. (4)

(i) *Ayliffe v. Archdale*, Cro. Eliz. 920; Moore, 679, S. C.

(k) *Whelpdale's case*, 2nd Res. 5 Rep. 119, a, and new rules, *ante*, p. 560.

(l) *Corpe v. Overton*, 10 Bingh. 252, distinguishing *Holmes v. Blogg*, 8 Taunt. 35.

(m) *Fisher v. Mowbray*, 8 East, 330.

(n) Doct. Plac. 107.

(1) Whether such obligation be void or voidable appears to have been a *veraxa questio*. See *Morning v. Knopp*, Cro. Eliz. 700. Authorities tending to show that it is void, are, Noy's Rep. 85; *Delavel v. Clare*, 3 Com. Dig. 163, (C. 2); Bull. N. P. 182. "If an infant become indebted for necessities, and give a bond in a penalty for the money, it will not extinguish the simple contract debt; *for the bond is void*," (supposing such a bond to have been void at common law, on the ground of its being manifestly prejudicial to the infant, *quare*, has the stat. 4 Ann. c. 16, s. 13, made any alteration in the law in this respect?) Authorities tending to prove that such obligation is voidable only, are *Edmund's case*, 1 Leon. 114; 2 Rol. Abr. 146, (A.) 4; Litt. s. 259; Perk. s. 12; 1 Bl. Com. 466; *Tapper v. Davenant*, as reported in 3 Keb. 798, but not as reported in Bull. N. P. 155; Salk. 279, per Treby, C. J. This question was again agitated in *Baylis v. Dinely*, 3 M. & S. 477; where it was decided on special demurrer, that in debt on bond to which the defendant pleaded infancy, the plaintiff could not reply that the defendant had ratified the bond after he came of age; the court observing, that the ratification must be by an instrument of as high a nature as that which created the original obligation. See *ante*, p. 130, 131, and notes, stat. 9 Geo. IV. c. 14, s. 5.

(2) As to the right of appropriation when payments are made indefinitely, see *Stone v. Seymour*, 15 Wend. 19; *Seymour v. Vanslyck*, 8 Id. 403; *Clark v. Burdett*, 2 Hall, 197; *Hall v. Constant*, 1b. 185; *Mitchell v. Dall*, 4 Gill & J. 361.

(3) In *Nichol's case*, 5 Rep. 43, a, to debt on a single bill, the defendant pleaded payment without acquittance, on which issue was joined and found for the plaintiff. It was holden, that, although payment without acquittance was no plea, and that issue was joined on a thing not material; yet forasmuch as there was an issue joined on an affirmative and negative, which issue was found for the plaintiff, it was expressly helped by the statutes of jeofails, 32 H. VIII. c. 30, and 18 Eliz. c. 14.

(4) To a plea of payment, plaintiff may reply, that before the time at which the pay-

To debt on bond *with a condition* for the payment of money on a day certain, the defendant (having craved oyer of the condition,) might, even at common law, have pleaded payment at the day ;(o) because such plea was in effect a plea of performance of the condition merely.

Solvit ad Diem.(1)—A plea of payment, from the language of the plea when the pleadings were drawn in Latin, has obtained the name of a plea of *solvit ad diem*. This plea is the proper form of a plea, as well where the money has been paid *before* the day, as where it has been paid *at* the day. Indeed, in the case of a bond conditioned for payment *at* a day certain, if the money has been paid *before* the day, *solvit ad diem* is the only proper plea ;(p) for if the defendant, agreeably to the fact, should plead payment *before* the day, and issue should be joined thereon, and a verdict found for the plaintiff, and judgment accordingly, such judgment may be reversed on error ; because there would still remain a possibility that the money was paid *at* the day, in which case the plaintiff would not have had any cause of action. Hence, in the case of payment *before* the day, the defendant must plead a payment *at* the day ; and then if issue is joined thereon, proof of payment before the day will be sufficient to support the defendant's plea.(q)(2) Where a bond is conditioned for the payment of money on or *before* such a day,(r) the defendant may plead payment before the day, *if the fact be so ; and the plaintiff ought not to demur to [*587] such plea, as tendering an immaterial issue.(3) But if to a bond so conditioned,(s) the defendant pleads payment *on* the day, and *issue is joined thereon*, and verdict for the plaintiff, a repleader

(o) Doct. Plac. 107.

(p) *Holmes v. Broket*, Cro. Jac. 434 ; *Merril v. Josselyn*, 10 Mod. 147 ; *Jernegan v. Harrison*, Str. 317.

(q) *Bond v. Richardson*, Cro. Eliz. 142 ; *Dyer*, 222, b. S. C. in marg. See also Doctr. pl. 181.

(r) *Fletcher v. Hennington*, 2 Burr. 944, and 1 Bl. R. 210.

(s) *Tryon v. Carter*, Str. 994 ; 7 Mod. 231, Leach's edit.

ment is alleged to have been made, the plaintiff assigned to A. B., of which the defendant had notice. *Littlefield v. Storey*, 3 Johns. Rep. 425. In Pennsylvania, the want of a court of chancery has introduced a practice of permitting defendants, under the plea of payment, to prove mistake, fraud, or want of consideration. *Swift v. Hawkins*, 1 Dall. 17 ; *Baring v. Shippen*, 2 Binn. 154. And generally, anything that shows *ex æquo et bono*, that plaintiff ought not to recover. *Latapie v. Pecholier*, 2 Wash. C. C. R. 180. Notice is required, however, to be given of the nature of the defence, which in substance amounts to a bill in chancery ; and where chancery would enjoin, the court will direct a verdict for the plaintiff. See *Hawk v. Geddis*, 16 S. & R. 28 ; *Roop v. Brubacker*, 1 Rawle, 304 ; 1 Troub. & Haly's Pract. 111, 398, 400, 3d ed.

(1) On a plea of payment *post diem* to an action on a bond, the defendant may first show generally a payment, and then its application to the bond. *Summers v. Loder*, 7 Halst. 104.

(2) "In the case of a bond conditioned for payment at a certain day, there cannot properly be any legal performance of the condition, but by payment at the day. *Payment before the day may indeed be given in evidence on solvit ad diem*, but that proceeds upon this notion, that the money is considered as a deposit in the hands of the obligee until the day arrives, and then it is actual payment." Per Lord Hardwicke, C. J., in *Tryon v. Carter*, 7 Mod. 231, Leach's edit.

(3) "If no payment has in fact been made, the proper replication in this case is, that the money was not paid at the day mentioned in the plea, nor at any time before or after the making of the obligation." Per *Denison*, J., 1 Bl. R. 210, and 2 Burr. 945.

must be awarded, as being an immaterial issue; for such verdict does not find any breach of the condition, because the money might have been paid before the day, which would have been a performance of the condition.

Solvit post Diem.—The bond being forfeited by the non-payment of the money on the day mentioned in the condition, a payment *after* the day could not be pleaded at the common law; but by stat. 4 Ann. c. 16, s. 12, “where debt is brought upon any bond, with a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors, or administrators, have, *before the action brought*, paid to the obligee, his executors, or administrators, the principal and interest due by the condition or defeasance though such payment was not made strictly according to the condition or defeasance, yet it may be pleaded in bar of such action. The form of plea under this statute (usually termed a plea of *solvit post diem*) is, *that the defendant, after the day mentioned in the condition, and before the commencement of the plaintiff's action, paid the money mentioned in the condition, with interest, according to the form of the statute, &c.* N. This statute is confined to absolute payments.(t) Hence a tender and refusal of principal and interest *after* the day, and before action brought, cannot be pleaded.(u)(1)

By R. G. H. T. 4 Will. IV., pleas founded on one and the same principal matter, but varied in statement, description, or circumstances only, are not to be allowed. *Ex. gr.* Pleas of *solvit ad diem*, and of *solvit post diem*, are both pleas of payment, varied in the circumstance of time only, and are not to be allowed. But pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed. See also R. G. T. T. 1 Vict. (*ante*, p. 557) as to Plea of Payment, and Particulars of Demand.

Evidence.—Formerly, if a bond had lain dormant for 20 years or more, without payment of interest or circumstance to account for the acquiescence, this was evidence sufficient, whence a jury might have presumed payment;(2) now, by stat. 3 & 4 Will. IV. c. 42,

(t) *Underhill v. Matthews*, Bull. N. P. 171.

(u) See *Player v. Bandy*, 10 Mod. 26; *Dixon v. Parkes*, 1 Esp. 110; 2 Wms. Saund. 48, n. f.

(1) *Non damnificatus* is a good plea to an action of debt on a bond to indemnify, but not on a bond conditioned to pay off another bond. *Douglas v. Clark*, 14 Johns. Rep. 177. It is not a good plea to debt on bond for the jail liberties. *Woods v. Rowan*, 3 Id. 42. See *Bank v. Chetwood*, 3 Halst. 1.

(2) It will entitle the defendant to a verdict, under the plea of *solvit ad diem*. *Merr v. Stevens*, Cox's Rep. 433; *Ludlow v. Van Camp*, 2 Halst. 113; *Gouldhawk v. Duane*, 3 Wash. C. C. R. 323; *Henderson v. Lewis*, 9 S. & R. 379; *Palmer v. Dubois*, 1 Rep. Con. Ct. 178; *Haskett v. Kenn*, 2 Nott & M'C. 160; *O'Brien v. Couller*, 2 Blackf. 421; *Foulk v. Brown*, 2 Watts, 121; *Karu v. Fisher*, Ib. 246. But where a bond has lain dormant for a less time than twenty years, some other evidence than the mere length of time must be given, in order to raise the presumption that the bond has been satisfied; *Coleell v. Budd*, 1 Campb. N. P. C. 27, Ld. *Ellenborough*, C. J.; such as having settled an account in the intermediate time, without any notice having been taken of such a demand, &c. *Blair v. Quash*, 3 M'Cord, 340. In *R. v. Stephens*, 1 Burr. 434, Lord *Manfield*, C. J., observed, that there was not any direct and express limitation of time, when a bond should be presumed to have been satisfied; the general time, indeed, was commonly taken to be about

[14th August, 1833] sect. 3, all actions of *debt, upon any [*588] bond or other specialty, shall be commenced and sued within ten years after the end of this present session, or within twenty years after the cause of such action or suit.

7. Release.

To debt upon bond, the defendant may plead a release, by the plaintiff, after the bond given.(1) If there are two or more obligees,(x) a release by one will be a bar to all. In debt on bond by several plaintiffs, as trustees,(y) &c., the defendant pleaded a release from one of the plaintiffs. On demurrer the plea was holden good; for the obligees only had the legal interest, and consequently the right to release; and a

(x) 2 Rol. Abr. 410; 1. 47.

(y) *Bayley v. Loyd*, M. T. 12 Geo. II. C. B.; 7 Mod. 250, Leach's edit.

twenty years; but he had known Lord *Raymond* leave it to a jury upon eighteen years. So in *Hull v. Horner*, Cowp. 109, Lord *Mansfield* said, that there was not any statute of limitations which would bar an action upon a bond, but that there was a time when a jury might presume the debt to have been discharged; as where interest did not appear to have been paid for sixteen years. But, if a witness is produced to prove the contrary, as by showing the party not to have been in solvent circumstances, or a recent acknowledgment of the debt, the jury must say the contrary. A similar doctrine was laid down by Lord *Mansfield*, in *Oswald v. Legh*, 1 T. R. 272, where he said, "that there was a distinction between length of time as a bar, and where it was only evidence of it; the former was positive, the latter only presumption; and he believed that in the case of a bond, no positive time had been expressly laid down by the court, that it might be eighteen or nineteen years." Although these observations of Lord *Mansfield* stand unqualified, and may appear to establish this point, viz., that a less period of time than twenty years is of itself sufficient to raise a presumption of payment; yet, since the case of *Oswald v. Legh*, in the decision of which Lord *Mansfield* concurred, such doctrine cannot fairly be inferred from them. It would seem, therefore, that the positions of his lordship must be taken with the qualification mentioned in the text, and that where the time falls short of twenty years, other evidence will be required to raise a presumption of payment. Where the time elapsed is considerable, though short of twenty years, the slightest evidence will be sufficient; but it is essentially necessary that some evidence of this kind should be given: for where to debt on bond, (*Oswald v. Legh*, 1 T. R. 270,) defendant pleaded payment, and it did not appear that there had been any demand made on the bond for nineteen years and a half, this circumstance alone was holden to be insufficient to raise the presumption of payment. See *Boltz v. Ballman*, 1 Yeates, 584; *Boyd v. Grant*, 13 S. & R. 124.

A receipt for interest, (*Reardew v. Searcy*, 3 Marsh. 544,) within twenty years, indorsed on the bond by the obligee, (although the time when such receipt was written and signed did not appear, otherwise than by the indorsement,) may be given in evidence to rebut the presumption. Str. 827, 3 Bro. P. C. 535, Ld. R. 1370. Text and note of former edition.

(1) It seems, that if the release has been obtained fraudulently, the special circumstances under which it was given, and that it was obtained by fraud, may be replied. See a replication of this kind in *Craib v. D'Aeth*, 7 T. R. 670, n. (b). It is worthy of remark, that in *Legh v. Legh*, 1 Bos. & Pul. 447, where the obligor, after notice of the bond having been assigned, took a release from the obligee, and pleaded it to an action brought by the assignee in the name of the obligee, the court (exercising, as it should seem, an equitable jurisdiction,) set aside the plea on a summary application. In order to call upon the court to exercise this equitable jurisdiction, it must be made out, manifestly and clearly, that there has been a fraud by some person upon the plaintiff seeking to enforce the demand, and that the defendant was a party to that fraud: and in a recent case the court refused to set aside a plea of release, when the releasor had an immediate interest in the money sought to be recovered, and no fraud was shown. *Phillips v. Claggett*, 11 M. & W. 84. See *Andrews v. Beecher*, 1 Johns. Cas. 411.

release from the one was a release from the others. If there are two or more obligors, a release to one may be pleaded in bar by the other, whether the bond be joint,(z) or joint and several,(a)(1) for there is but one duty extending to all the obligors, and therefore a discharge of one is a discharge of all.(2) So a release to one obligor is a release in equity(b) to both, as well as in law. It is immaterial whether the release be by deed, or by operation of law;(c)(3) for where the obligee in a joint and several bond, made one of two obligors his executor, who administered and died; it was holden,(d) that the surviving obligor was discharged: for a personal action once suspended by the voluntary act of the party entitled to it, is forever gone and discharged.(4)

[*589] *So where the obligee in a joint and several bond made one of two obligors his executor, *with others*,(e) and the obligor executor administered; it was holden, that the action was discharged as to all the obligors.(5) But if A. and B. are jointly and severally bound in an obligation to C., and A. makes C. and D. his executors; C. refuses, and D. administers, and afterwards C. makes D. his executor; D., as executor of C., may maintain an action on the bond against B.;(f) for when the obligor makes the obligee and another executors, and the obligee refuses, the debt is not released or discharged, and the obligee or his executor may sue for the debt.(6) If feme obligee take the obligor to husband, this is a release in law.(g) So if there be two feme obligees, and the one takes the debtor to husband.(h) The like law is, if two be bound in an obligation to a feme sole, and she takes one of them to husband, and the husband dies, the wife shall not have

(z) 2 Rol. Abr. 412, (G.) pl. 4.

(a) Ib. pl. 5; 1 Inst. 232, a.

(b) *Bower v. Swadlin*, 1 Atk. 294.

(c) *Cheetham v. Ward*, 1 Bos. & Pul. 630, recognized in *Nicholson v. Revill*, 4 A. & E. 682, 3.

(d) *Dorchester v. Webb*, 3rd Resolution, Sir W. Jones, 345.

(e) *Cheetham v. Ward*, 1 Bos. & Pul. 630, recognized and applied to a promissory note, indorsed by executor of payee, *Freakley v. Fox*, 9 B. & C. 130.

(f) *Dorchester v. Webb*, W. Jones, 345.

(g) 1 Inst. 264, b.

(h) *Ib.*

(1) *S. P. Crane v. Alling*, 3 Green, 423, vide *Burson v. Rincard*, 3 Penna. 57; *Ingersoll v. Sergeant*, 1 Whart. 358. A release to one of two joint and several obligors releases both at law, but equity will not give it operation beyond the intention of the parties and the justice of the case. *Clagett v. Salmon*, 5 Gill & J. 314.

(2) See *Hunt v. United States*, 1 Gall. 32; *United States v. Thompson*, Gilpin, 622.

(3) But a release by will is not sufficient. *Parsons v. Coward*, Cas. Temp. H. 357.

(4) Notwithstanding the legal extinguishment, in equity the bond will be considered as assets, available either to the residuary legatee, or heir at law, as the case may be. *Fox v. Fox*, 1 West. C. T. H. 162, and cases there cited. "The debt is considered to have been paid by the executor to himself, and becomes assets in his hands. Upon this supposition the rule in equity depends, which makes the executor accountable for the amount of his debt as assets." Per Lord Tenterden, C. J., in *Freakley v. Fox*, 9 B. & C. 134. See further as to the effect of making an obligor, executor, *Wankford v. Wankford*, 1 Salk. 305, 6.

(5) See *Marvin v. Stone*, 2 Cow. 28.

(6) But otherwise if the obligee administers. Per Cur. S. C. If a debtor make his creditor and another person executors, and the creditor neither proves the will nor acts as executor, he may maintain an action against the other for his demand on the testator. *Rawlinson v. Shaw*, 3 T. R. 557.

an action against the other obligor.⁽ⁱ⁾ But where a man, on the day of his marriage gave a bond to the woman, to whom he was to be married, by which he stipulated, that his representatives should, within twelve months after his death, pay to his widow, or her representatives,^(k) a sum of money; and the marriage took place, and afterwards the husband died; whereupon the widow brought an action against the representatives of the husband, on the bond; it was holden, that the marriage did not operate as a release of the debt, the bond not being payable during the lifetime of the obligor, nor until twelve months after his death. To a plea, that plaintiff by a deed of release had released one of two joint obligors; the plaintiff replied, that the release was given at the request of the defendant, (the other obligor,) and on the express condition, that the release should not operate in his discharge; this was holden^(l) bad, on the ground that it sought *by the introduction of parol [*590] evidence to put on an instrument under seal a construction differing from the import of that instrument. A covenant not to sue will not operate as a release,^(m) in its own nature, but only by construction, to avoid circuity of action.⁽¹⁾ Hence, if the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do so, that the deed of covenant may be pleaded in bar, he may still sue the other obligor.⁽²⁾ See *Fitzgerrard v. Trant*, 11 Mod. 254, and *Lacy v. Kynaston*, Holt's Rep. 178; 1 Lord Raym. 690, and 12 Mod. 551, where the distinction between the covenant not to sue a sole obligor, and one of several obligors, is taken; in the latter report it is said, "A is bound to B., and B. covenants never to put the bond in suit against A.; if afterwards B. will sue A. on the bond, he may plead the covenant by way of release. But if A. and B. be jointly and severally bound to C. in a sum certain, and C. covenant with A. not to sue him, that shall not be a release, but a covenant only; because he covenants only not to sue A., but does not covenant not to sue B.: for the covenant is not a release in its nature, but only by construction to avoid circuity of action; for where he covenants not to sue one, he still has a remedy; and then it shall not be construed as a covenant, and no

(i) 21 H. VII. 30.

(k) *Milbourn v. Ewart*, 5 T. R. 381.

(l) *Cocks v. Nash*, 9 Bingham. 341. See also *Brooks v. Stuart*, 9 A. & E. 854.

(m) *Dean v. Newhall*, 8 T. R. 168.

(1) A bond or covenant by the creditor to save harmless and indemnify the debtor against the debt, operates as a release of the debt. *Clark v. Bush*, 3 Cowen, 151. A covenant may be pleaded as a release, but it must be a covenant between the parties only; and if it contain no words of release, it will not be construed as such, unless it gives the covenantee a right of action which will precisely countervail that to which he is liable, and unless it was the intention of the parties that the last instrument should defeat the first. *Garnett v. Macon*, 2 Brock. C. C. R. 185. See *Whitaker v. Salisbury*, 15 Pick. 534.

(2) *S. P. Walker v. McCullough*, 4 Greenl. 421, where it was held, that a receipt, not under seal, given by the creditor to one joint debtor for his proportion of the debt, did not discharge the others. This decision is supported by the authority of the Supreme Court of New York, in *Harrison v. Close*, 2 Johns. 448; *Rowley v. Stoddard*, 7 Id. 207; *Catskill Bank v. Messenger*, 9 Cowen, 37; and see *Shotwell v. Miller*, Coxe's Rep. 81; *Legrand v. Baker*, 6 Monr. 244. The contrary doctrine was maintained by the Supreme Court of Pennsylvania, in the recent cases of *Milliken v. Brown*, 1 Rawle, 391; *Benson v. Kincaid*, 3 Penn. 57; *Finny v. Cochran*, 1 Watts & Serg. 112; and Maryland, in *Geiser v. Knavel*, 4 Gill & J. 305; *Yates v. Donaldson*, 5 Md. Rep. 389.

more." A covenant not to sue one of two joint debtors will not operate as a release to the other.(n) In an action for a partnership debt, a covenant not to sue, entered into by one only of the plaintiffs, cannot be set up as a release.(o)

Even in those cases where a covenant not to sue shall be construed to ensure as a release to avoid circuitry of action, the covenant not to sue must be a perpetual covenant, that is, a covenant not to sue at all; for a mere covenant not to sue within a particular time(p) will not have this effect.(1) In such case the party cannot plead the covenant in bar, but is put to his action of covenant. But if the obligee covenant not to sue the obligor before such a day,(q) and if he do, that the obligor shall plead this as an acquittance, and that the obligation shall be void, this is a suspension of the obligation, and so by consequence a release. A bond was conditioned,(r) that the obligor should indemnify the obligee from all sums the latter should pay on account of the obligor; before the execution of the bond, the following memorandum was indorsed on it, viz. "that the obligee hath given an undertaken not to sue upon the bond until after the obligor's death;" it was holden, that the memorandum was to be taken as part of the condition, and consequently that the bond was payable only by the representative of the obligor after his death.(2)

[*591]

*8. Set-off.(3)

At the common law, if the plaintiff was indebted to the defendant in as much or even more than the defendant owed to him, yet the defendant had not any method of setting off such debt in the action brought by the plaintiff for the recovery of his debt. To obviate this inconvenience and to prevent circuitry of action, or a bill in equity, it was enacted, by stat. 2 Geo. II. c. 22, s. 18, (made perpetual by the 8 Geo.

(n) *Hutton v. Eyre*, 6 Taunt. 289. [See *Crane v. Alling*, 3 Green, 423.]

(o) *Walmsley v. Cooper*, 3 P. & D. 149; 11 A. & E. 216.

(p) *Deux v. Jefferyes*, Cro. Eliz. 352; 1 Rol. Abr. 939, S. C.; *Ayliff v. Scrimshire*, 1 Show. 46; Salk. 573, S. C.; *Thimbleby v. Barron*, 3 M. & W. 210.

(q) 1 Rol. Abr. 939, L. pl. 2.

(r) *Burgh v. Preston*, 8 T. R. 483. See *Norton v. Wood*, 1 Russ. & My. 178.

(1) A covenant to suspend proceedings on a judgment, until another security is exhausted, not being perpetual, does not release the judgment. *Scriba v. Deans*, 1 Brock. O. C. R. 166. A covenant not to sue the obligor of a bond for a limited time, cannot be pleaded in bar of a suit on the bond. *Winans v. Huston*, 6 Wend. 471; *Berry v. Bata*, 2 Blackf. 118.

(2) The payment of a less sum than the whole debt, without a release, is no satisfaction. *Geiser v. Kreaval*, 4 Gill & J. 305. Where A. assigned his property for such creditors as should execute a release, and defendant released, being a creditor on a note discounted by him for A.; held, he had still a right to retain other notes deposited with him by A. as collateral security. *Lewis v. Bank of Pennsylvania*, 3 Whart. 531; *Russell v. Rogers*, 10 Wend. 473. See *Smith v. Stone*, 4 Gill & J. 311.

(3) In debt on bond by A., assignee of B. the obligee, against C. the obligor, it appeared that when the bond was given a settlement was made and releases executed of all claims by A. and B. against C., and of C. against A., and A. having said, "Now you will go and buy another judgment against me," and C. replied, "I will not; I will pay the bond when due:" Held, after this agreement, C. could not set off a judgment against B., assigned to him after the execution of the bond. *Hennis v. Page*, 3 Whart. 275.

II. c. 24, s. 4,) that "where there are mutual debts between the plaintiff and defendant; or if either party sue or be sued as executor or administrator where there are mutual debts between the testator or intestate, and either party; one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require; so as at the time of pleading the general issue, where any such debt of the plaintiff, his testator, or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence on such general issue. [But as to notice, see operation of new rules, *ante*, p. 156.]

Upon the construction of this statute several questions arose: First, Whether a debt on simple contract could be set off in common cases against a specialty debt?(1) 2ndly, If in common cases, whether they could be so set off, where an executor or administrator is plaintiff?(2) and, 3dly, Whether, in the case of a bond, the penalty was to be considered as the debt?(3) To remove these difficulties, it was enacted and *declared* by stat. 8 Geo. II. c. 24, s. 5, that, by virtue of "the preceding clause, mutual debts might be set against each other, either by being pleaded in bar, or given in evidence on the general issue,(s) in

(s) Under the operation of the new rules a set-off must now be pleaded specially. See *ante* p. 156.

(1) This question first arose in *Stephens v. Lofting*, M. 6 G. 2. C. B. 8 Vin. 462. pl. 31, and cited by *Willes*, C. J., in *Hutchinson v. Sturges*, *Willes*, 262, when the court were of opinion that a simple contract debt could not be pleaded by way of a set-off to a bond. But on error in B. R., *Yorke*, C. J., expressed a strong opinion to the contrary; *Probyn*, J., concurred with the C. J.; *Price*, J. doubted, and *Lee*, J. did not give any opinion; the decision, however, of another point rendered the determination of this question unnecessary at that time. The same question was again agitated in *Brown v. Holyoak*, *Barnes*, 290, E. 7 G. 2 C. B. The case was this: In debt (by an administrator, 8 Vin. 562,) for rent on a lease by indenture, the defendant pleaded that a greater sum was due from the plaintiff to the defendant, upon a promissory note; after argument, judgment was given for the plaintiff, on the ground that his demand was equal to a specialty, and that a simple contract debt could not be set off against a specialty debt. On error in B. R., the judgment of the Court of Common Pleas was reversed by Lord *Hardwicke*, C. J. and the court, the day after the stat. 8 G. 2. c. 24, was passed.

(2) In *Kemys v. Betson*, 8 Vin. 581, pl. 30, and cited by *Willes*, C. J., in *Hutchinson v. Sturges*, *Willes*, 262, it was holden in the case of an executor, that simple contract debts could not be set off against debts on specialties; for the debts must be of an equal nature; otherwise such a construction might occasion a *devastavit*. And in *Joy v. Roberts*, in the Exchequer (cited by *Willes*, C. J., in *Hutchinson v. Sturges*, *Willes*, 262,) there was the same resolution.

(3) In debt on a bond for 76*l.* 10*s.* conditioned for the payment of 88*l.* the defendant pleaded a debt by simple contract of 70*l.* *Stephens v. Lofting*, B. R. M. 7 G. 2; 2 Barn. 338. On demurrer, the question was, whether the penalty were the legal debt, so that the money due could not be pleaded against what was really due upon the bond. Judgment for the plaintiff in C. B. On error in B. R., *Yorke*, C. J., said, that the penalty of the bond was the legal debt; that one part of the stat. 2 Geo. 2, c. 22, s. 13, was to be compared with the other; and therefore, if the defendant (as he might have done,) had pleaded the general issue, and given in evidence part of the plaintiff's demand, and craved to have an allowance of so much, this would not have aided him, for the jury must find the whole, or else that it was not the parties' deed, and they could not sever the debt; so, in like manner, a lesser sum than was demanded by the plaintiff, that is, than the penalty, could not be pleaded. Judgment of C. B. affirmed.

the manner therein mentioned, notwithstanding such debts were deemed in law to be of a different nature; unless in cases where either of the said debts should accrue by reason of a penalty contained in any bond or specialty; and in all cases, where either the debt for which the action is brought, or the debt intended to be set against the same, hath accrued by reason of any such penalty, the debt intended to be set off shall be pleaded in bar; in which plea shall be shown how much is due on either side;(1) and in case the plaintiff shall recover in any such [*592] action, *judgment shall be entered for no more than shall appear to be due to the plaintiff, after one debt being set off against the other as aforesaid." In debt upon a bail-bond, brought by the officer of the Palace Court,(t) to whom the defendant had given the bond conditioned for the appearance of A. B. to answer C. D. in a plea of trespass on the case; the defendant pleaded, by way of set-off, a greater sum due to him from the plaintiff, by simple contract. On demurrer, the court gave judgment for the plaintiff; *Willes*, C. J., (who delivered the opinion of the court,) observing, that as this was not a bond conditioned for the payment of money, the case was not within the stat. 8 Geo. II.; and it was not within the stat. 2 Geo. II. because the plaintiff did not sue in his own right, but in the nature of a trustee for C. D.; that it might as well be said, that when a person sued as executor, the defendant might set off a debt from the plaintiff to the defendant, in his own right, as that the defendant could set off in the present case. He added, however, that if this had been a bond to the sheriff, assigned over to the party according to the statute, the court would have thought otherwise; and that the penalty must have been considered as the debt, this not being a case within the stat. 8 Geo. II. To debt on bond conditioned for the payment of an annuity,(u) defendant pleaded that a certain sum only was due to the plaintiff on account of the annuity, and that the plaintiff was indebted to the defendant in a larger sum of money, for money lent, &c., which he claimed to set off; on demurrer, it was adjudged, that this was a case within the stat. 8 Geo. II. c. 24, s. 5, and that the defendant was entitled to set off his debt. To a declaration in debt by assignees of bankrupt for money received by defendant to use of plaintiff's assignees; plea, that bankrupt *before his bankruptcy* was indebted to defendant in a greater sum upon an account stated between them, and that defendant was willing to allow plaintiffs to set off against such debt the debt claimed in the declaration, was holden(x) ill on demurrer.

The following rules must be attended to in a pleading a set-off:—Uncertain damages, or an unliquidated demand, cannot be made the subject of a set-off(y)(2) But if two persons agree to perform certain

(t) *Hutchinson v. Sturges*, *Willes*, 261.

(u) *Collins v. Collins*, 2 Burr. 820.

(x) *Groom v. Mealey*, 2 Bingh. N. C. 138.

(y) *Howlet v. Strickland*, 1 Cowp. 56; *Weigall v. Waters*, 6 T. R. 488.

(1) Hence the defendant, in his plea, must aver what is really due; and this averment has been holden to be traversable, (*Symmons v. Knox*, 3 T. R. 65,) although laid under a *videlicet*. *Grimwood v. Barrit*, 6 T. R. 460.

(2) "Debts to be set off must be such as an *indebitatus assumpsit* will lie for." Per *Ashurst*, J., in *Howlet v. Strickland*, Cowp. 56.

work in a limited time,(z) or to pay a stipulated sum weekly, for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the *payment of [*593] the stipulated sum weekly, such weekly payments are in the nature of liquidated damages, and not by way of penalty, and may be set-off by the obligee in an action brought against him by the obligor who executed. 2ndly, A debt barred by the statute of limitations cannot be set off;(a) for the remedy, by way of set-off, was intended to supersede the necessity of a cross action; and a debt barred by the statute of limitations cannot be recovered by action. If such debt be pleaded, the plaintiff ought to reply the statute.(b) 3dly, The debts sued for, and intended to be set off, must be *mutual*, and due in the same right.(1) A debt due to a person in right of his wife,(c) cannot be set off in an action against him on his own bond. Under the statutes of set-off, the court can only take notice of an interest at law.(d) As to particulars of set-off, see *ante*, p. 157.

A plea of set-off to several counts is not divisible; and the plaintiff is entitled to a verdict generally, unless the defendant proves a set-off equalling the whole of the plaintiff's aggregated demand.(e)

IV. *Debt on Bail-bond.* p. 593;(2) *Stat. 23 Hen. VI. c. 10.* p. 593; *Assignment of Bail-bond under Stat. 4 Ann. c. 16.* p. 598; *Declaration by Assignee.* p. 600; *Of the Pleadings.* p. 601; *Comperuit ad Diem.* p. 602; *Nul Tiel Record.* p. 602.

At common law, the sheriff was not obliged to take bail from a defendant arrested upon mesne process, unless he sued out a writ of main-prize; but by stat. 23 Hen. VI. c. 10, it was enacted, that sheriffs, under-sheriffs, bailiffs of franchises, and other bailiffs,(3) should let

(z) *Fletcher v. Dyche*, 2 T. R. 32.

(a) Per Willes, C. J., in *Hutchinson v. Sturges*, Willes, 262.

(b) *Remington v. Stevens*, Str. 1271.

(c) Bull N. P. 179, cites *Paynter v. Walker*, C. B. E. 4 Geo. III.

(d) Per Littledale, J., *Tucker v. Tucker*, 4 B. & Ad. 751.

(e) *Moore v. Butlin*, 7 A. & E. 595; 2 Nev. & P. 436, recognized in *Tuck v. Tuck*, 5 M. & W. 109, *ante*, p. 557.

(1) See cases affording an illustration of this rule, under "Plea of Set-off," tit. "Assumpsit," *ante*, p. 155, and notes.

(2) In Massachusetts and New Hampshire, it seems to be doubtful whether *debt* will lie on a bail-bond. *Scire facias*, not debt, is the form of action in Massachusetts on a bail-bond. *Crane v. Keating*, 13 Pick. 339. An action of debt on a recognizance of bail may be brought in a different court from that where taken. *Davis v. Packard*, 7 Peters, 276. See *Lane v. Smith*, 2 Pick. 81. At all events, it is held that the action will not lie after one year from the final judgment against the principal. *Ib.* *Pearce v. Read*, 2 N. Hamp. Rep. 359. Otherwise in Missouri. *Palmer v. Atkinson*, 1 Mis. 176.

(3) "This statute does not authorize *sheriffs'* bailiffs to take obligations for the appearance of persons arrested; from the express mention of bailiffs of franchises, it appears that those officers only are meant, who have the return of process. When, therefore, the process is directed to the sheriff, the indemnity must be to him." Per Buller, J., in

out of prison all persons by them arrested or being in
 [*594] *their custody, by force of any writ, bill, or warrant, in any
 action personal,⁽¹⁾ or by cause of indictment of trespass,⁽²⁾
 upon reasonable surety⁽³⁾ of sufficient persons, having sufficient within
 the counties where such persons are let to bail, to keep their days in
 such place as the said writs, bills, or warrants, shall require; persons
 in ward by condemnation, execution, *capias utlagatum* or *excommuni-*
catum, surety of the peace, or by special commandment of any justice
 excepted. And no sheriff, &c., shall take, or cause to be taken or
 made, any obligation for any cause aforesaid, or by colour of their
 office, but only to *themselves*, of any person, nor by any person, which
 shall be in their ward by course of law, but upon the name of
 [*595] their office, and upon condition that the prisoners shall *ap-
 pear at the day and place contained in the writ, &c.; and if
 any sheriffs, &c., take any obligation in other form, by colour of their
 office, it shall be void. The constant usage since the passing this act
 has been for sheriffs, and other officers, to take a security *by bond*.^(g)
 Regularly, this bond ought to be taken with two or more sureties, at
 the least, the words of the statute being "surety of sufficient *persons*;"
 and the sheriff, &c., may insist upon two sureties being given; yet it
 has been adjudged,^(h) that, as the indemnity is for the protection of
 the sheriff, &c., he ~~may~~ waive the benefit, and take a bond with one
 surety only.

(g) See note (3), below.

(h) *Drury's case*, 10 Rep. 100, b. 101, a, recognized in *Cotton v. Wale*, Cro. Eliz. 862,

Rogers v. Reeves, 1 T. R. 422. The marshal of the King's Bench is an officer within this statute, *Bracebridge v. Vaughan*, Cro. Eliz. 66; but the serjeant-at-arms of the House of Commons is not, *Norfolk v. Elliot*, 1 Lev. 209. See 1 Tidd's Pract. 221-238, 4th Am. ed., and notes.

(1) Upon an attachment of privilege, attachment upon a prohibition, attachment in process upon a penal statute, the sheriff may be compelled to take bail by force of this statute; but not upon an attachment for a contempt, issuing out of B. R., (*Anon.* 1 Str. 479. Resolved by all the judges) or C. B., (*Field v. Workhouse*, Comyn's Rep. 264,) or the Court of Chancery, for disobeying a subpoena. *Studd v. Acton*, 1 H. Bl. 468. But although the sheriff is not compellable to take bail upon an attachment out of Chancery, yet he is not prohibited by statute 23 Hen. VI. from doing so; and a bail-bond so taken is good at common law, and may be enforced by the sheriff. *Morris v. Hayward*, 6 Taunt. 569. But assignee thereof cannot maintain action, it not being within the stat. of 4 & 5 Ann. c. 16. *Meller v. Palfreyman*, 4 B. & Ad. 146. In *Studd v. Acton*, it was holden, that the words "by force of any writ, bill, or warrant, in any action personal," were confined to actions at law.

(2) The sheriff is not authorized (*Bengough v. Rossiter*, 4 T. R. 505,) to take a bond for the appearance of persons arrested by him, under process issuing upon an indictment at the quarter sessions, for a trespass and assault; because at common law the sheriff could not bail any persons indicted before justices of the peace, (2 Hawk. P. C. c. 15, s. 26.) and this stat. of 23 Hen. VI. was not passed to enable the sheriff to take bail in cases where he could not bail before; but in order to compel him to take bail in those cases, where he might have taken bail, and neglected so to do. At common law, the sheriff might have bailed persons indicted before him at his torn, (Id. sect. 27,) and, consequently, by this statute he was compellable to bail such persons; but the stat. 1 Edw. IV. c. 2, having taking away the sheriff's power of bailing in such cases, (Ib.,) the stat. 23 Hen. VI. is in this respect rendered of none effect.

(3) According to the opinion of *Ashhurst, J.*, in *Rogers v. Reeves*, 1 T. R. 421, a security of a lower nature than a security by bond, as a simple contract undertaking, is insufficient. If the sheriff refuses to take bail, sufficient sureties being tendered, the proper remedy against him is an action of trespass on the case. *Smith v. Hall*, 2 Mod. 32.

The form of surety prescribed by the statute must be strictly pursued, that is,

1st. The bond must be made to the sheriff or other officer himself.(i) Hence a bond made to the sheriff's bailiff is bad.

2ndly. It must be made to the sheriff or other officer by the name of his office(k) and county. On error in debt on bail-bond, it was excepted, that it was not shown; that the bond was to the sheriff by the name of his office. The court were of opinion that it should so appear;(l) but they thought that in the present case it did sufficiently appear on the whole declaration, it being laid *solvend. eidem vicecomiti et assignatis*.

3dly. There must be a condition to the bond; and that condition must be for the appearance of the defendant at the day and place mentioned in the writ, &c.; and for that only. Hence, if there be not any condition;(m) or, what amounts to the same thing, if the condition be impossible, as where the condition is for the appearance of the defendant at a day passed when the bond is made;(n) the bond is void. So if any other condition than that prescribed by the statute is expressed in the bond: as if it be conditioned "to put in good bail for the defendant at the return of the writ, or to surrender the defendant, or to pay the debt and costs."(o) it will be bad. But if the bond be made to the sheriff by the name of his office, and the condition expresses the time and place of appearance, a variance in other respects will be immaterial: as in the following cases; where the writ was to answer A. B. in a plea of debt of *three hundred and twenty pounds*, and the condition of the bond was to appear to answer A. B. in a plea of debt.(p) Where the writ was to answer in a plea of trespass, and the condition was to appear to answer generally, without saying in what action; the court held the bond good: because no other action shall be intended; and the statute only requires the bond to be conditioned for an appearance, *and the words "to answer, &c." are surplusage.(q) [*596] Where the writ was to appear before our lord the king, at Westminister, and the condition was to appear before his majesty's justices of the bench at Westminister;(r) it was holden sufficient.(1) Where the writ was to answer in a plea of trespass, and also to a bill of 100*l.* of debt, and the condition was to answer in a plea of trespass, of 100*l.*; the variance was holden to be immaterial.(s) Where the original was to answer in a plea of trespass, *on the case, on promises*; and the condition was to answer in a plea of trespass; the bond was holden to be good.(t) Where the writ was to answer of a plea of tres-

(i) 1 T. R. 422.

(l) *Symes v. Oakes*, Str. 893.

(n) *Samuel v. Evans*, 2 T. R. 569.

(p) *Villiers v. Hastings*, Cro. Jac. 286.

(r) *Kirkbride v. Dyke*, 2 Lev. 180; T. Jones, 46.

(s) *Cudwell v. Dunkin*, T. Jones, 137; 2 Show. 51, S. C.

(t) *Owen v. Nail*, 6 T. R. 702.

(k) *Noel v. Cooper*, Palm. 378.

(m) *Graham v. Crawshaw*, 3 Lev. 74.

(o) *Rogers v. Reeves*, 1 T. R. 418.

(q) *Kirkebridge v. Wilson*, 2 Lev. 123.

(1) It appears from Levinz's report of this case, that the defendant brought a writ of error in the Exchequer Chamber, and that it was argued again, and the majority of the judges were for affirming the judgment. But *North*, C. J., being strongly against it, it was adjourned.

pass, and also to a bill of *the said John*; and the condition was to answer of a plea of trespass, and also to a bill, (omitting the words "of the said John;") it was holden an immaterial variance.^(u) Where the process was to appear before the barons; and the condition was to appear in the office of pleas in the Court of Exchequer, at Westminster; it was holden well enough.^(x) Where the process was in an action of trover, and the condition was to appear to answer of a plea of trespass on the case on promises; the bond was adjudged sufficient, on the ground that the words, "to answer, &c." were only surplusage, and might be rejected.^(y) Where the original was returnable before our lord the king, wheresoever, &c.; and the words "wheresoever, &c.," were omitted in the bail-bond; and it was objected,^(z) that by the statute, the sheriff could not take any bond but such as corresponded with the writ, whereas this might be to compel an appearance out of England, if the king should happen to be so; but the court said, that it was sufficient in these bonds to state in substance the design of the writ; and they would understand, that by appearing before the king, was meant before the king *in his court*, and not before the king *in person*. So where the writ was to appear, on a general return-day, before the king, *wheresoever he should then be in England*,^(a) and the bond was conditioned for the appearance of the party before the king, at Westminster, at the day named in the writ; the variance was holden to be immaterial; Lord *Ellenborough*, C. J., observing, that Westminster, according to the common understanding of every-
 [*597] body at this day, (considering that *the Court of King's Bench had been invariably held there for many centuries, except only when it was removed for a short period to Oxford, in 1665,) was the place meant by the more general description in the writ; and that the variance in this case was certainly not greater than in the preceding case of *Shuttleworth v. Pilkington*.

An executor brought debt in the debet and detinet^(b) upon an assignment of a bail-bond, for appearance to a bill of Middlesex, and to answer the plaintiff of a bill of trespass, *ac etiam billæ querentis ut executoris I. S. pro 1,500l. de debito secundum consuetudinem curiæ nostræ coram nobis exhibend.* On demurrer, it was contended, that this action ought to have pursued the original action, and to have been brought in the detinet only. But the court gave judgment for the plaintiff; *Parker*, C. J., observing, "The condition of the bond is to appear, in the first place, to answer the plaintiff in an action of trespass in his own right, and then *secundum consuetud. cur.* to answer the bill in debt as executor, for this court has not jurisdiction in debt originally; but in whatever county the court is sitting, you may have a bill in trespass; and, when the party is brought in, a bill may be exhibited against him in any other action; for, being in custody of the marshal of the supreme court, he shall answer to all matters there; so that this bond is also a

(u) *Rench v. Britton*, 10 Mod. 327.

(x) *Phillips v. Phillips*, cited 2 Str. 1156.

(y) *Davenport v. Parker*, Fort. 368.

(z) *Shuttleworth v. Pilkington*, 2 Str. 155; 7 Mod. 325, Leach's ed., cited by *Buller*, J., in *King v. Pippett*, 1 T. R. 240.

(a) *Jones v. Stordy*, 9 East, 55.

(b) *Brumfield v. Lander*, B. R. H. 12 Ann. MSS.

security for his appearance in the action of trespass, which is in the plaintiff's own right, and may be insisted on as well as the bill in debt, *ergo*, the action well brought in the debet and detinet." This action is *in loco* of the sheriff. If the sheriff does not comply with the *injunctions* of the statute, and, without the plaintiff's consent, takes a security of a different kind than that described therein, the courts will not afford him any relief, nor interpose in his favour, for the purpose of enforcing such security, on the ground of his having been guilty of a breach of his duty.

Hence where a *sheriff's officer*(c) took an undertaking from the defendant's attorney, instead of a bail-bond, for the appearance of the defendant, and bail above was not duly put in, and an action for an escape was brought against the sheriff, the court would not relieve him, by permitting him to put in and justify bail afterwards; although he offered to pay the costs of the action brought against him. So where the defendant's attorney gave the sheriff's officer an undertaking(d) that he would give the sheriff a bail-bond in due time, which he afterwards neglected to do, and the plaintiff recovered against the sheriff for the escape; the court refused to proceed summarily against the attorney, to make him pay the debt and costs, for his breach of faith, on the ground that the undertaking *was illegal.(1) The [*598] statute 23 H. VI. c. 10, is a general law,(f) of which the king's courts will take cognizance, although it is not pleaded.(2)

As to the manner of pleading, so as to take advantage of this statute, it will be proper to remark, that the special matter, which brings the case within the statute, must appear by some means or other upon the record: if it be shown on the declaration, it need not be pleaded.(f) So if it appear on craving oyer of the bond, the defendant may demur without showing the special matter.(g) In short, it is sufficient if it appears on any part of the record.

If the defendant does not appear at the return of the process, according to the condition of the bail-bond, that is, if he does not put in and

(c) *Fuller v. Prest*, 7 T. R. 109.

(d) *Sedgworth v. Spicer*, 4 East, 568.

(f) *Samuel v. Evans*, 2 T. R. 569.

(g) Per Buller, J., in *Samuel v. Evans*, 2 T. R. 575.

(1) It is to be observed, that the provisions of this statute are confined to securities given to the sheriff or other officer. Hence, bonds given to the plaintiff are not within the statute; (*Raven v. Stockdale*, Gouldsb. 66, agreed in *Leach v. Davys*, Aleyn, 58;) and consequently may be taken in a different form than that prescribed by the statute. *Hall v. Carter*, 2 Mod. 304; per Buller, J., *Rogers v. Reeves*, 1 T. R. 422. So, also, undertakings given by the defendant or his attorney, to the plaintiff or his attorney, for the appearance of the defendant, are valid, and may be enforced by attachment. No bond is void for ease and favor, unless given to the sheriff or arresting officer. *Kavanagh v. Janvers*, 8 Greenl. 422.

(2) This statute was formerly considered as a private law. But in *Samuel v. Evans*, which finally decided that it was a public law, it was observed, that whatever might have been the law before the statute of Queen Anne, the case of *Saxby v. Kirkus*, Bull. N. P. 224, had removed all doubt, for the court there said, though the 23 Hen. VI. c. 10, were a private law, yet the statute 4 & 5 Ann. having enabled the sheriff to assign such bond, the court must take notice of the law that enables him to take such bond. See *Benson v. Welby*, 2 Saund. 155, a, n. (4).

perfect bail above in due time, (h) the bail-bond is forfeited, and the plaintiff may take an assignment of it. This course is usually pursued, if the bail below are sufficient. Before the statute for the amendment of the law, 4 & 5 Ann. c. 16, the sheriff was not compellable to assign the bail-bond, though if he had not assigned it, the court would have amerced him. Another mischief at common law was, that after an assignment of the bail-bond, the action thereupon must have been brought in the name of the sheriff, who might have released the obligor, (i) and thereby driven the plaintiff into a court of equity. To remedy these inconveniences, it was enacted by stat. 4 & 5 Ann. c. 16, s. 20, "that if any person shall be arrested by any writ, bill, or process, issuing out of any of the king's courts of record at Westminster, at the [*599] suit of *any common person, and the sheriff, or other officer, takes bail from such person, the sheriff, (1) or other officer, at the request and costs of the plaintiff in such action or suit, or his lawful attorney, shall (2) assign to the plaintiff in such action the bail-bond, or other security taken from such bail, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses, (3) which may be done without any stamp, provided the assignment so indorsed be duly stamped before any action brought thereupon: and if the bail-bond or assignment, or other security taken for bail, be forfeited, the plaintiff in such action, after such assignment made, may bring an action thereupon, in his own name; and the court, where the action is brought, may, by rule of the same court, give such relief to the plaintiff and defendant in the original action, and to the bail, as is agreeable to justice; and such rule shall have the effect of a defeasance to the bail-bond." By s. 24, it is provided, "that this act shall extend to all courts of record within this kingdom." But it does not apply to proceedings in equity. (k) Formerly, although by this statute the court where the action was brought on the bail-bond, was expressly authorized to exercise an equitable jurisdiction, yet upon the supposition that every

(h) *Harrison v. Davies*, 5 Burr. 2683.

(i) *Shipley v. Craiser*, 2 Ventr. 131.

(k) *Meller v. Palfreyman*, 4 B. & Ad. 146.

(1) In the case of *Kitson v. Fagg*, 1 Str. 60, (for the argument in this case, see 10 Mod. 288,) the question being, whether a bail-bond was well assigned by an under-sheriff's clerk? *Parker*, C. J., said, that he had the advice of all his brethren; and they were of opinion, that an under-sheriff might assign a bail-bond in the name of the high-sheriff, it having been the constant practice ever since the stat. 4 & 5 Ann.; but that if the assignment was neither by the sheriff, nor his under-sheriff, as in this case, it would not be good. In debt on a bail-bond, defendant pleaded that there was not any assignment of the bond by sheriff or under-sheriff. It appeared in evidence, that the bond had been assigned to the plaintiff by one of the under-sheriff's clerks. The preceding case of *Kitson v. Fagg* was cited as an authority to show that this was not a good assignment. But Lord *Mansfield*, C. J., was clearly of opinion, that the seal to the assignment, being the seal of office, was sufficient to give it validity, whoever had signed it. *Harris v. Ashby*, London Sitings, M. T. 1756, MSS.

(2) If the sheriff refuses to assign the bail-bond, it seems that an action on the case will lie against him for breach of duty imposed by the statute. Case does not lie against sheriff for not assigning a bail-bond, if it could not be enforced. *Newell v. Hoadley*, 8 Conn. 381.

(3) It has been holden, that the witnesses must be different persons from the assignor and assignee. *White v. Barrack*, 1 M. & W. 424.

other court, except that where the original action was brought, was incompetent to exercise that jurisdiction, it was holden, that an action on the bail-bond, whether brought by the assignee^(l) or the officer,^(m) must be brought in that court, where *the original [*600] action was commenced; advantage, however, could not be taken of the action having been brought in a wrong court, upon the plea of *non est factum*;⁽ⁿ⁾ but not by R. G. H. T. 2 Will. IV. 28, the sheriff himself may sue in any court; but the assignee must still, as formerly, bring his action in the same court from which the process issued, upon which the bond was taken. Jervis's New Rules, p. 49, n.^(c)

The assignment may be stated in the declaration to have been made in a different county from that in which the bail-bond was given, and the venue may be laid in the county in which the assignment is stated to have been made, agreeably to the rule, that where matter in one county is dependent on matter in another county, the action may be brought in either. Debt upon a bail-bond; and plaintiff declares that he sued out a writ directed to the sheriff of Surry,^(o) &c., who took a bail-bond, which he afterwards assigned to the plaintiff at London, where the action was brought. Demurrer, on the ground that the action was founded on the bond entered into by the bail, and that being laid to be done in Surry, the action should have been there; but judgment for the plaintiff.

It is sufficient for the plaintiff to state in his declaration,^(p) that the sheriff assigned the bond to him *according to the form of the statute*, without adding, that "the assignment was under the hand and seal of the sheriff;" and the defendant may plead, that he *did not assign, &c., according to the form of the statute*, and the plaintiff may tender an issue thereon in those words, on which he must prove that the assignment was according to the statute, under the hand and seal of the sheriff. So though the statute requires the indorsement to be made by the sheriff in the presence of two witnesses, yet it does not require the names of the witnesses to be set forth in the declaration, and, consequently, if they are omitted, the omission will be holden immaterial.^(q) So if it is averred in the declaration, that the sheriff assigned the bail-bond by indorsement upon the said writing obligatory, and attested it under his hand and seal, in the presence of two credible witnesses,^(r) or if it be averred, that the assignment was made in the presence of two credible witnesses,^(s) it is sufficient, without averring that the indorsement was attested by two credible witnesses. A *profert in curia* of the assignment is not necessary, because the assignment is not by

^(l) *Chesterton v. Middlehurst*, 1 Burr. 642; *Walton v. Bent*, 3 Burr. 1923; *Morris v. Rees*, 2 Bl. Rep. 838, and 3 Wils. 348.

^(m) *Donatty v. Barclay*, 8 T. R. 152; but see *Newman v. Fawcitt*, 1 H. Bl. 631, C. B. *contra*, as to sheriff, that he may sue in a different court.

⁽ⁿ⁾ *Wright v. Walmsley*, 2 Campb. 396.

^(o) *Gregson v. Heather*, Str. 727, and Lord Raym. 1445; *Norcroft v. Matthews*, 13 Geo. I. S. P., on the authority of *Gregson v. Heather*.

^(p) *Dawes v. Papworth*, Wilses's R. 408.

^(q) *Robinson v. Taylor*, Fort. 366.

^(r) *Leaf v. Box*, 1 Wils. 121.

^(s) *Rollison v. Taylor*, 13 Geo. I., probably the S. C. with *Robinson v. Taylor*, Fort. 366, (though this point is not mentioned in that report,) cited by *Wright, J.*, in *Leaf v. Box*, 1 Wils. 122.

deed.(t) The assignment is good,(*) though the sheriff be
[*601] *out of office; the act does not say it shall be done during
the shrievalty.

It is not necessary to state in the declaration, that the defendant in the original action was arrested,(x) nor if stated is it traversable.(y) Neither is it necessary to state, that the debt was sworn to by the plaintiff, nor that the sum sworn to was indorsed on the writ, such omission having been sanctioned by a series of precedents.(z) Bail to the sheriff are liable to the plaintiff's whole debt (without regard to the sum sworn to,) and costs, to the extent of the penalty of the bail-bond.(a)(1) After a defendant has been discharged out of custody upon the bail-bond being given,(b) it is neither in the power of the bail to render him, nor of the party to surrender himself again into the custody of the sheriff before the return of the writ, without the consent of the latter. But the sheriff may, if he pleases, accept the surrender of the party, who is willing to return into his custody, before the return of the writ. And if the sheriff consents to do so, and by virtue of such surrender has the defendant in his custody at the return of the writ,(2) the court will then consider it as if no bail-bond had been given: and consequently, under these circumstances, an action cannot be maintained against the sheriff for not assigning the bail-bond;(c) nor can he be proceeded against for not bringing in the body, although upon being ruled to return the writ, he returned *cepi corpus*.(d)

Pleadings.—To an action of debt by the assignees of the sheriff upon a bail-bond, *non est factum* may be pleaded. If issue be joined on *non est factum*, the only proof required on the part of the plaintiff (supposing there is not any other plea,) is proof the execution of the bail-bond by the defendant;(e) for the plea of *non est factum* does not put in issue any other allegation in the declaration; consequently, in such case, it is not necessary to prove the writ, assignment by the sheriff, &c.(3)

Debt on a bail-bond given upon an arrest in inferior court;(f)
[*602] the defendant pleads, that before the *day of appearance mentioned in the condition, he was rendered to the gaoler

(t) *Leaf v. Box*, 1 Wils. 121.

(u) *Hays v. Manning*, B. R. E. 8 Geo. I. Serjt. Hill's MSS. vol. 29, p. 68.

(x) *Watkins v. Parry*, Str. 444.

(y) *Haley v. Fitzgerald*, Str. 643.

(z) *Wiskard v. Wilder*, 1 Burr. 330. See the remarks of Sir J. Mansfield on this case, in *Hill v. Heale*, 2 B. & P. N. R. 201.

(a) *Stevenson v. Cameron*, 8 T. R. 28.

(b) *Hamilton v. Wilson*, 1 East, 383.

(c) *Stamper v. Milbourne*, 7 T. R. 122.

(d) *Jones v. Lander*, 6 T. R. 753.

(e) *Hutchinson v. Kearns*, C. B. London Sitings, Trin. T. 50 Geo. III. Sir J. Mansfield, C. J., MS. See new rules.

(f) *Pawling v. Ludlow*, 2 Show. 443; 3 Mod. 87, S. C.

(1) And an amendment of the declaration by which the damages are increased, does not exonerate the bail, but they remain liable to the extent of the penalty. *N. H. Bank v. Miles*, 5 Conn. Rep. 587.

(2) The party will not be considered as legally in the custody of the sheriff, from the mere circumstance of the sheriff's having received notice of the surrender; *there must be an assent on the part of the sheriff to the surrender*. 1 East's Rep. 383.

(3) *S. P. Soloman v. Evans*, 3 M'Cord, 274. Therefore the defendant, under this plea, cannot object that the assignment of the bond by the sheriff was not under seal, and was made in the presence of one witness only. *Ib.*

there, and there continued till a supersedeas came: upon demurrer the plea was holden good.

Comperuit ad Diem.—In debt on bail-bond, the defendant having craved oyer of the condition, may plead⁽¹⁾ an appearance at the day therein mentioned, according to the form and effect of the condition, concluding with “and this he is ready to certify by the record of the appearance;” for the appearance being entered of record, is not triable by jury, but by the record.^(g) This plea is termed a plea of *comperuit ad diem*. If the appearance is not entered of record, the bond is forfeited.^(h) To the plea of *comperuit ad diem* the plaintiff may reply *nul tiel record, viz.*, that there is not any such record of the appearance.⁽²⁾ When the record is of the *same* court,⁽ⁱ⁾ this replication ought to conclude with giving a day to the defendant. This constitutes a complete issue of fact; and if in this case the defendant should demur to the replication, the plaintiff need not join in demurrer; but if the record is not produced at the day, the plaintiff may sign judgment.^(k) When the record is of *another* court,^(l) the replication ought to conclude with a verification, and a prayer of judgment;⁽³⁾ the defendant thereupon rejoins, “there is such a record;” and the court gives him a day to bring it in. If the record is not brought into court on the day, judgment of failure of record is given.⁽⁴⁾ To an action of debt on a bail-bond to the plaintiffs^(m) as sheriff of Middlesex, the defendant pleaded, that the action was brought by the plaintiffs, for the benefit of, and as trustee for, J. S. (the sheriff’s officer,) by whom the defendant had been arrested, and to whom the defendant, after the return of the writ, but before the sheriff had been ruled to return the same, paid the debt and costs, which J. S. accepted in full satisfaction of the bond; and that if any damage had accrued for default of the defendant’s appearance, according to the condition of the bond, it was occasioned by the default of the sheriff’s officer not paying over the debt and costs to the plaintiff in the action, which would have been accepted by such plaintiff. On special demurrer, the case of **Bottomley v. [*603] Brook*,⁽ⁿ⁾ was cited in support of the plea, to show that to debt on bond the defendant might plead, that it was given to the plaintiff in trust for another; so as to let the defendant into a defence which he might have against the *cestui que trust*. The court, however, were

(g) *Bret v. Sheppard*, 1 Leon. 90.

(h) *Corbet v. Cook*, Cro. Eliz. (466).

(i) *Cremier v. Wickett*, Ld. Raym. 550, and Carth. 517, recognized in *Jackson v. Wickes*, 7 Taunt. 30.

(k) *Tipping v. Johnson*, 2 B. & P. 303.

(l) *Sandford v. Rogers*, 2 Wils. 113; 2 T. R. 443, S. C. See new rule, *post*, under “Debt on Judgment,” p. 617.

(m) *Scholey and Domville v. Mearns*, 7 East, 148.

(n) M. 22 Geo. III. C. B., cited in *Winch v. Keeley*, 1 T. R. 621.

(1) See the form of this plea of an appearance in B. R. *Tebbutt, ats. Powle*, Lill. Entr. 498, and a similar precedent, p. 114. For the form of plea of an appearance in C. B. see the same book, p. 479.

(2) For forms of this replication, see Lilly’s Entries, p. 114, 480, 498.

(3) See the form, 1 Saund. 92.

(4) See the form, 1 Saund. 92, n. (3).

of opinion that the plea was bad; Lord *Ellenborough*, C. J., observing, that as the officer could not have released the bond, he could not accept any thing in satisfaction of it; and further, that it was not alleged that the bond was originally given to the sheriff in trust for the officer; nor did it appear, how he afterwards came to have any equitable interest in it; consequently this was not brought within the case cited. *Lawrence*, J., adopting the remark of *Buller*, J., *Donnelly v. Dunn*,⁽¹⁾ animadverted on the plea, as being an attempt to set up matter as a legal defence, which was nothing more than an equitable practice of the court in exercising a summary jurisdiction over its officers.⁽²⁾

By R. G. H. T. 2 Will. IV. 29, in all cases where the bail-bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it. 30. Proceedings may be stayed on payment of costs in one action, unless sufficient reason be shown for proceeding in more. See *Key v. Hill*, 2 B. & A. 598, where before the new rule the court did so stay the proceedings, *Abbott*, C. J., dissentiente.

The legislature, considering that the power of arrest upon mesne process was unnecessarily extensive and severe, by stat. 1 & 2 Vict. c. 110, sect. 1, enacted, that no person should be arrested upon mesne process in any civil action in any inferior court, or (except in the cases and in the manner thereafter provided for) in any superior court; and by sect. 3, if a plaintiff in any action in any of her Majesty's superior courts of law at Westminster, in which the defendant is now liable to arrest, whether upon the order of a judge, or without such order, shall, by the affidavit of himself or some other person, show, to the satisfaction of a judge of the said courts, that such plaintiff has a cause of action against the defendant, to the amount of 20*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant is about to quit England unless he be forthwith apprehended, it shall be lawful for such judge, by a special order to direct that such defendant, so about to quit England, shall be held to bail for such sum as such judge shall think fit, not exceeding the amount of the debt or damages; and thereupon it shall be lawful

for such plaintiff, within the time which shall be expressed in [*604] such *order, but not afterwards, to sue out one or more writ or writs of *capias* into one or more different counties, as the case may require, against any such defendant so directed to be held to bail.

The principle by which the judges will be guided in allowing an arrest under the foregoing statute, is to consider whether the defendant is about to leave the country for such a time that he is not likely to be forthcoming to satisfy the plaintiff's execution at the period when he will be entitled to it in the ordinary course of law proceedings. It

(1) 2 B. & P. 47, where it was decided, that bail could not plead the bankruptcy and certificate of their principal in their own discharge. This decision was recognized in *Aldridge v. Harper*, 10 Bing. 125.

(2) The court having refused to relieve the defendant in a bail-bond suit, he cannot avail himself of the same facts submitted on that application, as a defence under plea of payment with leave, &c. *Wurtz v. Musselman*, 5 Watts, 95.

was therefore holden(o) to be a sufficient ground for issuing the writ, that the defendant, an officer in the army, was about to join his regiment stationed abroad.

V. *Debt on Bond, with Condition to perform Covenants.* p. 604 ;(1)
Assigning Breaches under Stat. 8 & 9 Will. III. c. 11, s. 8. p.
 604, 5, 6.

At common law, it was usual for the obligee of a bond, with a penalty conditioned for the performance of covenants, to declare on the bond merely; to which the defendant having craved oyer of the condition and the deed containing the covenants, usually pleaded performance; to this the plaintiff replied a breach of one of the covenants; and upon issue joined, and proof of such breach, the plaintiff was entitled not only to recover the penalty, that being the legal debt, but also to take out execution for the same: although the penalty far exceeded, in amount, the damages which he had sustained by the breach of covenant. Under these circumstances, the defendant could only obtain relief through the interposition of a court of equity, which would direct an issue of *quantum damnificatus*, and prevent any execution being enforced for more than the damage actually sustained.(2) To prevent plaintiffs, in cases of this kind, from converting that power, which the strictness of the common law gave them, into an engine of oppression, and to avoid the circuitous mode of relief to which defendants were compelled to resort, it was enacted by stat. 8 & 9 Will. III. c. 11, s. 8, "That in actions upon bond, or any penal sum, for non-performance of any covenants or agreements contained in any indenture, deed,(3) or *writing, the plaintiff may(4) assign as many [*605]

(o) *Larchin v. Willan*, 4 M. & W. 351.

(1) A bond for the "faithful" performance of duties as a teller in a bank is a security for competent skill and ordinary diligence as well as integrity, and it is a sufficient assignment of breach that defendant as teller received money and did not account. *Am. Bank v. Adams*, 12 Pick. 303. An official bond for good conduct is not discharged by a faithful accounting to the amount of the penalty but stands good as a security for losses to that amount. *Potter v. Titcomb*, 7 Greenl. 302. In debt on a penal bond conditioned for the delivery of property at a certain time and place, the declaration need not aver a demand at the place. *Aliter*, if for payment of money. *Mitchell v. Merrill*, 2 Blackf. 87. In a suit against a surety on an official bond by the U. S., the *onus* is on the plaintiff to show failure of principal. *U. S. v. Bell*, Gilpin, 43. But such surety is not discharged by a settlement on another account though subsequent to the default. *U. S. v. Beattie*, Ib. 98. In an action on a bond containing several stipulations in its condition, the plea of performance should disclose generally or specially a compliance with all the stipulations of the condition. *Mugan v. Mugan*, 4 Gill & J. 395.

(2) Where a bond conditioned to convey an estate, make a release or perform any other act at a particular day or on demand, and it appears that time is not of the essence of the contract, a performance after the day or on second demand, accepted by obligee, saves the penalty. *Hogins v. Reynold*, 15 Pick. 259.

(3) This statute is not confined to cases where the bond is conditioned for performance of covenants in some other instrument than the bond; *the condition of the bond is an agreement in writing* within this statute. 2 Burr. 826. Neither is this statute confined to cases where there is a penalty to secure the performance of an act, on the non-performance of

(4) See note (1), next page.

breaches as he shall think fit, and the jury, upon trial of such
[*606] action shall assess not *only such damages and costs, as have

which the obligee would be entitled to recover uncertain damages; but it extends also to cases where the agreement is for the payment of a certain sum; as to bonds conditioned for the payment of an annuity, (*Collins v. Collins*, 2 Burr. 820; *Walcot v. Goulding*, 8 T. R. 126, S. P.,) or the payment of a debt by yearly instalments. *Willoughby v. Swinton*, 6 East, 550. So it extends to bonds conditioned for the performance of an award, (*Welch v. Ireland*, 6 Id. 613,) although it appears that only a single sum is to be paid on the bond; for the condition being to perform an award, in other words, to perform an agreement, comes directly within the words of the statute. But as the great object (Per *Tindal*, C. J., delivering judgment, *Smith v. Bond*, 10 Bingh. 131,) of the statute was, to take away the necessity of applying for relief to a court of equity, this statute does not extend to bail, (*Moody v. Pheasant*, 2 Bos. & Pul. 446,) or replevin, (*Middleton v. Bryan*, 3 M. & S. 155, recognized in *Smith v. Bond*, 10 Bingh. 132,) bonds, or post obit bonds, (*Stair v. E. of Murray*, 2 B. & C. 82, cited by *Tindal*, C. J., delivering judgment in *Smith v. Bond*, *ubi sup.*,) or warrant of attorney to enter up a judgment, (*Shaw v. Marquis of Worcester*, 6 Bingh. 385,) given as a security for a debt on demand, or a bond with a penalty conditioned for the payment of money at a given day, with a stipulation that on any default in paying the interest, the whole sum should be demandable; (*James v. Thomas*, 5 B. & Ad. 40,) in these cases the court can relieve the defendant without his being compelled to file a bill in equity; and it may be observed, that it has not been holden to extend to common money bonds, that is bonds with a penalty conditioned for the payment of a less sum of money at a day or place certain. It seems, that in cases of this last kind, defendants are sufficiently protected against an unconscientious demand of the whole penalty by stat. 4 Ann. c. 16, sect. 13, by which it is enacted, "that if, at any time pending an action upon any such bond, the defendant shall bring into court the principal, interest and costs of suit, the same shall be taken in discharge of the bond, and the court shall give judgment accordingly."

(1) This statute having been made for the protection and relief of the defendants, these words "may assign," have been construed to be compulsory on the plaintiff; *Drage v. Brand*, 2 Wils. 377; *Hardy v. Bern*, 5 T. R. 540; as have the words, "may suggest," in the subsequent part of the statute, where the defendant suffers judgment by default, *Roles v. Rosewell*, 5 T. R. 538; or plaintiff obtains judgment on demurrer; *Walcot v. Goulding*, 8 T. R. 126. But see *Munro v. Allaire*, 2 Caines' Rep. 320; *Van Benthuysen v. De Witt*, 4 Johns. Rep. 213; *Hedges v. Suffolk*, 2 Johns. Cas. 406. Since the English determinations, some of the most eminent pleaders have thought it more convenient, in cases to which the statute applies, to set forth the condition of the bond, and to assign the breaches in the declaration, than in any subsequent stage of the proceedings. In debt on bond with special condition and assignment of breach the damages laid in the declaration are merely nominal and the jury may go beyond them. *Allen v. Smith*, 7 Halst. 160. This practice, as it seems, was founded on the supposition, that if the breaches were not assigned in the declaration, and the defendant pleaded *non est factum*, the plaintiff would be precluded from making the suggestion required by the statute; but, in the case of *Ethersey v. Jackson*, 8 T. R. 255, it was holden, that after issue joined on *non est factum*, the plaintiff might, upon summons and a judge's order, amend the issue, and proceed according to the directions of the statute; for per Cur., it is manifest that the legislature contemplated cases where the plaintiff had not originally assigned breaches in the declaration, which the statute enabled him to supply by entering a suggestion on the record, even after judgment, and therefore, *a fortiori*, it might be done before. The case of *Ethersey v. Jackson*, was recognized in *Homfray v. Rigby*, 5 M. & S. 60, and in *Webb v. James*, 8 M. & W. 645; in the former of which it was holden, that, after a plea of *non est factum*, and that the bond was obtained by fraud and covin, where breaches are not assigned in the declaration, the plaintiff may suggest them in making up the issue. See further on this subject, the notes of Serjeant Williams, in his edition of Saunders, vol. i. p. 58, n. (1), and vol. ii. p. 187, n. (2). Debt on the usual administration bond against the surety. Plea, *non est factum*, and issue by plaintiff, with a suggestion of several breaches. A rule to show cause why some of the breaches should not be struck out, or why the defendant should not be allowed to suffer judgment by default, and pay one shilling damages thereon, was refused: *Bayley*, B., observing, that in this case, on the suggestion, the jury were to inquire into the truth of the breaches; and that he was not aware of any case where a party had suffered judgment by default on such breaches; and it seemed to him contrary to the provisions of the statute that he should do so. *Archbishop of Canterbury v. Robertson*, 1 Cr. & M. 181; 3 Tyrw. 419, n. S. C.;

been heretofore usually done in such cases, but also damages for such the assigned breaches as the plaintiff shall prove to have been broken; and like judgment shall be entered on such verdict, as heretofore hath been usually done in such like actions." (1)

If judgment shall be given for the plaintiff, on demurrer, (2) or by confession, or *nil dicit*, (3) then the statute directs, "That the *plaintiff upon the roll (4) may suggest as many breaches of [*607] the covenants and agreements as he shall think fit, upon which shall issue a writ (5) to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justice or justices of assize, or *nisi prius*, of that county, (6) to inquire of the truth of

Bayley, B., added, that the present was not the defendant's only course; he might have pleaded performance, and suffered judgment by default in answer to the replication. Where breaches are assigned in the replication under this statute, the jury may assess damages without a special venire. *Scott v. Staley*, 4 Bingh. N. C. 724, recognizing *Quin v. King*, 1 M. & W. 42. The usual course of pleading on bonds for the performance of covenants, is, for the plaintiff to declare in debt for the penalty, the defendant to craveoyer, and plead a general performance, the plaintiff to reply and set forth particular breaches; and the defendant to rejoin to these breaches, and take issue thereon. But if the plaintiff assigns the breaches in his declaration, the defendant is bound to meet the allegations by something more than a general plea of performance: he ought to show when, how, and where to perform. Per *Kent, Ch. J.* in *Post Master General v. Cochran*, 2 Johns. Rep. 413; *Munro v. Allaire*, 2 Caines' Rep. 320. And plaintiff may assign double breaches. *Ib.* A breach assigned generally by negating the words of the condition or covenant is sufficient. *Hughes v. Smith*, 5 Johns. Rep. 168; *Smith v. Jansen*, 8 Id. 111; *Warren v. Powers*, 5 Conn. Rep. 373; *Kerr v. Meredith*, 4 Yeates, 283; *Wilmer v. Harris*, 5 Har. & J. 1; *Union Bank v. Ridgely*, 1 Har. & Gill, 324; *Pendleton's case*, 1 Monroe, 176.

(1) In an action on an official bond of sheriff against the sureties, if the breach consists in not levying on the goods and lands of a defendant at the time the execution was delivered to him, it should be shown in the assignment of the breach that the neglect was after the execution of the bond and also that the defendant then had goods or lands. *The State v. Roberts*, 7 Halst. 114. See *Rees v. Ticknor*, 1 Miles, 183.

(2) See *Glidewell v. M'Gaughey*, 2 Blackf. 359.

(3) The only difficulty, in cases where a party obtains a judgment on demurrer or by default, and is obliged to proceed under this statute, respects the costs of the inquisition, which if the plaintiff does not obtain, he is in a worse condition than he would have been before the statute. To obviate this difficulty, Mr. Serjeant Williams, in a note to *Gainsford v. Griffith*, 1 Saund. 58, recommends, that the judgment should be suspended until after the return of the inquisition, and proposes a form of entry for that purpose; to which form, Lord *Alvanley*, in *Hankin v. Broomhead*, 3 Bos. & Pul. 612, said, that he did not see any objection. His lordship, however, suggested another mode of proceeding, that is, that an application should be made to the court, to order the master to tax the costs of the inquisition, and then to add them to the sum to be levied under the execution. In debt on bond in the penal sum of 2,000*l.*, conditioned for the performance of covenants, defendant suffered judgment by default; whereupon the usual common law judgment in debt was entered for the recovery of the debt and damages; the plaintiff then proceeded to suggest breaches, upon which suggestion, a writ of inquiry was awarded and executed, and damages and costs assessed; after which, the plaintiff entered a second judgment for the damages assessed under the writ of inquiry, and further costs adjudged by the court, and then entered a *remittitur* as to the costs. A writ of error having been brought; it was holden, that the second judgment could not stand; and thereupon it was adjudged, that the second judgment, with the amercement, should be reversed, and that the former judgment should remain unimpeached. *Hankin v. Broomhead*, 3 Bos. & Pul. 607.

(4) See note (1), *ante*, p. 605. No suggestion is necessary on a judgment by warrant of attorney. *Kinnersley v. Mussen*, 5 Taunt. 264.

(5) See the form of this writ, 2 Wms. Saunders, 187, c.

(6) By stat. 3 & 4 Will. IV. c. 42, s. 16, the writ shall be executed before the sheriff, unless otherwise ordered by the court where action is pending, or by a judge of one of the superior courts.

every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby; in which writ it shall be commanded to the said justices, that they shall make a return⁽¹⁾ thereof to the court, whence the same shall issue, at the time in such writ mentioned; and in case the defendant, after such judgment entered, and before any execution executed, shall pay into court, to the use of the plaintiff, his executors or administrators, such damages so to be assessed, by reason of all or any of the breaches of such covenants, together with costs of suit, a stay of execution of the said judgment shall be entered upon record; or if, by reason of any execution executed, the plaintiff, or his personal representative, shall be fully paid or satisfied all such damages, with costs of suit, and all reasonable charges and expenses, for executing the said execution, the body, lands, or goods of the defendant, shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record; but, notwithstanding, in each case such judgment shall remain as a further security to answer to the plaintiff and his personal representative, such damages as shall be sustained for further breach of any covenant in the said indenture, &c., [*608] upon which the plaintiff may have a **scire facias*,⁽²⁾ upon the said judgment against the defendant, or against his heir, terre-tenant, or his personal representative, suggesting other breaches of the said covenants or agreements:⁽³⁾ and to summons him or them respectively, to show cause why execution shall not be had upon the said judgment: upon which there shall be the like proceeding, as was in the action of debt upon the said bond, for assessing damages upon trial of issue joined upon such breaches, or inquiry thereof, upon a writ to be awarded as aforesaid; and upon payment or satisfaction as aforesaid, of such future damages, costs, and charges, all further proceedings are again to be stayed; and so *toties quoties*; and the defendant, his body, lands, or goods, shall be discharged out of execution as aforesaid."⁽⁴⁾

(1) See the form of postea returned by justices of assize, 2 Wms. Saunders, 187, c.

(2) See form of this writ against defendant, Tidd's Pract. Forms, 1st ed. p. 430. If the plaintiff proceeds to execution, without a *scire facias*, the court will set aside the execution, and order the money levied under it to be restored. *Willoughby v. Swinton*, 6 East, 550. In cases within this statute, although new breaches take place within a year after judgment recovered, yet the plaintiff is bound to sue out a *scire facias*, *S. C.*

(3) On a bond of indemnity there can be but one judgment against the same party, which is for the penalty with damages, assessed by the jury, for the breaches assigned. For subsequent breaches, the remedy is by *scire facias* on that judgment, the assignment of additional breaches, and the assessment of additional damages. *Duffy v. Lytle*, 5 Watts, 120; *Adams v. Bush*, Id. 289.

(4) Pleas—1. *Non est factum*. 2. Performance of the condition; plaintiff replied setting forth breaches, and issue was joined thereon. A verdict was taken upon the issue of *non est factum* only, and damages assessed by reason of the detention of the debt to one cent, besides costs and charges to six cents. Judgment thereon for debt and costs. *Per Curiam*. Where breaches are assigned, the jury at the trial must assess the damages for such breaches as the plaintiff shall prove to have been broken; otherwise the verdict is erroneous, and a *venire de novo* will be awarded. *Van Benthuysen v. De Witt*, 4 Johns. Rep. 213.

Where there is a demurrer to the declaration, and the declaration is adjudged sufficient, an entry on the record that the judgment on the demurrer be stayed until the truth of the breach to be suggested be ascertained, and the damages assessed, is correct within the statute, which is to receive a liberal and beneficial construction.

VI. *Debt on Bond of Ancestor against Heir.* p. 608; *Pleadings.* p. 610; *Riens per Descent.* p. 610; *Replication.* p. 610; *Of the Liability of the Heir for the Value of the Land alienated under 11 Geo. IV. & 1 Will. IV. c. 47, s. 6,* p. 612; *Of the Liability of Devisee under the same Statute.* p. 613; *Judgment.* p. 615; *Execution.* p. 615.

Debt will lie against an heir, having assets by descent in fee simple, on the obligation of his ancestor, wherein the heir is expressly bound.(1) The law considers the bond of the ancestor, wherein the heir is bound, as becoming, upon the death of the ancestor, *the [*609] heir's own debt, *in respect of the assets*, which the heir has in *his own* right, and holds him liable upon such bond, to the value of the land descended.(2) Hence the action, on the bond of the ancestor, ought to be brought against the heir in the *debet* and *detinet*.(3) But if it be brought in the *detinet* only,(p) the omission of the *debet*, which was error at common law, will be cured after verdict, by stat. 16 & 17 Car. II. c. 8. And although it is the debt of the defendant,(q) because his ancestor has bound him, yet he is not liable any further than to the value of the land descended; and as soon as he has paid his ancestor's debt, to the value of the land, he is entitled to hold the land discharged. Where the obligor has heirs and lands on the part of his father and on the part of his mother, both heirs shall be equally charged.(r) The possession of a tenant for years, being a rightful possession, is considered in law as the possession of the heir, and therefore gives him a seisin in fact. A. seised of land in fee simple, at the time of her death, in the possession of a tenant from year to year, died, leaving B. her heir-at-law. No rent was ever paid to him, it being supposed that the land passed to a devise under the will of A. After the death of B.,

(p) *Combers v. Watton*, 1 Lev. 224.

(q) *Buckley v. Nightingale*, Str. 665.

(r) 11 Hen. VII. 12, b.

Smith v. Jansen, 8 Johns. Rep. 111. The suggestion of breaches may be *before* a formal entry of judgment on demurrer. *Ib.* The judgment must be for the penalty, which is the debt and the costs; and if the plaintiff add in his entry of judgment the damages assessed by the jury, it will be erroneous as to the damages, but the judgment will stand good as to the residue. *Ib.*

(1) "The executor more actually represents the person of the testator, than the heir does the person of the ancestor; for if a man binds himself, his executors are bound, though they be not named; *but so it is not of the heir.*" 1 Inst. 209, a. See also *Barber v. Fox*, 2 Saund. 136, and *ante*, p. 48, S. C. "In an action against the heir-at-law for a debt of his ancestor upon specialty, the ground of the charge is, that he is bound as well as the ancestor, and therefore it is the *debet* and *detinet*, as it would have been against the ancestor; and the law gives him liberty to discharge himself by pleading nothing by descent, or but so much; which plea, if found false, he is charged as a person bound for the whole debt, if he had but one acre; which is not the case of an executor, who is charged only for so much as comes to his hand, notwithstanding such plea found false." Per Lord Hardwicke, Ch., 1 Ves. 212.

(2) The debt is not a lien upon the land from the ancestor's death, but only capable of being made so by the suit of the party.

(3) "Because the inheritance of the ancestor, which creates a lien upon the heir, is possessed by the heir, *jure proprio*, and not *alieno*, as the personal estate is by the executor." Gilb. Debt, B. 3, c. 1.

his son and heir brought ejectment and recovered the land. It was holden,^(s) that B. was seised in *fact* of the land in question, which descended from him to his son, and was therefore assets in the hands of the son and heir, liable to the bond debt of the ancestor. If the defendant is only collateral heir of the obligor, the declaration ought to charge him specially, and the mesne descents ought to be stated. In debt on bond against the defendant,^(t) as brother and heir to J. S., the defendant pleaded *riens per descent* from his brother. A special verdict was found, that the obligor was seised in fee, had issue, and died seised, and the issue died without issue; whereupon the lands descended to the defendant as heir to the son of his brother; it was holden, that the issue was found against the plaintiff; for the defendant had nothing as immediate heir to his brother, but took by descent from the son of his brother; and although the defendant was chargeable as heir upon this bond, yet, being collateral heir only, the plaintiff ought to have declared specially. But this rule, as to stating the mesne descents in the declaration, applies only to descents from persons seised in fee [*610] simple *in possession; for where A. being seised in fee,^(u) bound himself and his heirs in a bond, and having two sons, B. and C., limited the estate to himself for life, remainder to his eldest son B. in tail, remainder to his own right heirs, and died; whereupon B. became seised in tail, with remainder in fee expectant, and afterwards died, leaving a son D., who became seised in like manner, and afterwards, died without issue; upon whose death the premises descended to C. in fee, the estate tail being then extinct; an action having been brought on the bond against C., as son and heir to A., and *riens per descent* from A. pleaded; it was holden, that the declaration charging the defendant as immediate heir of A., and not mentioning the mesne descents, was proper.⁽¹⁾ The plaintiff being presumed a stranger to the defendant's pedigree,^(x) it is not necessary for him to state in the declaration how the defendant is heir.

Creditors by specialty should be careful to make the debtor bind his heirs; as thereby they will be entitled to a priority in the distribution of assets by courts of equity under the stat. 3 & 4 W. IV. c. 104, making freehold and copyhold estates assets. See this stat. *post*, tit. "Executors," s. VI. in fin. See also the 9th section of stat. 11 Geo. IV. & 1 Will. IV. c. 47, making traders' estates assets, *post*, p. 614, to which a similar remark applies.

Of the Pleadings.—Riens per descent.—To this action the heir may plead, that he has not, nor had at the commencement of the suit, any

(s) *Bushby v. Dixon*, 3 B. & C. 298.

(t) *Jenks v. —*, Cro. Car. 151; *Bell's case*, Hotl. 134.

(u) *Kellow v. Rowden*, Carth. 126; per *Holt*, C. J., and two justices, *Byrne*, J. dissenting.

(x) *Denham v. Stephenson*, Salk. 355.

(1) As to what shall be assets by descent, see Serjeant Williams's note on *Jefferson v. Morton*, 2 Saund. 7. To the cases on this subject there collected, may be added the case of *Doe v. Hutton*, 3 Bos. & Pul. 643.

lands or tenements, by hereditary descent from the ancestor in fee simple.^(y) This plea is usually termed a plea of *riens per descent*.

Replication.—The common replication to the preceding plea is that the defendant had assets by descent in fee simple: upon which issue is usually joined. Upon this issue⁽¹⁾ the plaintiff must prove assets;^(z) but proof of assets in the county of A. will support an allegation of assets in the county of B.; for assets or not, is the substance of the issue, and the place is named only for conformity. Upon this issue a question frequently arises, whether the heir takes by purchase or descent; with respect to which the following *rules may [*611] be observed: If lands are devised to the heir, and the devise does not make any alteration, either in the tenure, quality, or limitation of the estate; that is, if the devise conveys to the heir the same estate as the law would cast on him by descent, then the heir takes by descent, although by the terms of the devise there is either a possibility of a charge,^(a) or an actual charge or incumbrance on the lands,^(b) as payment of debts and legacies, and the like.⁽²⁾ But now, by stat. 3 & 4 Will. IV. c. 106, s. 3, when any land shall have been devised by any testator who shall die after the 31st day of December, 1833, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited, by any assurance executed after the said 31st day of December, 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof. See this statute, *post*, tit. "Ejectment." For the replication given by stat. 11 Geo. IV. and 1 Will. IV. c. 47, s. 7, see *post*, p. 612.

(y) Doctr. pl. 181.

(z) Cases cited in 6 Rep. 47, a.

(a) *Clerk v. Smith*, Salk. 241.

(b) *Allam v. Heber*, Str. 1270, and 1 Bl. R. 22; Serjt. Hill's MSS. vol. 26, p. 194, S. C.

(1) Upon this issue the heir may give in evidence a bond, acknowledged by his ancestor to the king, and an extent thereon against the heir, to the amount of the asset descended. Per *Holt*, C. J., *Horne v. Adderley*, *Ld. Raym.* 734, 5. But the extent only, without the production of the bond, or examined copy thereof, is insufficient, per *Holt*, C. J. *Sherwood v. Adderley*, *Ld. Raym.* 734.

(2) Charging land with the payment of an annuity or rent, will not prevent the heir's taking by descent, per *Holt*, C. J., in *Emerson v. Inchbird*, *Lord Raym.* 728. In *Haynesworth v. Pretty*, *Cro. Eliz.* 833; *Moor*, 644; *Vaughan*, 271; the devise was to the eldest son in fee, upon condition of his paying legacies to the second son and daughter; and in default of his so doing, then to such second son and daughter: it was holden, that the devise over had not the effect of preventing the heir taking by descent. So where the devise was to the wife for life, provided she did not marry; and if she married, to the son in fee; and after her death, at all events, to the son in fee, charged, however, with an annuity to the daughter, for life; and after the death of the wife and daughter, the testator bequeathed 1,500*l.* to the daughter's children; and if no children, then subject to her appointment; and in case of no appointment, to her executors; and in default of his paying the annuity to the daughter, or the legacy to her children, then he devised to a trustee: it was holden, that the executory devise over did not alter either the quantity or quality of the estate to the heir, and consequently that he took by descent. *Chaplin v. Leroux*, 5 M. & S. 14. So where the devise was to the heir in fee, with an executory devise in case he did not attain twenty-one. *Doe d. Pratt v. Timins*, 1 B. & A. 530.

The language of the plea being, that the defendant had not any lands by descent, at the time of the original writ brought, or bill filed against him, it is evident that the defendant cannot avail himself of an alienation *pending* the suit, and that the lands so aliened will still remain charged.^(c) If upon issue joined on the plea of *riens per descent*,^(d) the plaintiff prove that lands came to the defendant by descent, [*612] and the defendant give in evidence a conveyance *of the same lands by himself to a stranger, before action brought, the plaintiff may, to encounter this evidence, prove that the conveyance was fraudulent, and therefore void by stat. 13 Eliz. c. 5.

Liability of Heir under Stat. 11 Geo. IV. & 1 Will. IV. c. 47.^(e)—At the common law, if the heir had made a *bond fide* alienation of the lands descended, before action brought, he was discharged,^(f) and he might have pleaded this in bar; consequently there was not any remedy against him at law; although in equity^(g) he was responsible for the value of the land aliened: but now, by stat. 11 Geo. IV. & 1 Will. IV. c. 47, s. 6,⁽¹⁾ the heir is rendered liable in an action of debt or covenant, *to the value of the land aliened* before action brought or process sued out against him; and such execution shall be taken out upon any judgment obtained against such heir,^(h) *to the value of the said land*, as if it was his own debt, but not beyond:⁽ⁱ⁾ and land, *bond fide* aliened before action brought, is specially exempted from such execution.

By the 7th section of the same statute it is provided, “That where debt or covenant upon a specialty is brought against any heir, he may plead *riens per descent* at the time of the original writ brought, or bill filed against him; and the plaintiff may reply,⁽²⁾ that he had [*613] *lands, &c., from his ancestor, before original writ brought, or bill filed; and if, upon issue joined thereupon, it be found

(c) 1 Inst. 102, a. b.

(d) *Gooch's case*, 5 Rep. 60, a.

(e) Explained and extended by stat. 2 & 3 Vict. c. 60, *post*, p. 614.

(f) *Termes de la Ley*, v. Assets.

(g) Per *Comyns*, B., in *Krew v. Ld. Kilmain*, Exch. T. 5 & 6 Geo. II. MSS.

(h) Per *Ld. Macclesfield*, Ch., in *Coleman v. Winch*, 1 P. Wms. 777.

(i) *Brown v. Shuker*, 2 Cr. & J. 311; 1 Tyrw. 400.

(1) This clause, and the 7th, with the exception of the additional remedy by covenant, is almost *verbatim* the same with the 5th and 6th sections of the 3 & 4 Will. & Ma. c. 14, made perpetual by 6 & 7 Will. III. c. 14, but now repealed by stat. 11 Geo. IV. and 1 Will. IV. c. 47, except as to persons who died before 16th July, 1830.

(2) To a plea of *riens per descent*, the plaintiff replied, that the obligor (father of the defendant) died on such a day, and that the defendant, after his death, and before the action brought, had lands by descent from his father in fee simple, *unde querenti de debito prædicto satisfacisse potuit*, and concluded with a verification. Upon demurrer, it was objected, that the replication was ill, because the plaintiff had put the value of the lands in issue by these words, *unde, &c., de debito prædicto satisfacisse potuit*, which ought to have been omitted: because the statute is express, that after issue tried, the jury shall inquire of the value: so that it is matter of inquest only, *ex officio*, and not to be the point of the issue; but the court held the replication good; observing, that if *unde, &c., de debito præd. satisf. pot.* had been omitted, it might have been a good cause of objection; for the statute does not require any alteration of the form of the usual replication, except only as to the time concerning the assets by descent; and the conclusion, which before the statute was to the country, must now be with an averment, in order to give the defendant an opportunity of answering the new matter alleged in the replication. *Redshaw v. Hester*, Carth. 353. See the pleadings in this case, 5 Mod. 119.

for the plaintiff, the jury⁽¹⁾ shall inquire of the value of the lands, &c., so descended; and thereupon judgment shall be given, and execution awarded as aforesaid, (that is, against the heir, to the value of the land, as if the same were the proper debt of the heir;) but if judgment be given against such heir, by confession of the action without confessing assets descended, or upon demurrer, or *nihil dicit*, it shall be for the debt and damage, without any writ to inquire of the lands, &c., so descended." The heir cannot plead assets in the hands of the executors;^(k) for it is at the election of the obligee to sue either the heir, or the executors. A plea by the heir,^(l) that he claims to retain a certain sum for money laid out in *repairs*, not stating them to be necessary repairs of the tenements descended, cannot be supported.

Liability of Devisee under Statute.—Before the stat. of 3 & 4 Will. & Ma. c. 14, persons who had bound themselves and their heirs by bond, or other specialties, used frequently to alienate the lands of which they were seised in fee simple by devise, for the purpose of defrauding their creditors; because, at common law, such lands, in the hands of the devisee or alienee, were not liable to the specialty creditor. To remedy this inconvenience, several provisions were made by stat. 3 & 4 Will. & Ma. c. 14, made perpetual by stat. 6 & 7 Will. III. c. 14, the general view of which was to prevent such creditors from being defrauded of their debts, and to put the devisee on the same footing with the heir,^(m) but as the statute has been repealed, except as to persons who died before the 16th July, 1830, by stat. 11 Geo. IV. & 1 Will. IV. c. 47, it will be sufficient to state the enactments contained in the last-mentioned statute; by which, all wills,⁽ⁿ⁾ and testamentary limitations, dispositions or appointments already made, [that is, before 16th July, 1830,] by persons now in being, or hereafter to be made by any person concerning any manors, lands, &c., or any rent, &c., or charge out of the same, whereof any person at the time of his *decease [*614] shall be seised in fee simple, in possession, reversion or remainder, or have power to dispose of the same by will, shall be deemed (only as against such person and his heirs, successors, executors, &c., with whom the person making such will, &c., shall have entered into any bond, covenant, or other specialty binding his heirs,) to be fraudulent and void. And every such creditor^(o) may maintain debt or *covenant*,⁽²⁾ upon the bonds, covenants and specialties, against the heirs and

(k) 10 Hen. VII. 8, b., per *Vavasour*, J. C. B., and *Cape's* case, 1 And. 7 S. P. adjudged.

(l) *Shetelworth v. Neville*, 1 T. R. 454.

(m) See remarks of Lord *Hardwicke*, on this stat. in *Galton v. Hancock*, 2 Atk. 432. This is the case in which Lord *Hardwicke*, having altered his opinion, and stated his reasons, made the following memorable observation: "These are the reasons which induced me to alter my opinion, and I am not ashamed of doing it; for I always thought it a much greater reproach to a judge to continue in his error than to retract it." 2 Atk. 439.

(n) Sect. 2.

(o) Sect. 3.

(1) In *Jeffry v Barrow*, 10 Mod. 18, *Powis*, J., and *Eyre*, J., were of opinion, that by "the jury," in this clause, must be understood the jury that tried the cause; and consequently, if that jury omitted to inquire of the value of the lands, such omission could not be supplied by another jury. Accord. *Brown v. Shuker*, 1 Tyrw. 401.

(2) This is new; for under the stat. of Will. & Ma., debt only could have been maintained. *Wilson v. Knubley*, 7 East, 128.

devisees, or devisees of such first-mentioned devisees *jointly*,⁽¹⁾ and such devisees shall be chargeable for a false plea in the same manner as the heir is, or for not confessing the lands descended. By the 4th section, if there is not any heir at law, the creditor may bring debt or covenant against the devisee solely. The 5th section contains an exception in favour of limitations, or appointment, or devises, or dispositions made for the payment of debts,^(p) or portions for children, other than the heir at law, in pursuance of any marriage contract, *bond fide* made before marriage. The 8th section provides, "that every devisee made liable by this act, shall be chargeable in the same manner as the heir, by force of this act,^(q) notwithstanding the lands, &c., to him devised, shall be aliened before action brought." By the 9th section, traders' estates shall be assets to be administered in courts of equity, provided that creditors by specialty in which heirs are bound, shall be paid before creditors by simple contract, or specialty in which heirs are not bound. The 11th section authorizes courts of equity, in cases where suits have been instituted for the payment of debts, to compel infant heirs and devisees to convey the estates liable, and which have been decreed to be sold for the satisfaction of the debts. The 12th section contains a similar enactment with respect to persons having life or limited interests; and these provisions are by stat. 2 & 3 Vict. c. 60, [17th Aug. 1839,] s. 1, extended, so as to authorize courts of equity to direct mortgages as well as sales to be made of the estates of infant heirs and devisees liable to the debts.

The intention of the statute was to present three inconveniences; 1, that the creditor should not be defrauded by a devise; or 2, by alienation; 3, that the heir should not be charged with the whole debt by his false plea; for, at the common law, if, on issue joined on *riens per descent*, it were found, that the heir had any land, however [*615] *little, *per descent* in fee simple, he was chargeable with the whole debt, for his false plea; and the alteration introduced by this statute was to enable the creditor to recover, after the alienation of the heir; but then he is to take proof of the value upon himself, and recover no more of his debt than the value of the lands amounted to. By the common law, the infant heir might have pleaded his nonage, and prayed that the parol might demur.^(r) Not so the infant devisee(s) under the statute of Will. & Ma., and now by the 10th section of the last act,^(t) the parol shall not demur by or against infants.

Judgment.—If the heir confesses the action, and declares with certainty the assets which he has by descent, the judgment shall be that the plaintiff do recover his debt and damages,^(u) to be levied of the assets descended.

(p) See *Gott v. Atkinson*, Willes, 521.

(q) See sect. 6, *ante*, p. 612.

(r) Gilb. H. C. B. 56.

(s) *Plaskett v. Beeby*, 4 East, 485.

(t) 11 Geo. IV. & 1 Will. IV. c. 47.

(u) *Davy v. Pepys*, Plowd. 438, recognized by *Holt*, C. J., in *Smith v. Angel*, 7 Mod. 44.

(1) See the form of declaration in debt against heir and devisee jointly, under the stat. of Will. & Ma., Clift. Entr. 243, pl. 19; Lil. Entr. 145, 529, 530; 2 Rich. C. P. 241.

If the heir confesses the action, (x) and says that he has nothing by descent but a reversion, after the death of A. B., of so many acres of land, situate, &c., the plaintiff may pray a special judgment, that he recover the debt and damages to be levied of the said reversion, *quando acciderit*. (y) If the heir pleads *riens per descent*, (z) or payment by a co-obligor, (a) and it is found against him, the judgment shall be general; that is, to recover the debt and damages.

Execution.—As the judgment in debt against an heir, upon *riens per descent* pleaded and found against him, (b) is general, so is the execution. Thus it was holden, that the plaintiff might have execution, by writ of *elegit*, of a moiety of all the lands of the heir; as well of those which the heir has by purchase, as of those which he hath by descent. (1)

If the heir suffers judgment to go by default, and does not show with certainty the assets descended, the judgment shall be general, and the execution may be awarded against the heir as for his own debt, by *capias ad satisfaciendum* against his person, (c) or *fi. fa.* against his goods and chattels. (d) If judgment is given against *the [*616] heir upon demurrer, (2) the body of the heir may be taken in execution. (e)

VII. Debt on Judgment, and New Rules to the Plea of Judgment recovered in another Court.

Debt lies upon a judgment, within or after the year after the recovery. (f) (3) An action of debt may be maintained in the Court of King's Bench or Common Pleas, upon a judgment recovered in one of the courts of the city of London by special custom; although the original action could not have been brought in the superior courts. (g) Debt

(x) Dy. 373, b.

(y) Per Holt, C. J., Carth. 129.

(z) 21 Edw. III. 9, b. pl. 28; Doctr. pl. 181; *Allen v. Holden*, 2 Rol. Abr. 71, pl. 8; Sty. 287, 288, S. C.

(a) *Brandlin v. Millbank*, Carth. 93.

(b) 21 Edw. III. 9, b. pl. 28; *Hinde v. Lyon*, 2 Leon. 11.

(c) *Barker v. Borne*, Moore, 522, and Cro. Eliz. 692; *Trewinard's case*, Plowd. 440, b. S. P.

(d) *Pozon v. Smart*, C. B. Hil. 4 Geo. II. MSS.

(e) *Grenesmith v. Brackhole*, cited in Plowd. 440, b.

(f) 43 Edw. III. 2, b.

(g) *Mason v. Nicholls*, 1 Rol. Abr. 600, 1, 45.

(1) It seems, however, that the plaintiff is not compelled to sue an *elegit* in this case, but he may suggest that the defendant has certain lands, (describing them,) by descent, and pray execution against such lands; for possibly the heir may not have any other than those which he has by descent. 2 Rol. Abr. 71, pl. 3.

(2) And so, if the heir is condemned on any plea whatsoever, or by default, or without plea for any cause, the practice is for the plaintiff to have execution of the body of the heir, or his goods, or *elegit* of his lands, unless he confesses the debt, and shows the certainty of the lands descended. Per Plowd., in *Davye v. Pepys*, Plowd. 440, b. It was said by Holt, C. J., delivering the judgment of the court, in *Smith v. Angell*, Ld. Raym. 783, that the foregoing resolution in Plowden had been always held to be law.

(3) If in debt on judgment defendant would avail himself of want of process, or of his non-appearance, he must crave oyer of the record and set it out. *Evans v. Instone*, 6 Ohio, 118. As to debt on judgment, the record of which has been destroyed, see *Newcomb v. Drummond*, 4 Leigh, 57.

lies on a judgment for damages in a real action ; for, by the judgment, the damages are reduced to personalty ; as for damages recovered in an action of waste.(h)(1) So on a judgment in *scire facias* on a recognizance.(i) Debt also lies upon a judgment in an inferior court ; but the declaration must allege, that the cause of an action in the original suit arose within the jurisdiction of the inferior court ;(k) it is not enough to allege that the plaintiff recovered his damages within that jurisdiction.(2) Debt on judgment lies only where the judgment remains unsatisfied.(l)(3) Hence, where the defendant had been taken in execution on a judgment, and afterwards was discharged out of custody, with the consent of the plaintiff, upon entering into an agreement to pay the debt by instalments, part whereof the defendant had accordingly paid, but had failed in payment of the remaining part ; it was holden, that the plaintiff could not maintain an action upon the judgment.(4) An action of debt on a judgment, being founded on the consequent duty, cannot be differed in principle from the ordinary case of an action of debt against one of several joint contractors ; to which an objection cannot be taken on the ground of variance, but only, if at all, by way [*617] of plea in abatement.(m) The venue in this action *must be laid in the county where the judgment was given, and not in the county where the original cause of action arose.(n) The defendant cannot plead *nil debet*.(o) If there be not any such record as the plaintiff has declared on, the defendant must plead *nil tiel record* ; which issue is tried by producing the record itself, if it be a record of that court where the action is brought ; but by new rule, H. T. 4 Will. IV., R. G. 8,(p) where a defendant shall plead a plea of judgment recovered in another court, he shall in the margin of such plea state the date of such judgment ; and if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered, if any ; and

(h) 43 Edw. III. 2. But see stat. 3 & 4 Will. IV. c. 27, s. 36.

(i) *Lovelle's case*, 2 Leon 14.

(k) *Read v. Pope*, 1 Cr. M. & R. 302 ; 4 Tyrw. 403, S. C.

(l) *Vigers v. Aldrich*, 4 Burr. 2482, recognized in *Jaques v. Wethy*, 1 T. R. 557.

(m) *Cocks v. Brewer*, 11 M. & W. 51.

(o) *Gilb. Debt. and new rules*.

(n) *Hob. 196*.

(p) See *Brokenshir v. Monger*, 9 M. & W. 111.

(1) Debt lies on a judgment against two joint debtors, though one was not arrested and did not appear in the original action. How far the record is conclusive against him as to the debt being joint, *dubatur*. *Townsend v. Carman*, 6 Cowen, 695. An action of debt does not lie against one of two defendants, on a joint judgment against both, without showing the other could not be a party. *Gilman v. Rives*, 10 Pet. 298.

(2) Debt has been holden to lie on a decree of a Court of Chancery in another state, if it be simply for the payment of a sum of money by the defendant, without any acts to be done by the plaintiff. *Post v. Neaffe*, 3 Caines' Rep. 22 ; S. P. *Evans v. Tatem*, 9 S. & R. 252. Debt lies on a decree of chancery in a sister state for payment of money only. *McKim v. Odorn*, 3 Fairf. 94 ; *Elliott v. Ray*, 2 Blackf. 31. But no action at law lies on such decree within the territorial jurisdiction of court that pronounced it, as it enforces its own decree. *Richardson v. Jones*, 3 Gill & J. 163 ; see *ante*, p. 552, note (2).

(3) At common law there is no presumption of payment of judgment as of a bond after twenty years. *Smith v. Miller*, 14 Wend. 188.

(4) The imprisonment under execution of one of several defendants, against whom there is judgment, is whilst it continues a bar to a joint action, against all. *Chapman v. Hall*, 11 Wend. 41. Where an execution has been extended on land not the property of the debtor, the creditor cannot bring debt upon his judgment, but *scire facias*. *Green v. Bailey*, 3 N. Hamp. R. 33. *Contra*, *Ware v. Pike*, 3 Fairf. 303.

in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the court or a judge. A plea of *nul tiel record*, (q) pleaded to an action of debt on an Irish judgment recovered, must conclude to the country; for it is only provable by an examined copy on oath, the veracity of which is only triable by a jury.(1) A writ of error pending on the judgment may be

(q) *Collins v. Ld. Mathew*, 5 East, 473; but see *Harris v. Saunders*, 4 B. & C. 411.

(1) By the constitution and laws of the United States, a judgment of one state is to have the same effect in every other state which it has in the courts of that state where the judgment is rendered, and the plea of *nil debet* is not a good plea to an action brought upon such a judgment. *Mills v. Duryee*, 7 Cranch, 481; *Hampton v. M'Connell*, 3 Wheat. Rep. 234, and note to *S. C.*; *Ib.* 235, note *c.* Some of the state courts have submitted to this decision of the Supreme Court of the United States with great reluctance. See *Commonwealth v. Green*, 17 Mass. Rep. 546; *Warren v. Flagg*, 2 Pick. 449, in which last case it was decided, that *nil debet* may be pleaded to an action of debt on a judgment obtained before a justice of the peace in another state. In the case of *Hall v. Williams*, 6 Id. 232, C. J. Parker, after a thorough examination of the subject, in which the arguments and authorities were ably considered, states the opinion of the court as follows: "We therefore are all of opinion, that the record of a judgment of another state is not conclusive evidence, but that it is examinable in order to ascertain whether the party against whom it is produced was subject to the judicial process on which it is grounded; and that where it appears, by the record itself, that there was no appearance and no notice which he was bound to attend to, the judgment against him is a dead letter beyond the territory in which it was pronounced." The rule of the conclusiveness of judgments supposed to have been so broadly laid down by the Supreme Court of the United States, has also been narrowed in other states. See *Thurber v. Blackbourne*, 1 N. Hamp. Rep. 246; *Aldrich v. Kinney*, 4 Conn. Rep. 380; *Borden v. Fitch*, 15 Johns. Rep. 121; *Shumway v. Stilman*, 4 Cowen, 292; *Benton v. Burgot*, 10 S. & R. 242; *Curtis v. Gibbs*, 1 Pennington's Rep. 405; *Rogers v. Coleman*, Hardin, 413. See also *Mayhew v. Thatcher*, 6 Wheat. 129; *Woodward v. Tremere*, 6 Pick. 354; *Scott v. Coleman*, 5 Littell, 349; *Scott v. Cleveland*, 3 Monr. 62. In *Thomas v. Robinson*, 3 Wend. 267, it was held, that an action could not be maintained in New York on a judgment obtained before a justice of the peace in Pennsylvania, unless the statute giving jurisdiction to the court was shown, and if it appeared, on such showing, that the justice had jurisdiction and pursued it, his judgment would be entitled to full faith and credit. *Nil debet* cannot be pleaded to an action of debt on a decree of a court of equity of a sister state. Nor can *nul tiel record* be pleaded to such suit; a decree in chancery not being a *record*. If the defendant wish to deny the existence of such decree, he may frame a plea to meet the averment of the decree in the declaration, and such a plea must conclude to the country. *Evans v. Tatem*, 9 S. & R. 252. Debt lies on a judgment recovered in a sister state on a *qui tam* action. *Healy v. Root*, 11 Pick. 389. So also on a judgment in a sister state, originally against defendant and another, not served with process, and subsequently amended so as to stand against the defendant alone. *Hall v. Williams*, 1 Fairf. 278. And on the judgment of a justice in a sister state. *Houglan v. Rogers*, 3 Blackf. 501; *Cole v. Driskell*, 1 Blackf. 16. To debt on transcript of justice in another state, *nil debet* is a good plea. *Silver Lake Bank v. Harding*, 5 Ohio, 546; *Robinson v. Prescott*, 4 N. Hamp. R. 450. In debt on a judgment, in a sister state, *nul tiel record* only puts in issue the existence of the record. Matters properly to be investigated in the original suit cannot be drawn into controversy. *Goodrich v. Jenkins*, 6 Ohio, 44. On the issue of *nil debet* to debt on a judgment, in a sister state, it cannot be shown it was by fraud and misrepresentation. *M'Rae v. Maltoor*, 13 Pick. 53. In the Supreme Court of New York, it has been determined, that a replication of *nul tiel record*, to a plea of judgment recovered, for the same cause of action in the Circuit Court of the United States, must

pleaded in abatement,(r) but not in bar.(s) If the defendant bring a writ of error, and the plaintiff bring another action on the judgment and recover, he cannot sue out execution on the second judgment, until the writ of error be determined.(t) The more regular, as well as the least expensive, mode by which a plaintiff may reap the benefit of his judgment, is by writ of execution; hence the proceeding by action of debt, being considered as a vexatious and oppressive mode of enforcing the judgment, is discountenanced by the courts in Westminster Hall; and by statute 43 Geo. III. c. 46, s. 4, (Lord Ellenborough's Act,) "the plaintiff in such action shall not recover costs, unless the court in which the action is brought, or some judge of the same court, shall otherwise order."

[*618] *VIII. *Debt for Rent Arrear.* p. 618; *Stat. 4 Geo. II. c. 28, against Tenants holding over after Notice from Landlord.* p. 619; *Stat. 11 Geo. II. c. 19, against Tenants holding over after Notice given by themselves* p. 622; *Declaration.* p. 622; *Debt for Use and Occupation* p. 624; *Pleadings.* p. 625; *Eviction.* p. 525; *Nil habuit in tenementis.* p. 627. *Statute of Limitations.* p. 628.

If a lease be of lands or tenements for years,(u) or at will,(x) rendering rent, debt lies for the recovery of rent arrear, by the common law. So if a release be for life,(y) after the estate of freehold determined, debt lies for the arrears, by the common law: and now, by stat. 8 Ann. c. 14, s. 4, though a lease for life be continuing, any person having rent due on such lease may bring debt for the same, in the same manner as if due upon a lease for years. But debt does not lie(z) at the common law, nor by stat. 8 Ann. c. 14, for the arrears of an annuity or yearly rent devised, payable out of lands to A. during the life of B., to whom the lands are devised for life, B. paying the same thereout, so long as the estate of freehold continues. At common law, if a person seised of rent-service, rent-charge, rent-seck, or fee-farm in fee-simple died,(a) and there was rent arrear, neither his heir nor executor could maintain an action of debt for such rent: the heir was not competent to sue, because he was a stranger to the personal contracts of his ancestor; and the executor was incompetent; inasmuch as he did not represent his testator as to any contracts relating to the freehold and inheritance.

(r) *Aby v. Buxton*, Carth. 1.

(s) *Rogers v. Mayhoe*, Carth. 1.

(t) *Taswell v. Stone*, 4 Burr. 2454; *Benwell v. Black*, 3 T. R. 643.

(u) Lit. s. 58.

(x) *Id.* s. 72.

(y) 1 Roll. Abr. 596, pl. 11.

(z) *Webb v. Jiggs*, 4 M. & S. 113; *Kelly v. Clubbe*, 3 Brod. & B. 130.

(a) 1 Inst. 162, a.

To obviate this inconvenience, it was enacted by stat. 32 Hen. VIII. c. 37, s. 1, that an executor or administrator of any person seised of rent-service, rent-charge, or rent-seck, or of a fee-farm rent, in fee, in tail, or for life, might maintain debt against the person who ought to pay the same, and his personal representative.⁽¹⁾ At the common law, the devisee,^(b) or assignee^(c) of rent reserved on a lease for years might maintain debt for the rent, in cases where the tenant had attorned; for that transferred the privity of contract. By the stat. 4 Ann. c. 16, s. 9, attornment is no longer necessary.^(d) As to stat. 32 Hen. VIII. c. 37, and what persons are within this statute, see *post*, under tit. "Distress," s. IV.

*The action must be brought against the persons who took [*619] the profits when the rent became in arrear,^(e) or against their executors or administrators. If A. make a lease for life,^(f) or a gift in tail, reserving a rent, that is a rent-service within this statute. The act is remedial^(g) and extends to the executors of all tenants for life. If lessee for years assign over the term, reserving a rent, he may maintain debt for such rent arrear, although he has not any reversion.^(h) By stat. 4 Geo. II. c. 28, s. 1, "If tenants for life, lives, or years,⁽²⁾ or other persons coming into possession of any lands, &c., under or by collusion with such tenants, shall wilfully⁽³⁾ hold over after the determination of their term,⁽⁴⁾ and after demand made,⁽⁵⁾ and

(b) *Ards v. Watkin*, Cro. Eliz. 637, 651; cited per *Cur.*, in *Rivis v. Watson*, 5 M. & W. 266.

(c) *Robins v. Cox*, 1 Lev. 22.

(d) See *Allen v. Bryan*, 5 B. & C. 512.

(e) 1 Inst. 162, b.

(f) *Ib.*

(g) *Hool v. Bell*, Lord Raym. 172.

(h) *Newcomb v. Harvey*, Carth. 161.

(1) The action is local, and must be brought where the land lies. Bell. N. P. 177; but under stat. 3 & 4 Will. IV. c. 42, s. 22, may be tried in any county.

(2) "I am aware that a tenant for half a year, or a smaller portion of a year, may, for some purposes, be considered and denominated a tenant for years. But this is a penal statute, and to be construed strictly. I cannot, therefore, include a tenant *from week to week* in the description of tenants for life, lives, or years: and I do not remember any instance of a tenant for a less time than a year being held within the statute." Per Lord *Ellenborough*, C. J., *Lloyd v. Rosbee*, 2 Campb. 453. "The statute is penal, and is to be construed strictly." Per *Parke*, B., in *Robinson v. Learoyd*, 7 M. & W. 54.

(3) A tenant who holds over, under a fair claim of right, will not be considered as wilfully holding over within the meaning of this statute; though it may be decided eventually, that he had no right. *Wright v. Smith*, 5 Esp. N. P. C. 203.

(4) Where the demise is for a certain time, *e. g.*, for one year and no longer, a notice to quit is not necessary at the end of the year, to put an end to the tenancy. 8 East, 361.

(5) In *Wilkinson v. Colley*, 5 Burr. 2694, the court, considering this as a remedial law, in favor of landlords, the penalty being given to the party grieved, held, that a notice to quit, in writing, included a demand. On the authority of this case it was holden, (*Lake v. Smith*, 1 Bos. & Pul. N. R. 174,) by three judges, that where a woman, tenant from year to year, had received a written notice to quit, and before the expiration of the year married, it was not necessary for the landlord to make a demand on the husband, in order to entitle him to maintain an action against the husband, on this statute, for wilfully holding over. *Chambre*, J., differed from the other judges, conceiving, that a demand ought to be made upon the party against whom a penal action is brought. N. In a case of this kind, the husband may be sued alone, and it is not necessary to join the wife for conformity, the husband being in possession of the estate at the time when possession is to be delivered, and consequently the offence being committed by him; for the offence, which consists in not complying with the demand to deliver possession at the time when it ought to be complied with, is not complete until the day for delivering possession arrives. The demand need not be made either on or before the expiration of the term,

[*620] notice in writing given, for delivering *the possession thereof, (1) by their landlord or lessors, or persons entitled to the reversion or remainder of such lands, &c., or their agents; (2) such persons so holding over shall, for the time they shall so hold over, pay to the persons kept out of possession, their executors, administrators, or assigns, at the rate of double the *yearly value* of the lands, tenements and hereditaments so detained, for so long time as the same are detained, to be recovered by action of debt, whereunto the defendant shall be obliged to give special bail, against the recovery of which penalty there shall not be any relief in equity." To ascertain the amount which the tenant holding over is to pay under this statute, the value of the soil itself, and every thing which, by having been attached to it, becomes part of the soil, must be estimated; and that value is what an occupier would give, and the landlord would otherwise have received, for the use of the freehold and everything connected with it, during the time that the possession is withheld; but where the plaintiff, being the owner of a woollen-mill and steam-engine, let to the defendant a room in the mill, together with a supply of power from the steam-engine, by means of a revolving shaft in the room; it was holden, (i) in an action for double value under this statute, that in estimating such double value, the value of the power supplied could not be included. One tenant in common may maintain an action on this statute, (k) without his companion, for double the yearly value of his moiety. An action on this statute may be brought after a recovery in ejectment. The defendant, (l) after having held of the plaintiff a farm for fourteen years, received a regular notice to quit on the 12th of May, 1806, and the possession was then demanded of him; but he refused to deliver it up, and held over till the 7th of February, 1807; whereupon the plaintiff brought his ejectment against the defendant [*621] and recovered possession; and afterwards *brought this action of debt upon the stat. 4 Geo. II. c. 28, for *double the yearly value* of the premises, in the interval between the expiration of the notice to quit, (which was the day of the demise in the ejectment,) and the time of recovering the possession under the ejectment. The declaration was in the usual form, alleging the demise to and holding by the defendant: the demand of possession and notice in writing to deliver up the premises at the end of the term, on the 12th of May, 1806: the subsequent refusal of the defendant, and his wilfully holding over for

(i) *Robinson v. Learoyd*, 7 M. & W. 48.

(k) *Cutting v. Derby*, 2 Bl. Rep. 1077.

(l) *Soulsby v. Neving*, 9 East, 310.

but may be made afterwards; *e. g.*, six weeks afterwards, the landlord not having in the meantime done any act to recognize the defendant as continuing to be his tenant: but the landlord will be entitled to double the yearly value only from the time of giving notice to quit and making demand. *Cobb v. Stokes*, 8 East, 358.

(1) Notwithstanding the order^e in which the words stand in this statute, from which it should seem that the notice ought to be given *after* the determination of the term, yet the notice may be given before the expiration of the term. *Cutting v. Derby*, 2 Bl. R. 1075.

(2) A receiver, appointed under an order of the Court of Chancery, is an agent, within the meaning of this statute. *Wilkinson v. Colley*, 5 Burr. 2694, recognized in *Peole v. Warren*, 8 A. & E. 582.

three quarters of a year after the 12th of May; and the annual value of the premises. It was objected, on the part of the defendant, that the plaintiff having before recovered the premises by the ejectment, and thereby treated the defendant as a *trespasser*, the action of debt upon the statute, in which, as it was said, the defendant was proceeded against as *tenant* could not be maintained; but, per Lord *Ellenborough*, C. J., there is no incongruity in the landlord's bringing this action for the double value after a recovery in ejectment. The legislature considered, that, in many cases, the single value might not be a compensation to the landlord for having been kept out of possession by the misconduct of the tenant, and therefore they gave him double the value. It has no reference to any antecedent remedy which the landlord had to recover possession by ejectment, but is cumulative. The two actions are brought *diverso intuitu*; the ejectment is in order to get possession of the premises wrongfully withheld; the action of debt for the double value is in order to indemnify the landlord for the wrong. The other judges concurred with the C. J.

In the following case the plaintiff declared in the first count for double the yearly value;(m) and in the second, for use and occupation. The defendant pleaded as to the demand in the first count, and as to parcel of the demand in the second count, *nil debet*; and as to the residue, (being the amount of the single rent,) the defendant pleaded a tender, and paid the money into court, which the plaintiff took out of court, but proceeded to trial. It was contended, on the part of the defendant, that there should be a non-suit, because the plea of tender of *rent* covered the whole period, for which the double value was claimed in the first count; and the acceptance of the tender, which adopted the terms and character of it, must be taken to be an admission by the landlord, that the defendant held the premises mentioned in the second count, as tenant to him during the whole period, for which the rent was claimed, and that he received the tender, as of *rent* for the same premises; and consequently it operated as a waiver of the penalty. But the court held, that plaintiff was not estopped from taking the money as part of the larger sum claimed, and that going on with the suit showed that he did not mean to take it in satisfaction of the lesser sum.

**Stat. 11 Geo. II. c. 19, s. 18.*—By *stat. 11 Geo. II. c. 19, s. 18*, [*622] “If any tenant(1) shall give notice(2) of his intention to quit the premises holden by him, at a time mentioned in such notice,(3) and shall not deliver up the possession thereof accordingly, then such tenant, his executors, or administrators, shall, thenceforward, pay to the landlord double the *rent* which he should otherwise have paid, to be levied,(4)

(m) *Ryal v. Rech*, 10 East, 48.

(1) A tenant for a year under a parol demise is a tenant within this statute. *Timmins v. Rowlison*, 3 Burr. 1603.

(2) It is not necessary that this notice should be in writing. *Timmins v. Rowlison*. *Ib.*

(3) There must be some fixed time mentioned. A notice that the tenant will quit as soon as he can possibly get another situation will not enable the landlord to recover under this statute, although he can prove that the tenant had got another situation. *Farrance v. Elkington*, 2 Campb. 591.

(4) That is, by distress.—N. This remedy was pursued in *Timmins v. Rowlison*.

sued for, and recovered, at the same times and in the same manner as the single rent could; and such double rent shall continue to be paid during all the time such tenant shall continue in possession.”(1) A tenant, who, after having given notice to quit, holds, over for a year and then pays double rent, according to the foregoing statute, may(n) quit at the end of such year without giving a fresh notice. N. By stat. 3 & 4 Will. IV. c. 42, s. 3, “All actions for penalties, damages, or sums of money, given to the party grieved, by any statute now in force, or hereafter to be in force, shall be commenced and sued one year after the end of this present session, or within two years after the cause of such actions or suits.” The 4th section contains the usual provision in favour of infants, femmes covert, non compotes mentis, and persons beyond sea, and provides also for the absence of defendant beyond sea.

See further provisions of the legislature for enabling landlords more speedily to recover possession of lands and tenements unlawfully held over by tenants, in stat. 1 Geo. IV. c. 87, and which is not to be construed to prejudice or affect any right of action or remedy which landlords already possessed, sect. 7. This statute extends to Ireland, sect. 8.

Declaration.—Debt for rent, by the lessor against the lessee,(2) may be brought either where the land lies, or the deed was made;(o) [*623] *but debt by the grantee of the reversion against lessee,(p) or by lessor against the assignee of the term,(q) or by grantee of the reversion against assignee of the term,(r)(3) is maintainable on privity of estate only, consequently is local, and must be brought in that county where the lands are. If the venue is laid in the wrong county, advantage may be taken of it on demurrer.(s) It is a general rule, that, wherever an action is founded on a deed, the deed must be declared upon. But the action of debt, for rent arrear, forms an exception to this rule: for in this case it is not necessary to declare upon the deed.(t)(4) Debt against an executor for rent incurred during the life of the testator, must be in the detinet only.(u) But the rent incurred after the death of the lessee, the action may be brought either in the

(n) *Booth v. Macfarlane*, 1 B. & Ad. 904. (o) *Patterson v. Scott*, Str. 776

(p) *Bord v. Cudmore*, Cro. Car. 183; *Trahearne v. Cleabrooke*, W. Jones, 43; *Thrale v. Cornwall*, 1 Wils. 165.

(q) Per Cur. in *Patterson v. Scott*, Str. 776.

(r) See *Barker v. Damer*, Carth. 183.

(s) 2 Lev. 80; 1 Wils. 165.

(t) Adm. per Cur. in *Atty v. Parish*, 1 Bos. & Pul. N. R. 109.

(u) 1 Rol. Abr. 603, (S.) pl. 9.

(1) It seems, that there would be an incongruity in applying the remedy given by this statute for double rent after the remedy by ejectment, which treats the person in possession as a trespasser. Per Lord *Ellenborough*, C. J., 9 East, 314.

(2) Debt lies by lessor against lessee notwithstanding the lease has expired. *Norton v. Vallee*, 1 Hall, 384.

(3) Assignee of a lease who enters on the premises is liable for rent, as the assignor is, and may be described generally as assignee. But in *debt*, he is liable only for the rent of that part in his possession, and the rent may be apportioned. *Norton v. Vallee*, 1 Hall, 384.

(4) See *Davis v. Shoemaker*, 1 Rawle, 135.

debet and detinet, (x) or in the detinet only; (y) for the lessor has his election. (1) Debt by (z) or against (a) an executor or administrator, for rent arrear, partly in time of testator or intestate, and partly in time of executor or administrator, is well brought in the detinet only. If, in such case, the plaintiff in the same declaration charge the defendant in the detinet for the rent arrear in time of testator or intestate, (b) and in the debet and detinet for the rent arrear in his own time, the declaration will be bad on demurrer; because several judgments would be required. It seems, therefore, that if the lessor, in such case, will not waive his right of demanding satisfaction out of the estate of the defendant, he must bring two actions. Detinet for rent against an executor of lessee is transitory; (c) because it is for arrears in the testator's time; but when it is in the debet and detinet for rent accrued in the executor's time, it must be where the land lies; (d) for in this case the executor is charged as assignee on the privity of estate, and not on the privity of contract. If A. demises land by indenture to B. for years, (e) yielding rent, and B. dies, making C. his executor, the lessor may have debt against the executor for the rent reserved, and arrear after the death of the lessee, although the executor never *entered nor agreed; for the executor represents the person [*624] of the testator, and the testator by the indenture was estopped and concluded during the term to pay the rent upon his own contract; and, therefore, although the rent is higher than the profit of the land, yet the executor cannot waive the land, but, notwithstanding that, he shall be charged with the rent. (2)

Debt for Use and Occupation.—In the case of a demise, not by deed, the action of debt for use and occupation has been substituted for the ancient method of declaring in debt for rent. This action lies at common law, and is not defeated by proof of a demise (not under seal) reserving a certain rent. (f)

The reader should be reminded, that by stat. 7 & 8 Vict. c. 76, (which took effect from the 31st of December, 1844,) s. 4, it is enacted, that “no lease in writing of any freehold, copyhold, or leasehold land,

(x) *Rich v. Frank*, Cro. Jac. 238; 1 Bulstr. 22, S. C.; *Mawle v. Cacyffyr*, Cro. Jac. 549.

(y) *Royston v. Cordrye*, Aleyn, 42.

(z) *Smith v. Norfolk*, Cro. Car. 225.

(a) *Aylmer v. Hyde*, M. 13 Geo. II. B. R. MSS.

(b) *Salter v. Codbold*, 3 Lev. 74.

(c) *Gilb. Debt*, B. 2, c. 2.

(d) *Cormal v. Lisset*, 2 Lev. 80.

(e) Agreed by three justices in *Howse v. Webster*, Yelv. 103.

(f) *Gibson v. Kirk*, 1 Q. B. 850; 1 G. & D. 252.

(1) The only inconvenience of suing in the *detinet*, is to the plaintiff himself, who waives his right to demand satisfaction out of the estate of the defendant, and contents himself with what the testator's estate will afford. Aleyn, 43.

(2) See also *Helier v. Casebert*, 1 Lev. 127, where *Wyndham*, J., said, that an executor cannot waive a term, so as not to be charged for the rent, if he has assets: for he is bound to perform all the contracts of the lessor, if he has assets, be the rent above the value of the land or not; which was not denied. And *Kelynge*, J., said, that he could not so waive it, but that he should be charged in the *detinet*, on which the assets would come into question. And if he continues the possession, he shall be charged in the *debet* and *detinet* in respect of the reception of the profits, whether he has assets or not: to which *Twysden*, J., agreed. See also *Billinghurst v. Speerman*, Salk. 297, to the same effect.

or surrender in writing of any freehold or leasehold land, shall be valid as a lease or surrender unless the same shall be made by deed: but any agreement in writing to let or to surrender any such land, shall be valid and take effect as an agreement to execute a lease or surrender; and the person who shall be in the possession of the land in pursuance of any agreement to let, may, from payment of rent or other circumstances, be construed to be a tenant from year to year."

The first case in which it was determined, that an action of debt might be maintained for use and occupation, was the case of *Stroud v. Rogers*, H. 32 Geo. III. C. B., reported shortly in a note to a similar determination in the Court of King's Bench, in *Wilkins v. Wingate*, M. 35 Geo. III. B. R.; 6 T. R. 62. The generality of the form of declaring, permitted in the action for use and occupation, renders it very convenient; for it has been holden, that a declaration in debt, not setting forth any demise of the premises,^(g) nor for what term, or what rent they were demised, nor how long the defendant had occupied them, nor when the sum claimed to be due for the use and oc-
[*625] cupation became due, nor for what space of *time, is sufficient to enable the plaintiff to recover for use and occupation. So where the declaration omitted the place where the premises were situated,^(h) it was holden good on special demurrer, there not being any locality in the action. The inconvenience resulting to the defendant from this general form of declaring, is remedied by permitting the defendant to call on the plaintiff for the particulars of his demand. See *ante*, p. 71.

Pleadings.—In debt for rent, upon a demise of land, if the rent be reserved by deed indented, the defendant may plead *non est factum*,⁽ⁱ⁾ if without deed, *non dimisit*, or nothing in arrear, or that the defendant never entered. The plea of *nil debet* shall not be allowed in any action;⁽¹⁾ R. G. H. T. 4 Will. IV. In debt for rent, against the lessee,^(k) or his personal representative,^(l) an assignment before the rent became due, cannot be pleaded in bar of the action; for the privity of contract remains notwithstanding the assignment: but an assignment and an acceptance on the part of the lessor of the assignee as his tenant may be pleaded in bar either by the lessee,^(m) or his personal representative;⁽ⁿ⁾ because the lessor's acceptance of the assignee, as his tenant, destroys the privity of contract. Upon this

(g) *Stroud v. Rogers*, *sup.*, and cited by *Le Blanc*, J., in *King v. Fraser*, 6 East, 354.

(h) *King v. Fraser*, 6 East, 348. See also *Egler v. Marsden*, 5 Taunt. 25, and *Davis v. Edwards*, 3 M. & S. 380.

(i) Gilb. C. B. 61, 3rd edit.

(k) *Walker's case*, 3 Rep. 22, a.

(l) *Helier v. Casebert*, 1 Lev. 127.

(m) *Marsh v. Bracc*, Cro. Jac. 334.

(n) *Marrow v. Turpin*, Cro. Eliz. 715; Moor. 600, pl. 829, S. C.

(1) Before this rule, *nil debet* was allowed in debt for rent although the rent was reserved by indenture; for the indenture does not acknowledge a debt like an obligation since it accrues by the subsequent enjoyment. *Davis v. Shoemaker*, 1 Rawle, 135; *Warren v. Consett*, Ld. R. 1503. Vide *Bullis v. Giddens*, 8 Johns. 82. On *nil debet* the last receipt is presumptive evidence that all the rent before the receipt is paid. Gilb. Debt, B. 3, c. 2. The plea of *nil debet* traverses the whole declaration. Per *Holt*, C. J., Salk. 562.

principle it was holden, that debt would not lie on the *reddendum* against the lessee(o) for rent accruing after his bankruptcy, when he had ceased to occupy the premises, and the assignee was in possession under the commissioner's assignment, the lessor's assent to such assignment being virtually in the statute authorizing the assignment, and being equivalent to an express assent.(1)

Eviction.—In debt, as in other remedies for rent arrear, an eviction may be pleaded in bar, for that occasions a suspension of the rent; but care must be taken that an eviction, or such facts as amount in law to an eviction, be stated in the plea; for, if a mere trespass,(p) or an illegal ouster(q) only, be stated, the plea will be insufficient. See *post*, tit. "Replevin." If the land be evicted, or the lease determine before the legal time of payment, no rent shall be paid;(r) because there shall never be any apportionment in respect of part of the time, as there shall be in respect of part of *the land.(2) Hence, at [*626] common law, if tenant for life made a lease for years, rendering rent at Easter, and the lessee occupied for three quarters of a year, and in the last quarter before Easter the tenant for life died; in this case there was not any apportionment of rent for the three quarters of a year.(3) But now by statute 11 Geo. II. c. 19, s. 15, "Where tenant for life dies before or on the day on which rent is reserved or made payable, upon any lease of lands, &c., which determines on the death of such tenant for life, his personal representative may, in an action on the case, recover from the under-tenant of such lands, &c., if the tenant for life die on the day on which the same was made payable, the whole, or if before such a day, then a portion of such rent, according to the time the tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due, making all just allowances, or a proportional part."(s)

To remove doubts which have been entertained upon the construction of the foregoing provision, it was enacted and *declared* by stat. 4 & 5 Will. IV. c. 22, s. 1, [27th June, 1834,] that rents reserved and made payable on any lease of lands, &c., which have been and shall be made, and which leases determined or shall determine on the death of the person making the same (although such person was not

(o) *Wadham v. Marlowe*, 8 East, 314, n.

(p) *Reynolds v. Buckle*, Hob. 326; *Hunt v. Cope*, Cowp. 242.

(q) *Vochell v. Dancastell*, Moor. 891.

(r) *Clun's case*, 10 Rep. 128, a.

(s) See *Botheroyd v. Woolley*, 5 Tyrw. 522.

(1) But *assumpsit* lies against a lessee, from year to year, upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy, and the occupation of his assignees during part of the time for which the rent accrued. *Boot v. Wilson*, 8 East, 311, and *post*, "Use and Occupation."

(2) "Where our books speak of an apportionment, where the lessor enters upon the lessee, *in part*, they are to be understood where the lessor enters *lawfully*, as upon a surrender, forfeiture, or such like, where the rent is lawfully extinct in part." 1 Inst. 148, b.

(3) "If there be lawful eviction from part by an elder title, it is clear that the rent is apportioned only, and not suspended." Per *Parke*, B., delivering the judgment of the court in *Neale v. Mackenzie*, 5 Tyrw. 1125; *S. C.* will be found in 2 Cr. M. & R. 84.

strictly tenant for life thereof,) or on the death of the life for which such person was entitled to such hereditaments, shall, so far as respects the rent reserved by such lease, and the recovery of a proportion thereof by the person granting the same, his executors, or administrators (as the case may be,) be considered as within the foregoing provision. And by sect. 2, from and after the passing of this act, "All rents-service reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power (and which leases shall have been granted after the passing of this act), and all rents-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in G. B. and I., made payable, or coming due at fixed periods under any instrument that shall be executed after the passing of this act, or (being a will or testamentary instrument,) that shall come into operation after [*627] the passing of this act, shall be apportioned in such *manner, that on the death of any person interested in any such rents, annuities, &c., or in the estate, fund, office, or benefice, from or in respect of which the same shall be issuing or derived, or on the determination, by any other means whatsoever of the interest of any such person, he and his executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities, &c., and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be); including the day of the death of such person, or of the determination of his interest, all just allowances and deductions in respect of charges on such rents, &c., and other payments being made; and that every such person, his executors, administrators, and assigns, shall have the same remedies at law and in equity for recovering such apportioned parts, when the entire portion, of which such apportioned parts shall form part, shall become payable, and not before, as he would have had for recovering such entire rents, annuities, &c., if entitled thereto, but so that persons liable to pay rents reserved by any lease, and the lands, &c., comprised therein, shall not be resorted to for such apportioned parts specifically, but the entire rents of which such portions shall form a part shall be received and recovered by the persons, who if this act had not passed would have been entitled to such entire rents; and such portions shall be recoverable from such persons by the parties entitled to the same under this act, in any action or suit at law or in equity; provided, (t) that these provisions shall not apply to any case, in which it shall be expressly stipulated, that no apportionment shall take place, or to annul sums made payable in policies of assurance of any description." This statute is very obscurely worded; but in a late case, (u) Lord Cottenham, Ch., held, that the statute does not apply to rents, payable by tenants from year to year, which have not been reserved by an instrument in writing; and in a still more recent case, (x) the V. C. Wigram held, that the death of the person interested in the rent or other payment—the event on which the apportionment is to take place

(t) Sect. 3.

(x) *Browne v. Amyot*, 3 Hare, 173.

(u) *In re Markby*, 4 M. & Cr. 484.

—must be understood as a death occasioning the determination of the interest; and therefore that the act does not apply to any cases except those in which the interest of the party entitled to the rents, annuities, or other periodical payments, determines by death or some other means, so that there is no apportionment of rent as between the heir and personal representative of a tenant in fee.

Nil habuit in tenementis.—If the plaintiff declares upon an indenture of lease, the defendant cannot plead *nil habuit in tenementis*,^(y) or *non dimisit*; because the defendant, by the execution of the counterpart of the indenture, is estopped from controverting *either [*628] the power of the plaintiff to demise or the actual demise; but otherwise it is, where the demise is by deed poll,^(z) or by parol. In debt for rent reserved upon a lease by indenture,^(a) if the defendant pleads *nil habuit in tenementis*, the plaintiff need not reply the estoppel, but may demur; because the declaration being on the indenture, the estoppel appears on the record. If to debt on a demise without deed, the defendant pleads *nil habuit in tenementis*, the plaintiff ought in his replication to show specially what estate he had in the premises.^(b) But if, instead of doing this, he replies, “that he had a good and sufficient title” and issue is joined thereon and found for the plaintiff, the defect in the replication will be aided by the verdict. *Nil habuit in tenementis*^(c) cannot be pleaded in debt for use and occupation.

Statute of Limitations.—By stat. 21 Jac. I. c. 16, s. 3, actions of debt for arrearages of rent shall be commenced and sued within six years next after the cause of such actions. This statute is confined to actions for arrears of rent,^(d) upon a demise without deed, and does not extend to cases of rent reserved by specialty.⁽¹⁾ But by stat. 3 & 4 Will. IV. c. 42, s. 3, [14th Aug. 1833,] “All actions of debt for rent upon an indenture of demise shall be commenced and sued within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after.” See 3 & 4 Will. IV. c. 27, s. 42, and *Paget v. Foley*, 2 Bingh. N. C. 679, and the other cases referred to, *ante*, p. 538.

Debt for Escape.—For the statutes and cases relating to the action of debt for escape, the reader is referred to the former editions of this work;⁽²⁾ but now by stat. 5 & 6 Vict. c. 98, s. 31, [10th Aug. 1842,] if any debtor in execution shall escape out of legal custody after the passing of this act, the sheriff, bailiff, or other person, having the custody of such debtor, shall be liable only to an action upon the case for damages sustained by the person or persons at whose suit such debtor was taken or imprisoned, and shall not be liable to any action of debt in consequence of such escape.

(y) Gilb. Debt. B. 3, c. 3.

(z) Per Cur., *Lewis v. Willis*, 1 Wils. 314.

(a) *Heath v. Vermeden*, 3 Lev. 146; *Kemp v. Goodal*, Salk. 277.

(b) *Gill v. Glasse*, Yelv. 227.

(c) *Curtis v. Spitty*, 1 Bingh. N. C. 15.

(d) *Freeman v. Stacy*, Hutt. 109.

(1) See *S. P. Davis v. Shoemaker*, 1 Rawle, 135.

(2) See text, next page.

[The following pages within brackets, contain the text and notes to the former edition, referred to in the text.]

Debt against sheriff, &c. for Escape of Prisoner in Execution—Stat. 13 Ed. 1 c. 11, 1 R. 2, c. 12—What shall be deemed an Escape—Of Recaption—By whom the Action for an Escape may be brought—Against whom—Declaration—Pleadings—Evidence.

By the common law, sheriffs and gaolers were obliged to keep persons in execution "in close and safe custody;" but if such prisoners escaped, the only remedy which the creditor had against the gaoler, was, by an action upon the case, grounded upon the tort; for, at the common law, an action of debt did not lie for an escape. The statute of Westminster the second, (13 Ed. 1, c. 11,) first gave an action of debt against the gaoler who permitted the escape of a person committed to prison by auditors for arrears of account. That statute having authorised the commitment of the bailiff or receiver, in case he is found in arrear, proceeds thus: *Et caveat sibi vicecomes vel custos(1) ejusdem gaolæ, sive sit in libertate sive non, quod per commune breve, quod dicitur, replegiare, vel alio modo sine assensu(2) domini ipsum a prisonē exire non permittat; quod si fecerit, et super hoc convincatur, respondeat domino de damno per hujusmodi servientem sibi illato, secundum quod per patriam verificare poterit, et habeat [dominus] suum recuperare, per breve(3) de debito [versus custodem.] Et si custos gaolæ non habeat per quod justicietur vel unde solvat, respondeat superior suus,(4) qui custodiam hujusmodi gaolæ sibi commisit, per idem breve.(5)*

The next statute on this subject is stat. 1 R. 2, c. 12, (it has been decided that the statutes 13 Edw. 1, c. 11, and 1 Rich. 2, c. 12, extend to Pennsylvania. *Shewell v. Fell*, 3 Yates, 17, 4 Yates, 47,) by which it is ordained, "that no warden of the Fleet shall suffer any prisoner there being, by judgment at the suit of the party, to go out of prison by mainprize, bail, nor by baston, without making gree to the said parties

(1) This act extends to all keepers of gaols, as well by wrong or *de facto*, as *de jure* 2 Inst. 382.

(2) This assent may be by parol, and shall be a sufficient bar in an action of debt brought for the escape. 2 Inst. 382.

(3) Although this statute and the subsequent stat. 1 R. 2, c. 12, only mentions "*per breve*," yet a bill of debt lies also by the equity of these statutes. 2 Inst. 382.

(4) When a person, having the custody of a gaol of freehold or inheritance, commits the same to another, who is not sufficient, the superior shall answer for the escape of the prisoner. The mayor and citizens of London having the shrievalty of London in fee, and the sheriffs of London being guardians under them, and removable from year to year, the mayor and citizens are the superiors; and although the sheriffs appoint a keeper under them, yet he is not within the statute; for there cannot be two superiors within this act, but one superior and one inferior only. 2 Inst. 382. In *Plummer v. Whitcomb*, 2 Lev. 158; 2 Mod. 119; T. Jones, 60, S. C., the court were of opinion, that the warden of the Fleet in fee, having granted the office to A. for life, who permitted a prisoner in execution to escape, was responsible, A. not being sufficient at the time of action brought.

(5) It was said, arg. in *Plummer v. Whitcomb*, 2 Lev. 159, that after this statute, and before the statute 1 R. 2, c. 12, actions of debt were brought in other cases besides Account, and 16 E. 3 Fitzdam. 81; Mitch. 41 E. 3, pl. 1; 41 Ass. Bro. Escape, 28, were cited. And by *Buller, J.*, in *Bonafous v. Walker*, 2 T. R. 132, it was said, that this statute (13 Edw. 1, c. 11,) by a liberal construction had been holden to extend to all cases.

of that whereof they were judged, unless it be by writ or other commandment of the king, upon pain to lose his office, and the keeping of the said prison. And if any such warden be attainted by due process, that he has suffered such prisoner to go at large against this ordinance, then the plaintiffs shall have their recovery against the warden, by writ of debt." Under the statutes of New York, an action of debt will not lie against the sheriff for the escape of a prisoner, committed on an execution on a *justice's* judgment. *Brown v. Genung*, 1 Wend. 115. Though this statute is confined in terms to the wardens of the Fleet, (Plowd. 35, b,) yet it has been holden that sheriffs and other gaolers are within the equity of it. On the preceding statutes, extended by a liberal construction, the action of debt against sheriffs and other gaolers, for original escapes out of execution, is wholly founded. It is observable, however, that these statutes being in affirmance of the common law, have not taken away the common law remedy by action on the case: and that it is at the election of the party to bring either the one or the other. *Burton v. Eyre*, Cro. Jac. 289.(1) There is, however, an advantage attending the remedy given by statute, which makes it more eligible than proceeding by the common law: when an action on the case is brought for an escape, the jury are at liberty to give such damages as they shall think right under all the circumstances of the case, and a small sum is frequently considered as sufficient in cases of great hardship against the gaoler. But where a prisoner escapes out of execution, (*Bonafous v. Walker*, 2 T. R. 126; *Porter v. Sayward*, 7 Mass. Rep. 327,) and the remedy prescribed by the statute 13 Edw. 1, c. 11, and 1 Ric. 2, c. 12, is adopted, the gaoler is put in the same situation in which the original debtor stood, and the jury cannot give a less sum than the creditor would have recovered against the prisoner;(2) namely, the sum indorsed on the writ, and the legal fees of execution. Interest is not recoverable in debt for an escape. *Littlefield v. Brown*, 1 Wend. 398. *Secus*, in an action on the case. *Markle v. Hatfield*, 2 Johns. Rep. 455. *Shewell v. Fell*, 3 Yeates, 17; 4 Yeates, 47; *Bernard v. Commonwealth*, 4 Littell, 149. Such is the law relating to original escapes out of execution; and by stat. 1 Ann. stat. 2, c. 6, s. 2, the same remedy is given against sheriffs, who permit the escape of persons who have been retaken on an escape warrant authorised by the first section of that act.

What shall be deemed an Escape.—A marshal of the United States is not liable for the escape of a debtor committed to the state jail under process from the courts of the United States. There is no provision in any act of Congress declaring the keepers of state jails, *quoad* prisoners in custody under process of the United States, to be deputies of the marshals, or making the latter liable for escapes committed by the negligence or malfeasance of the former. Nor is this liability to be inferred

(1) An action on the case is the only remedy against the sheriff for the escape of prisoners who have been arrested on mesne process; the statutes 13 Edw. 1, c. 11, and 1 Ric. 2, c. 12, being confined to escapes out of execution. Vide *Van Slyck v. Hogeboom*, 6 Johns. Rep. 270.

(2) In *debt* for escape, the jury must find the whole debt and costs, *aliter* in case. *Duncan v. Klinefelter*, 5 Watts, 141; *Fullerton v. Harris*, 8 Greenl. 393.

from the general powers and duties of their office, or the doctrine of the common law applicable to the case of principal and agent. Where a prisoner is regularly committed to a state jail by the marshal, he is no longer in his custody or controllable by him, and he has no power to command or direct the keeper in respect to the nature of his imprisonment. *Randolph v. Donaldson*, 9 Cranch, 76. Escapes are either voluntary or negligent. *Voluntary* escapes are such as are by the express consent of the gaoler; (1) *negligent*, where the prisoner escapes without the consent or knowledge of the gaoler. *Stonehouse v. Mullins*, Str. 873. In either of these cases, an action of debt may be maintained against the gaoler. Even circumstances of the escape having been without any default on the part of the gaoler, will not afford him any justification; the act of God alone, or that of the king's enemies, will be an excuse. *Alsept v. Eyles*, 2 H. Bl. 108. Debt lies for an escape against sheriff, though there be no gaol. *Gwinn v. Hubbard*, 3 Blackf. 14. If a defendant taken in execution be afterwards seen at large, for any the shortest time, even before the return of the writ, the sheriff will be chargeable for an escape; (2) (*Koomes v. Maddox*, 2 Har. & Gill, 106;) for it is his duty to obey the writ, and the writ commands him to take the defendant, and him safely keep, so that he may have him ready to satisfy the plaintiff. *Hawkins v. Plomer*, 2 Bl. R. 1048. In case of a *voluntary* escape, although the prisoner returns before suit brought, the escape is not purged as in the case of a *negligent* escape, but he may elect to consider the prisoner in custody, at his suit or otherwise. An action against the sheriff for an escape, is an election on the part of the plaintiff, to consider the prisoner out of custody; and during the pendency of the suit the debtor may depart from the jail with impunity. *Littlefield v. Brown*, 1 Wend. 398. For negligent escape, an action lies against the sheriff only. Steph. N. P., p. 1212. A sheriff's officer having on the 27th of September, (*Benton v. Sutton*, 1 Bos. & Pul. 24; *Palmer v. Hatch*, 9 Johns. Rep. 329,) arrested a person under a *ca. sa.*, returnable on the 7th of November following, carried him to a lock-up-house; and on the 2d of October permitted him to go in company with one of his

(1) "If a gaoler retakes a prisoner in execution after a voluntary escape, he is liable to an action of false imprisonment." 3 Rep. 52, b, and per Grose, J., in *Atkinson v. Matteson*, 2 T. R. 177. A sheriff is liable for an escape, where he had returned N. E. I. to a *ca. sa.*, and it appeared that prior to the return day, his deputy had the defendant in custody under another *ca. sa.*, and discharged him, though it do not appear that the sheriff knew of the latter writ, or the deputy of the former. *Wheeler v. Hambright*, 9 S. & R. 390.

(2) After an arrest on *mesne* process, the gaoler may suffer the prisoner to go at large, provided he has him at the return of the writ. *Atkinson v. Matteson*, 2 T. R. 172. Hence in Noy, 72, a distinction is taken that in actions for escape on *mesne* process, the writ shall allege, that *ad largum ire permisit et non comperuit ad diem*; but on process of execution *ad largum ire permisit*, is sufficient. And so are the precedents. Rastal. 171.

If the sheriff has the body of the defendant after an arrest upon *mesne* process, at the return day of the writ, it is sufficient. But if the defendant escapes at any time thereafter, the sheriff is liable to an action. *Stone v. Woods*, 5 Johns. Rep. 181. And if the escape was only *negligent*, and the defendant returned, &c., it is no defence, *sensu*. But if the sheriff takes a sufficient bail-bond, and discharge the defendant at any time before the return of the writ, he is not liable for an escape. *Richards v. Porter*, 7 Id. 137.

If the sheriff take a bond, but not such a bond as the law requires, he will be liable for an escape. *Skinner v. Fleet*, 14 Id. 263.

(the officer's) followers to his own house, for the purpose of settling his affairs; the day after, the prisoner was seen riding with the officer; it was adjudged that the sheriff was liable for an escape; for the custody of the follower, after the writ had been once executed, amounted to nothing; and further, what was done by the follower was not done in execution of the writ. Process of execution being to operate immediately by duress of imprisonment, the party ought to be taken to prison within a convenient time. 1 Bos. & Pul. 27, 8. Where a sheriff, after he had arrested a defendant on execution, went with him two or three miles out of the direct road to goal, in order that the prisoner might obtain the means of settling the execution, and also went with him the same distance to the prisoner's house, in order that he might get his necessary apparel, and to see his wife before he went to goal, it was holden not to be an escape, it being no more than a reasonable indulgence from laudable and compassionate motives. *Wood v. Turner*, 10 Johns. Rep. 420. Upon a *habeas corpus* to a gaoler, to bring a prisoner in execution before the court, the gaoler shall have a convenient time only for that purpose, and for carrying him back again to prison; which if he exceeds, it is an escape, resolved by all the judges. Cro. Car. 14. At the conclusion of the resolutions on this point, (Cro. Car. 14,) the judges admonished the warder of the Fleet, that under color of writs of *habeas corpus* he should not suffer prisoners to go at large, upon peril to be charged with escapes. See also, Hob. 202, Hard. 476. Where a prisoner is removed by *habeas corpus*, if the officer take him out of the direct road, it is an escape. Per Buller, J., in *Benton v. Sutton*, 1 Bos. & Pul. 28. The sheriff is bound on a *habeas corpus ad testificandum* to take his prisoner out of his county to the place appointed; and if the prisoner, in the course of their absence from the county, goes about alone on his own business, but of his own head, and without the knowledge or leave of the sheriff, it is no escape, if there has been no unreasonable delay in returning to gaol. *Hassam v. Griffin*, 18 Johns. Rep. 48. The sheriff is liable for the escape of a prisoner taken in execution on an erroneous judgment. *Gold v. Strode*, Carth. 148. So, though there be error in the process, the sheriff cannot take advantage of it. *Burton v. Eyre*, Cro. Jac. 289; *Scott v. Shaw*, 13 Johns. Rep. 376; *Hinman v. Brees*, 12 Johns. Rep. 529; *Cable v. Cooper*, 15 Johns. Rep. 152. In debt on sheriff's bond for money collected on execution, defendant cannot plead there was no judgment. *The State v. Hicks*, 2 Blackf. 336.

So debt lies for an escape against the sheriff, who permits a prisoner taken under a *ca. sa.* to go at large, although the sheriff returns not to the writ; (*Clipton's* case, cited by *Periam*, Cro. Eliz. 17;), for there is a record of which the party shall take advantage, though the writ be not returned.

A sheriff cannot take notice of an attorney's privilege; nor can he discharge him on his producing a writ of privilege; and if he does, he is liable for an escape. Attorneys are relievable from arrest only on motion and under the circumstances of the case. *Secor v. Bell*, 18 Johns. Rep. 52. N. All officers of the several courts of record in New

York are liable by stat. to arrest on mesne process, and to be held to bail as other persons.

If a sheriff arrests a party under a *ca. sa.* who then pays the debts and costs, whereupon the sheriff permits him to go at large, the sheriff is guilty of an escape for which debt will lie; at least, when the sheriff retains the money, and does not pay it over immediately to the plaintiff; for it is the duty of the sheriff to *have the body* to satisfy the plaintiff, and not to receive the money. *Slackford v. Austen*, 14 East, 468. The court, however, in this case, intimated a strong opinion, that if the sheriff had, immediately upon the receipt of the money, paid it over to the plaintiff, they would have exonerated the sheriff.

A sheriff cannot be imprisoned in the gaol of which he has the custody; and, therefore, if the coroner arrest him, and put him into the gaol, it is an escape. *Day v. Brett*, 6 Johns. Rep. 22.

Where the defendant is arrested on a *ca. sa.* issued upon a judgment, (*Bushe's case*, Cro. Eliz. 188,) without a *scire facias*, after the year, and the sheriff permits him to escape, debt will lie against the sheriff for the escape; for though the process be erroneously awarded,⁽¹⁾ yet it is sufficient for the arrest by the sheriff; and he might have justified an action for false imprisonment, and therefore cannot set the prisoner at large. So where the writ of execution is returnable the term next but one after the teste, (*Shirley v. Wright*, Lord Raym. 775; Salk. 700, S. C.,) instead of the next term, the sheriff may be charged for an escape; because the writ, though erroneous, is not void, the party not having a day on such writ. So where a court not having jurisdiction, orders an officer to discharge a prisoner, and the officer obeys the order, he is liable in an action for an escape. *Van Slyck v. Taylor*, 9 Johns. Rep. 146; *Jackson v. Smith*, 5 Johns. Rep. 115. See *Hecker v. Jarret*, 3 Binn. 404; *Hurst's case*, 4 Dall. 388. The stat. 37 Geo. 3, c. 112, authorized justices of the peace, (*Brown v. Compton*, 8 T. R. 424, in which *Orby v. Hales*, 1 Ld. Raym. 3, was overruled,) "at the first or second general quarter session, or general session, to be holden, after the passing the act, or some adjournment thereof, to discharge insolvent debtors under certain circumstances." The justices in the county of S. "at a general quarter session holden by adjournment," after the passing the act, but which appeared to have been an adjournment of a session holden before the act, ordered the gaoler of the sheriff's gaol to discharge an insolvent, who was in the custody of the sheriff in execution. It was holden, that this adjourned session, not being an original session holden after the passing of the act, nor an adjournment of such a session, had not any jurisdiction under this act; and, as the court of general session, or general quarter session had not, independently of this act, any authority over a person charged in execution in a civil suit, the proceeding was *coram non judice*, and consequently, the sheriff, being responsible for the act of his servant, was liable to the party at whose suit the insolvent was in custody, for the escape; agreeably to the rule laid down in the case of the Marshalsea,

(1) It is a good defence to an action for an escape, that the prisoner was privileged from arrest. *Ray v. Hogeboom*, 11 Johns. Rep. 433.

10 Rep. 76, a, that, when the court has not jurisdiction of the cause, the whole proceeding is *coram non judice*, and an action lies against the officer, who executes the process of the court.

By stat. 8 & 9 W. 3, c. 27, s. 1, "Prisoners upon contempt or mesne process, or in execution, committed to the custody of the marshal of the King's Bench, or Warden of the Fleet, shall be detained within the said prison, or the rules thereof,(1) until discharged by due course of law; and if the marshal, or warden, or keeper of any prison, shall suffer any prisoner committed to their custody, either in mesne process or in execution, to go or be at large out of the rules of the prison (except by virtue of some writ of *habeas corpus*, or rule of court, to be granted only upon motion made or petition read in open court) such going or being at large shall be deemed an escape." And by section 8, "If the keeper of any prison, after one day's notice in writing, refuse to show any prisoner committed in execution, to the creditor or his attorney, such refusal shall be deemed an escape." And by s. 9, "If any person desiring to charge another with any action or execution, shall desire to be informed by the keeper of the prison, whether such person be a prisoner or not, the keeper shall give a true note in writing, thereof, to such person upon demand, at his office for that purpose, upon pain of forfeiting 50*l.*; and such note shall be sufficient evidence that such person was at that time a prisoner in actual custody." In an action for an escape against the marshal, it appeared that the prisoner Serres, (*Field v. Jones*, 9 East, 151,) who was in execution in the mar-

(1) By this statute, the rules are, to all intents and purposes, the same as the walls of the prison. A defendant in execution, who had the liberty of the rules of the Marshalsea Prison, upon his giving security to the marshal, was proved to have been out of the rules for several days, but on the marshal's hearing of the escape, was put in close custody before action brought for the escape; it was holden, that this was a negligent and not a voluntary escape: that the escape was not voluntary unless it was with the consent or by the default of the marshal, and his allowing the rules of the prison was not any default in him, for the law had given a sanction to it; and it could not be inferred thence, that he consented to the prisoner's escape; because he had taken security that the prisoner should not go beyond the rules, and immediately on his return the marshal had confined him in close custody. *Bonafous v. Walker*, 2 T. R. 126. Sheriffs in New York are bound to allow prisoners to go at large within the limits, on their giving security. Vide Stat. N. Y. sess. 36, c. 69, s. 6, 7, 8, 9, 10, 1 R. L. 429. As the bond to be given, however, is intended only for the sheriff's indemnity, he may waive it, and grant the liberties without it, and will not be liable for an escape. *Holmes v. Lansing*, 3 Johns. Cas. 73. If the limits are vaguely defined, without the post or other visible marks prescribed by the statute, this will not justify the escape. The sheriff is not bound to take a bond until the limits are defined according to law; and if he does, and suffers the prisoner to go at large, it is at his peril. The creditor has nothing to do with the liberties, in making out his action against the sheriff. It is enough for him to show the judgment and execution, the prisoner taken, and then at large without the four walls of the prison. It lies with the defendant to justify his being at large, by showing liberties established and defined according to law; and if he does not, he fails in making out his defence. *Bissell v. Kip*, 5 Johns. Rep. 89; *Kip v. Brigham*, 7 Id. 178. See *Poncher v. Holley*, 3 Wend. 184.

The statute of New York provides, that in case the plaintiff will not take an assignment of the bond, the court may stay the proceedings in an action against the sheriff, for a negligent escape, until he has had time to prosecute the bond. Vide *M'Intire v. Woods*, 5 Johns. Rep. 357. Where a defendant was taken under a bail writ, and the sheriff by mistake took a bond for the prison bounds, stating defendant's imprisonment to have been under a *ca. sa.*, it was held, that the bond was void, and that the defendant was not estopped to show that there was no *ca. sa.* *Miller v. Bagwell*, 3 M'Cord, 429. See also *January v. Cartwright*, 6 Littell, 450.

shal's custody, at the suit of the plaintiff, was seen at large about eleven o'clock, on the first day of *Michaelmas* term, 1806. The defence was, that Serres was out upon a day-rule granted by the court on the same day; and by the preceding statute that could only have been granted at the sitting of the court, which, in fact, did not sit till after the time when he was at large. And, it further appeared, that the plaintiff had actually filed his bill against the marshal in this action before the sitting of the court on the same day. The petition, however, had been signed by the prisoner in the morning, before he went out of prison. The court were of opinion that the day-rule was a justification to the marshal for the liberation of the prisoner on the whole of the day, by relation; Lord *Ellenborough*, C. J. observing, that it would entirely frustrate the benefit of the day-rule to the parties, if the court were to construe it thus narrowly and strictly; for if it were first to be moved, and then to be drawn up, and afterwards served upon the marshal, before the party could avail himself of it, he would have the benefit of a very small portion of the day, considering how late the court usually commenced their sittings on the first day of term. The court would consider, however, that the rule was only granted, as legally it could only have been, when the court sat on the first day: but, when granted, it was a liberty for that day, and covered the antecedent part of the day, because, generally speaking, there is no fraction of a day, unless where it is necessary to look to it in order to answer the purposes of justice.

Of Recaption.—If the party in execution escapes by the negligence of the gaoler, he may be retaken either by the gaoler, (F. N. B. 130,) or the plaintiff; (agreed by the court in *Allanson v. Butler*, 1 Sidf. 330;) or if the plaintiff recovers against the sheriff for the escape, the sheriff may bring an action on the case against the defendant for damages sustained by him by reason of the escape; (F. N. B. 130;) but if he escapes by the assent of the gaoler, the gaoler cannot retake him; (*Featherstonehaugh v. Atkinson*, Barnes, 373; *Adm. in Atkinson v. Jameson*, 5 T. R. 25; *Lansing v. Fleet*, 2 Johns. Cas. 3;) neither in such case can the gaoler, if he is obliged to pay the creditor the amount of his debt in consequence of the escape, recover back the money from the debtor; (*Pitcher v. Bailey*, 8 East, 171;) yet as the judgment remains still in force, the plaintiff may either bring debt, (*Buxton v. Home*, 1 Show. 174,) or *scire facias* (*Allanson v. Butler*, 1 Lev. 211; *Allen v. Vinter*, T. Jones, 21,) on the judgment, or sue out another writ of *capias ad satisfaciendum*, (1 Vent. 4,) or of *fieri facias*; (*Basset v. Salter*, 2 Mod. 136;) and if the plaintiff die, his personal representatives may have a *scire facias*. *Sudall v. Wytham*, 2 Lutw. 1264. If a prisoner in execution has been permitted to go at large, with the consent of the plaintiff, he can never resort to the judgment again for the purpose of enforcing it in any manner. The attorney for the plaintiff, from his general character, has no authority to order the discharge of the defendant without the consent of the plaintiff, or a previous satisfaction of the debt: and the sheriff is liable for an escape if he discharges the defendant by the instructions of the attorney. *Kellogg v. Gilbert*, 10 Johns. Rep. 220. If the plaintiff in a *qui tam* action dis-

charge the defendant from execution, it is no defence in an action for escape, as the plaintiff could not discharge the people's moiety. *Minton v. Woodworth*, 11 Johns. Rep. 474. And this rule holds, although the party in execution has been discharged on terms which are not afterwards complied with: as upon an undertaking to pay the debt by instalments; *Vigers v. Aldrich*, 4 Burr. 2482; or to render himself on a given day if he did not in the mean time pay the debt; *Clarke v. Clement*, 6 T. R. 525; or to pay the debt at a future time, (*Tanner v. Hague*, 7 T. R. 420,) and on failure thereof, that he should be liable to be taken in execution again. *Blackburn v. Stupart*, 2 East, 243. So if the plaintiff consent to discharge one of several defendants taken on a joint *ca. sa.*, the plaintiff cannot afterwards take any of the other defendants. 6 T. R. 525. But a discharge by act of law, as under an insolvent debtor's act, of one of several defendants taken on a joint *ca. sa.* has been holden not to operate as a discharge of the other defendants. *Nadin v. Battie*, 5 East, 147. So where the prisoner was discharged upon giving a fresh security to satisfy the judgment, which was afterwards defeated, on account of a mere informality; it was holden, that the judgment was satisfied and could not be set off against the demand of the prisoner. *Jaques v. Withy*, 1 T. R. 557. In conformity with this rule, it was holden, that an agreement, by the defendant, (*Thompson v. Bristow*, Barnes, 205,) on his being discharged out of custody with the plaintiff's consent, that the judgment should stand revived for twelve months, was null and void. So where a bond was conditioned for the surrender of a debtor who had been discharged out of execution, (*Da Costa v. Davies*, 1 Bos. & Pul. 242,) with the creditor's consent, on a certain day, so that the debtor might be again taken in execution, the condition was holden void. The ground on which these decisions proceed, being, that the judgment is *satisfied* by the discharge of the prisoner (once in execution) with the consent of the creditor, the creditor loses the whole benefit of his judgment, and is deprived of *every* remedy upon it, as well by action of debt, (*Vigers v. Aldrich*, 4 Burr. 2482,) or writ of execution against the goods, (*Tanner v. Hague*, 7 T. R. 420,) as by writ of execution against the person.

But it is settled that, although a previous consent of the creditor that the debtor may go off the liberties, will excuse the escape, and discharge the judgment; yet, a subsequent assent, or agreement that the debtor may remain off, is no discharge. The right of action for the escape having once accrued, nothing but a release, on an agreement for valuable consideration, can defeat the action. *Sweet v. Palmer*, 16 Johns. Rep. 181.

Such are the provisions of the common law: but, for the relief of debtors in execution for small debts, it has been enacted, by stat. 48 Geo. 2, c. 123, "that all persons in execution, upon any judgment obtained in any court, whether such court be or be not a court of record, for any debt or damages not exceeding twenty pounds, exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged, may, upon application in term time to one of his majesty's superior courts of record at West-

minster, to the satisfaction of such court, be forthwith discharged out of custody, as to such execution by rule of court. The word "damages" in the forgoing statute, comprehends damages for an assault. *Winter v. Elliott*, 1 Ad. & Ell. 24. Where the amount for which the party is charged in execution exceeds 20*l.* although the original debt was less, but the excess is made up of interest, the party is not entitled (*Cooper v. Bliss*, 3 M. & Sc. 797,) to his discharge.

If a prisoner in execution (*Anon.* Salk. 273, recognized by *Lawrence, J.*, in *Brown v. Compton*, 8 T. R. 424,) be discharged by the order of a court not having jurisdiction, the creditor may retake him on an escape warrant. By stat. 8 & 9 W. 3, c. 27, s. 7, "If a prisoner committed in execution shall escape thence, by any ways or means, the creditor, at whose suit such prisoner was charged in execution, at the time of his escape, may retake him by any new *capias*, or *capias ad satisfaciendum*, or sue forth any kind of execution on the judgment, as if he had never been in execution."

By whom the Action for an Escape may be brought.—If a writ of execution be delivered to the sheriff against A., at the suit of B., and a warrant made out thereon, and before the return of such writ A. is taken in execution, at the suit of C., and then escapes, (*Benton v. Sutton*, 1 Bos. & Pul. 24,) B. may maintain debt against the sheriff, for the escape, although the party was not arrested under the writ at the suit of B. If A. be in custody of the sheriff, at the suit of B., and a writ be delivered to the sheriff at the suit of C., the delivery of the writ is an arrest in law; and if A. escape, C. may bring debt against the sheriff for the escape. Salk. 274, cited in Bull. N. P. 66. But if one in custody on mesne process, has the privilege of the limits, having given bond, a delivery of a *ca. sa.* against him to the sheriff is not *ipso facto* and *eo instanti* an arrest. *Tracy v. Whipple*, 8 Johns. Rep. 379. So where A. levied a plaint in the sheriff's court of London (*Jackson v. Humphreys*, Salk. 273,) against B., then in the Counter in custody on a former plaint levied against him by C., and the sheriff permitted B. to escape; it was holden that A. might bring an action for the escape; for by entering the plaint, and charging the defendant in the Counter, he is in actual custody of the sheriff.

This action may be maintained by an executor for an escape out of execution in the time of the testator. Adm. by *Holt, C. J.*, in *Berwick v. Andrews*, Lord Raym. 971. If the plaintiff, in an action against an hundred, (*Hundred of Lauress v. ———*, Fitzg. 296,) is nonsuited, and judgment entered against him for the costs, upon which he is taken in execution, and the sheriff permits him to escape, the hundred may bring debt against the sheriff for the escape.

If an attorney having a lien on a judgment for his costs, or an assignee having an equitable interest therein, take out a *ca. sa.* on the judgment, giving the sheriff notice of such interest, the party beneficially interested may maintain an action against the sheriff for an escape in the name of the plaintiff in the original suit, and the sheriff cannot set up a release from the nominal plaintiff. *Martin v. Hawkes*, 15 Johns. Rep. 425.

In an action for an escape of a prisoner who had been taken on a

capias utlagatum after judgment, and the action being brought at the suit of the party only, it was objected that it ought to have been *tam pro domino rege quam pro seipso*; but the prothonotaries certifying that the precedents had been both ways, the objection was disallowed. *Moore v. Reynolds*, Cro. Jac. 619, 620, recognised in *Throgmorton v. Church*, D. P. 1 Peere Williams, 698.

Plaintiff having arrested a debtor by process out of an inferior court, cannot by *habeas corpus ad respondendum*, (*Melsome v. Gardner*, 1 Cowp. 116, cited per Ld. Tenterden, C. J., in *Rogers v. Jones*, 7 B. & C. 90,) remove him into the custody of the Court of King's Bench to answer to a new action there for the same debt.

Against whom the Action for an Escape may be brought.—If husband and wife are taken in execution, and the wife is suffered to escape, although the husband continue in prison, yet an action will lie against the sheriff for this escape, in which action the whole debt shall be recovered. 1 Roll. Abr. 810, (F.) pl. 5. If the prisoner returns to prison after a voluntary escape, (*James v. Pierce*, 1 Ventr. 269, in which the case of a sheriff of Essex, in Hob. 202, is denied to be law,) the plaintiff may admit him to be in execution; and if he be turned over to a new sheriff, &c., and afterwards escape, the plaintiff may bring an action against the new sheriff for such escape. Where a new sheriff is appointed, (1) his predecessor ought to deliver over (2) *by indenture* all the prisoners in his custody, charged with their respective executions; and if he omit any it is an escape; (Adj. in *Westby's* case, 3 Rep. 71, b;) but if a sheriff die, the new sheriff *ex necessitate* must at his peril take notice of all persons in custody and of the several executions wherewith they are charged. 3d Resolution in *Westby's* case, 3 Rep. 72, b, affirmed on error in Exch. Chr. Cro. Eliz. 866. By stat. 3 Geo. 1, c. 15, (3) s. 8, "In case of the death of the high-sheriff, the under-sheriff shall execute his office, until another sheriff be appointed, and shall be answerable for the execution of the office in all things during that interval as the high-sheriff would have been, if living." The marshal of the King's Bench permitted a prisoner in execution to escape, (*Lenthal v. Lenthal*, 2 Lev. 109; *Rawson v. Turner*, 4 Johns. Rep. 469,) who afterwards returned to prison again. The marshal died, and his successor permitted the same person to escape again. It was holden, that the second marshal was liable for this escape, and that the escape permitted by his predecessor did not discharge him. If the prisoner, being out on bail, (Salk, 272,) come and surrender himself by entering *Reddidit se*, in discharge of his bail in the judge's book, and the plaintiff's attorney accept him in ex-

(1) A sheriff's sureties are liable for his neglect, after his term, to finish an execution left with him previously on which there had been a levy. *The State v. Roberts*, 7 Halst. 114.

(2) An assignment of prisoners by an *under-sheriff* to the succeeding high-sheriff, (though not by indenture,) is a good assignment. *Poulter v. Greenwood*, Barnes, 367, 4to. ed. But see *Davidson v. Seymour*, 1 M. & Malk. 34, where Abbott, C. J. held, that the new sheriff was not answerable for the escape of a debtor taken in execution in the time of his predecessor, and not delivered over to him by indenture. See also the note by the learned reporters.

(3) Repealed as to some of its provisions by 3 & 4 W. 4, c. 99.

execution, and file a *committitur*, the marshal is not chargeable for an escape without notice, either by serving him with a rule, or entering a *committitur* also in his book. The bailiff of a liberty, (*Boothman v. The Earl of Surry*, 2 T. R. 5,) who has the execution and return of writs, is liable to an action of debt for an escape, if he remove a prisoner in his custody in execution, to the county gaol, situate out of the liberty, and there deliver him into the custody of the sheriff.

This action is founded on tort, and does not survive, and of course cannot be maintained against the executors or administrators of a deceased sheriff. *Martin v. Bradby*, 1 Caines' Rep. 124.

Declaration.—If a prisoner escape in Essex, and is seen at large in Hertfordshire, the venue may be laid in Hertfordshire. *Walker v. Griffith*, M. 25 G. 2, Bull. N. P. 67. As to the venue, vide *Bogart v. Hildreth*, 1 Caines' Rep. 1; *Marshal v. Hosmer*, 3 Mass. Rep. 23; *Jones v. Pemberton*, 2 Halst. 350. The plaintiff must set forth in his declaration the recovery by that judgment upon which the writ of execution issued, and allege that the judgment is still in full force and unsatisfied: (*Brown v. The Commonwealth*, 6 Monroe, 621:) but it is not necessary to set forth the pleadings previous to the judgment; for it is but inducement to the action. Beginning with the judgment, and stating briefly, "*quod cum recuperasset*," is sufficient. It is sufficient (*Nightingale v. Wilcoxson*, in error, 10 B. & C. 202,) to allege that the writ directing the arrest *was duly indorsed for bail*, without adding "by virtue of an affidavit made and filed of record." The plaintiff must aver and show in evidence, not only the escape of the prisoner, but that he was previously lawfully detained. Per Bayley, J. *Brazier v. Jones*, 8 B. & C. 130. If upon a judgment by an intestate, (Per Cur. in *Gold and others v. Strode*, Carth. 146,) his administrator brings a *scire facias* and has judgment, whereupon a *ca. sa.* issues, and the defendant is taken, and permitted to escape, in an action against the sheriff for such escape, the plaintiff may declare briefly on the judgment in the *scire facias*, without setting forth all the proceedings at length. If a prisoner in the custody of the sheriff, (*Wightman v. Mullens*, 2 Str. 1226, recognised in *Turner v. Eyles*, 3 Bos. & Pul. 461,) is brought by *habeas corpus* before a judge, and committed to a different custody, e. g. to the custody of the marshal of the King's Bench, who suffers him to escape, in an action against the marshal for such escape, it must be averred in the declaration, that the commitment was of record, otherwise it will be bad on special demurrer: for the prisoner is not in point of law in the marshal's custody until the commitment is entered of record. It is not stated in Strange's report, whether the party committed had been taken on mesne process or in execution: but, from the case of *Wigley v. Jones*, 5 East, 440, it appears that the case in Strange is not law, unless it be understood of a commitment of a prisoner in execution; for commitments on a writ of *habeas corpus* of persons in custody on mesne process, are not properly capable of being entered of record, either by themselves or as part of any other record or proceeding.

Pleadings.—If the prison be on fire, (1 Rol. Abr. 808, (D.) pl. 6,)

or be broken open by the king's enemies, (Id. pl. 5,)(1) and the prisoners escape, this will excuse the sheriff; but it is otherwise if the prison be broken open by the king's subjects; Id. pl. 7, cites 4 Rep. 84. See also *Elliott v. D. of Norfolk*, 4 T. R. 789, 5 Burr. 2812. After the gaols in the metropolis were destroyed by the rioters, in the year 1780, an act of parliament (20 G. 3, c. 64,) was passed to indemnify the gaolers from the consequences of the prisoners escaping. If a prisoner in execution escape without the assent of the sheriff, and he make fresh suit, and retake him *before any action brought* (1 Rol. Abr. 808, (E.) pl. 1,) against him, this will excuse him: but by stat. 8 & 9 W. 3, c. 27, s. 6, he cannot give this in evidence, but must plead it specially, and must likewise make oath that the prisoner made such escape without his privity or consent. By this plea it must appear, that the recaption was before action brought, otherwise it will be bad on demurrer; *Stonehouse v. Mullens*, Str. 873:(2) for if the party at whose suit the prisoner was in execution, bring his action against the gaoler for an escape, and, after action brought, the gaoler retake him on fresh suit, this will not bar the action well attached before. *Harvey v. Reynell*, 1 Rol. Abr. 808, 9 (E.) pl. 2 W. Jones, 145, S. C. If the defendant escapes and fresh suit is made after him, and he dies before he is retaken, an action will lie, and the fresh suit is no excuse unless he be retaken, for he died at large out of gaol; Gilb. Execution, p. 85, Edn. 1763, cites Popham, 186; but the case there is put by counsel in argument, and does not appear to have been adjudged; the proposition, however, scarce requires an authority. By stat. 3 & 4 W. 4, c. 42, s. 3, this action must be commenced and sued within six years after the cause of such action. It is a good defence, (*Saffery v. Jones*, 2 B. & Ad. 598,) that the sheriff discharged the prisoner by virtue of an order of the Insolvent Debtor's Court; and it is not necessary to show that the proceedings upon which the order is grounded were properly taken, or that the insolvent was within the walls of a prison when he petitioned for his discharge; see 7th G. 4, c. 57, s. 81. If the plaintiff in his declaration, (*Bovy's case*, 1 Ventr. 211, 217, adj. on demurrer,) set forth that the defendant *voluntarily* suffered J. S. (whom he had in execution) to escape, the defendant may plead that he retook him on fresh suit, before action brought, without traversing the voluntary escape,(3) for this allegation in the declaration is immaterial. The proper place for setting it forth, if necessary, is in the replication. If without the knowledge of the gaoler the defendant escapes, (*Chambers v. Gambier*, Comyn's R. 554; S. P. *Grey v. Gambier*, Hill, 8 G. 2 Pr. Reg. C. B. 199,) and returns before action brought, the gaoler may(4) *plead* this in bar, (*Bonafous v. Walker*,

(1) Rolle (and Dyer, from whom he cites,) say "fire which is the act of God," which seems to mean fire by lightning. See *Alsept v. Eyles*, 2 H. Bl. 113, in which Lord Loughborough, delivering the opinion of the court, said, "as the law stands, nothing but the act of God or the king's enemies will be an excuse."

(2) From a MS. note, it appears to have been a special demurrer, assigning for cause "that a recaption after action brought was not pleadable in bar."

(3) Hence, under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape. *Bonafous v. Walker*, 2 T. R. 126, ruled on the authority of *Bovy's case*.

(4) The sheriff may permit a prisoner in execution to go within the liberties without

2 T. R. 126,) for it is tantamount to a retaking on fresh pursuit before action brought. But in a plea of subsequent return, it is necessary to allege a detention, and that it continued to the time of action, (*Chambers v. Jones*, 11 East, 406,) or that it has been terminated by legal means.

Nil debet is a good plea in debt for an escape; *Minton v. Woodworth*, 11 Johns. Rep. 474.

Evidence.—To support this action the following proof will be necessary; 1st, an examined copy of the record of the judgment; 2dly, the writ of *capias ad satisfaciendum*; or in case the writ has been returned, an examined copy thereof, and of the return; see *Tildar v. Sutton*, Bull. N. P. 66; 3dly, the delivery of the writ to the sheriff must be proved;(1) and here it is to be observed, that where the writ has been returned, the indorsement of such return on the writ, (*Blatch v. Archer*, Cowp. 63,) under the hand of the sheriff, will be sufficient evidence of the writ having been delivered to him. 4thly, a legal arrest under the writ must be proved; that is, an arrest either by the sheriff, or by the sheriff's

taking the bond prescribed by the stat. of New York, as the bond is intended only for his indemnity; and if the prisoner without his knowledge, go beyond the liberties, but return, before suit brought, the sheriff is not liable for an escape. *Peters v. Henry*, 6 Johns. Rep. 121. And the liberties are to all intents and purposes the same as the walls of the prison. *Ib. Jansen v. Hilton*, 10 Id. 549. There has been some difficulty in settling the law on this subject where the sheriff has taken a limit bond. In *Tillman v. Lansing*, 4 Id. 44, it was holden, that where a prisoner had given a limit bond, and went off the limits, with the knowledge of the sheriff, the sheriff had no right to retake him, and therefore it could not be considered a voluntary escape; yet, as the escape was with the knowledge and sufferance of the sheriff, it was so far in the nature of a voluntary escape, that a return before writ could not purge it. In Maine, it is held that after the execution of a bond for the debtor's liberties, the sheriff is not liable to an action of debt for a voluntary escape. *Palmer v. Sawtell*, 3 Greenl. 447. In a subsequent case in the Court of Errors, *Jansen v. Hilton*, 10 Johns. Rep. 549, it was holden that the sheriff, having taken a limit bond, might, nevertheless, retake on fresh pursuit, and that where the escape was without the knowledge of the sheriff, a voluntary return of the prisoner before suit, would purge it. But if the sheriff knows of the escape, or if the escapes are habitual, as going off the limits every Sunday, and without the knowledge of the sheriff, he is bound to retake, and a voluntary return does not excuse him. N. There is a mistake in the opinion delivered in this case. It is said, that in *Tillman v. Lansing*, there was no evidence of a voluntary return. It is expressly stated in that case, that "the prisoner was in custody within the limits when the suit was commenced." Vide also, *Barry v. Mandell*, 10 Id. 563. If the writ against the sheriff is left with the wife of the coroner at his house while the prisoner is off the limits, it is a sufficient commencement of the suit. So, *semel*, if it be left at his house, though not with the wife. *Bronson v. Earle*, 17 Id. 63. Where the attorney, hearing that the prisoner was off the limits, delivered a writ against the sheriff, to a person with instructions "to go and see M. off the gaol liberties, so that he could swear to the fact, and then deliver the writ to the coroner;" this was holden not to be a commencement of a suit, the writ having been given to the person conditionally. It is incumbent on the plaintiff to show affirmatively that the prisoner is off the limits at the time of the delivery of the writ to the coroner. *Visscher v. Gansevoort*, 18 Id. 496. Delivery of a writ to the coroner on Sunday, while the prisoner is off the limits, is not a commencement of a suit. *Van Vechten v. Paddock*, 12 Id. 178. If the affidavit of the sheriff, required by statute, be not filed with his plea or notice of the voluntary return of the prisoner, the plaintiff may, if the return be pleaded, treat the plea as a nullity, or move the court to set it aside, or if notice be given he may on the trial move to strike out the notice. But by accepting the plea and going to trial, he waives the irregularity. *Richmond v. Tallmadge*, 16 Id. 307.

(1) If the sheriff neglect to return a *ca. sa.*, or refuse to produce it at the trial, the issuing the execution, its delivery to the sheriff, and the arrest, may be shown by parol. *Hinman v. Brees*, 13 Id. 529.

officer, acting under the authority of a warrant duly signed and sealed by the sheriff. Regularly, in the latter case, the warrant ought to be proved; and for this purpose the plaintiff ought to subpoena the officer, and give him notice to produce the warrant; in which case, if it be not produced, a copy, or parol evidence of its contents, will be admissible. The officer when called to show his authority, is a witness for all purposes and may be cross-examined as to the whole of the case, although he be the real party in the cause. *Morgan v. Bridges*, 2 Stark. N. P. C. 315, *Abbott*, J. It will be proper, however, to remark, that this strict proof of the authority of the officer is not always required, for in one case (*M'Neil v. Perchard*, 1 Esp. N. P. C. 263; see also *Blatch v. Archer*, Cowp. 63, and *Jones v. Wood*, 3 Campb. 228,) the production of the writ with the name of the officer indorsed, and proof of the usage in the sheriff's office to indorse on the writ the name of the officer to whom the warrant to arrest is delivered, coupled with evidence, that the person, whose name was indorsed, was the sheriff's officer, was holden sufficient, without the production of the warrant. But in *Hill v. The Sheriff of Middlesex*, Holt's N. P. C. 217, 7 Taunt. 8, it was holden that an examined copy of a writ returned and filed and the indorsement thereon, on which writ was indorsed the name of the bailiff employed to make the levy, was not evidence to prove who was the bailiff, there not being any evidence to show that the indorsement was made by the sheriff's authority. And in *Morgan v. Bridges*, 2 Stark. N. P. C. 314, the same law was laid down by *Abbott*, J. *Gibbs*, C. J., however, in *Hill v. Sheriff of Middlesex*, Holt's N. P. C. 219, observed that it was the general practice to connect the sheriff and the officer by the production of the warrant, but although that was the formal, it was not the only way, and that any subsequent recognition by the sheriff would be equivalent to the production of the warrant. In order to constitute a legal arrest by the officer, the arrest must be *by his authority*; Cowp. 63; but it is not necessary that he should be the hand that arrests, or that he should be in the presence of the person arrested, or actually in sight, or within any prescribed distance at the time of the arrest. Lastly, the escape must be proved by showing, that the prisoner, after the arrest, was at large; whether before or after the return of the writ is immaterial. The under-sheriff's confession of an escape will be evidence of the fact; *Yabsley v. Doble*, *Ld. Raym.* 190; see the remarks of *Lawrence*, J., on this case in *Drake v. Sykes*, 7 T. R. 113; because the under-sheriff gives the sheriff a bond to save him harmless, and therefore such confession goes in effect to charge himself.(1) To prove a voluntary escape, the party escaping may be a witness, because it is a thing of secrecy, a

(1) *Rees v. Tichenor*, 1 Miles, 183. This was an action by a sheriff on a bond of his deputy, conditioned for the faithful discharge of his duties. Per *Jones*, J. The usual course of pleading upon a bond like this, is for the plaintiff to declare in debt for the penalty. The defendant then claims oyer of the condition and pleads performance or non-damnicatus generally, according to the nature of the stipulation. The plaintiff in his replication, sets forth the particular breaches, and the defendant rejoins either by way of traverse, tendering an issue, or by way of confession and avoidance, or he demurs.

The plaintiff may, however, set out the condition, and assign the particular breaches in his declaration; but by this course, he gives the defendant the advantage of pleading, with the leave of the court, any number of pleas to such breach.

private transaction between the prisoner and gaoler. *R. v. Warden of the Fleet*, Salk. MSS. Bul. N. P. 67. Under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape. *Bonafous v. Walker*, 2 T. R. 126. Such is the evidence required to support this action in ordinary cases; but, where the circumstances under which the party has been arrested are of a more complicated nature, and the declaration more special, other proof will of course be necessary; Peake's Evid. 392; as if the debtor, being in the county gaol, was charged with a writ of execution, by lodging it with the sheriff, it will be necessary to prove the fact of his so being in custody. See stat. 8 & 9 W. 3, c. 27, s. 9, ante, p. 619.

An acknowledgment of a debt made by a debtor after arrest, but before an escape, is evidence against the marshal in an action for the escape; per *Bayley, J.* in *Rogers v. Jones*, 7 B. & C. 89. In debt for an escape, (*Turner v. Eyles*, 3 Bos. & Pul. 456. See *Barnes v. Eyles*, 2 Moore, (C. P.) 561,) where the party who had been taken in execution by the sheriff, was afterwards brought up by *habeas corpus*, and committed to the custody of the marshal of the King's Bench, the declaration alleged that the prisoner was brought, by *habeas corpus*, before a judge of the King's Bench, and by him committed to the custody of the marshal, "as by the said writ of *habeas corpus*, and the said commitment thereon, now remaining in the said court, more fully appears." It was holden, that the production of the writ of *habeas corpus*, with the commitment of the judge indorsed thereon, but which appeared to have been brought from the office of the marshal, but *had not been filed of record in the court* was not sufficient to support this allegation; for, admitting it not to be necessary, that the commitment should be of record, in order to entitle the plaintiff to the action, yet the plaintiff having averred a commitment of record, he was not at liberty to prove any other species of commitment; for the commitment, though matter of inducement, was material, and the latter part of the averment, "now remaining in the said court," was not capable of being separated from the former part, or treated as an immaterial or distinct averment. A different rule holds, where an action is brought for an escape after a commitment on a *habeas corpus*, of a person arrested on mesne process; there the "*prout patet per recordum* remaining in the court," may either be rejected as surplusage, on the ground of such commitments not being records, nor capable of becoming so; or, if considered as *quasi* of record, the allegation is sufficiently proved by the production of the writ, with the committitur annexed by the clerk of the papers of the King's Bench Prison, with whom, as servant of the marshal, such papers are usually deposited. *Wigley v. Jones*, 5 East, 440. If the plaintiff declare that he had J. S. and his wife in execution, (*Roberts v. Herbert*, 1 Sidf. 5,) and that the defendant suffered them to escape, and the jury find specially that the husband only was

If the plaintiff assigns the breaches specifically in his declaration, the general plea of performance or of non-damnificatus on which no issue can be taken is bad. The defendant must answer each breach specifically assigned specially.

In regard to the stipulation to indemnify and save the plaintiff harmless, &c., the rules of pleading allow the defendants to plead negatively.

taken in execution (it being a debt due from the wife before coverture), and that he escaped, the plaintiff shall have judgment, for the substance of the issue is found. In debt for an escape against the marshal, it was alleged, that the prisoner was surrendered to him at the chief justice's chambers in the parish of St. Bride's, whereas it appeared upon evidence, that it was in the parish of St. Dunstan. But the judges held it well enough, this being debt and the surrender (not the place of surrender,) being the only thing material, and that it differed from trespass where every part of the declaration was descriptive. *Oales v. Machee*, Str. 595, at Nisi Prius in Middlesex, coram Fortescue and Raymond, Js. Declaration for an escape stated, that the plaintiff in E. T. 5 G. 4, recovered against one H. W. £ , as by the record appeared, that in Trin. T. in the fifth year aforesaid, such proceedings were had in the said court, that it was considered, that the plaintiff should have execution against the said H. W. for the damages aforesaid, according to the force of the said recovery by default of the said H. W. as by the record of the said last-mentioned proceedings still remaining in the said court appears, and *thereupon*, on, &c. in T. T. in the fifth year aforesaid, the said H. W. was committed to the custody of the marshal in execution for the damage aforesaid, and escaped. Plea, not guilty. At the trial, the plaintiff proved the original judgment, and that a committitur issued thereon, but he did not prove any judgment in *scire facias*. It was holden, that the allegation of the judgment in *sci. fa.* was immaterial, and that the word "*thereupon*," did not so connect the judgment, in *sci. fa.* with the commitment, as to make it necessary for the plaintiff to prove such judgment. Declaration against the marshal for escape alleged, that J. S. was arrested and gave bail, that afterwards bail above was put in *before a judge at chambers*, "as appears by the record of the recognisance;" that J. S. surrendered in discharge of the bail, and afterwards escaped. At the trial, the plaintiff produced the entry of a recognisance of bail, and the entry of special bail in the filazer's book; but the entry of recognisance imported, not that the recognisance was taken before a judge at chambers, but in court, and the entry in the filazer's book imported that bail was put in before a judge, but did not state whether it was put in at chambers or in court. It was holden, that the allegation in the declaration was not supported by the evidence. If the defendant plead no escape, he cannot give in evidence no arrest, for the plea admits an arrest.]

IX. Of the Statutes, and General Rules, relative to Actions founded on Penal Statutes.(1)

Of the Time within which Actions on Penal Statutes must be brought.—By stat. 31 Eliz. c. 5, s. 5, "All actions brought for any

(1) Debt in the name of consul, not information, is the proper form of action for the penalty for not depositing register under act of Congress, 1803, c. 62, s. 2. *Levy v. Burly*, 2 Sumner, 355.

Where the statute gives no form of declaring, the plaintiff must set forth specially the facts which constitute the offence. *Biglow v. Johnson*, 13 Johns. Rep. 428; *Cole v. Smith*, 4 Id. 193.

forfeiture upon a penal statute, whereby the forfeiture is limited to the *king only*, shall be brought within two years next after [*629] the *offence committed. And all actions brought for any forfeiture upon a penal statute, (except the statute of tillage,) the benefit whereof is limited to *the king and the prosecutor*, shall be brought within one year after the offence committed; and, in default thereof, the same shall be brought for the king, at any time within two years after that year ended. And if any action shall be brought after the time before limited, the same shall be void. Provided, (e) that where a shorter time is limited by any penal statute, the action shall be brought within that time."

This statute extends (f) to all actions brought upon penal statutes, whereby the forfeiture is limited to the king, or to the king and the party, *whether made before or since the statute*. 2dly, If any offence prohibited by any penal statute be also an offence at common law, the prosecution of it as an offence at common law, is not restrained by this statute. 3dly, The defendant may take advantage of this statute on the general issue, and need not plead it. In actions brought on penal statutes, it is incumbent on the plaintiff to show that the action was commenced within the limited time.

By stat. 21 Jac. I. c. 4, s. 1, "All offences against any penal statute, for which any common informer may ground a popular action, bill, plaint, suit, or information, before justices of assize, justices of *nisi prius* or gaol delivery, justices of *oyer and terminer*, or justices of peace in their general or quarter sessions, shall be commenced, sued, prosecuted, tried, recovered, and determined by way of action, plaint, bill, information, or indictment, before the justices of assize, &c., of every county, city, &c., having power to determine the same, wherein such offences shall be committed, in any of the courts, &c., aforesaid respectively; and the like process shall be as in actions of trespass *vi et armis* at common law; and all information, actions, bills, plaints, and suits, commenced, sued, &c., by the attorney-general, or other officer, or common informer, in any of the king's courts at Westminster, for any of the said offences, penalties, or forfeitures, shall be void." And by sect. 2, "The offence shall be alleged to have been committed in the county where such offence was in truth committed; and if, on the general issue, the plaintiff or informer shall not prove the offence, *and that the same was committed in the county in which it is laid*, the defendant shall be found not guilty." By the 3rd section it is enacted, "That no officer in any court of record shall receive, file, or enter of record any information, bill, &c., grounded upon a penal statute, until the informer has first taken an oath, which shall be entered of record, before some of the judges of the court, that the offence was not committed in any other county than where, by the said information, bill, &c., the same is supposed to have been committed, and that he believes in conscience, that the offence was committed [*680] *within a year before the information or suit, within the same county." By the 4th section, defendants are permitted to plead the general issue, not guilty, and give the special matter in evi-

(e) Sect. 6.

(f) Tidd's Prac. 15.

dence. By the 5th section, several statutes now obsolete, *e. g.* the statute against Popish recusants, and actions for maintenance, &c., are exempted from the operation of this act. With respect to this statute, it is to be observed; 1st, That it does not extend to subsequent penal laws; *(g)* consequently, in an action founded on stat. 12 Ann. c. 16, against usury, it is not necessary that there should be an affidavit that the offence was committed in the county where, and within a year before, the action was brought. *(h)* 2ndly, Wherever, by any act in force at the time when this statute passed, the informer might have sued by action, bill, plaint, suit, or information, in the inferior courts, as well as in the courts at Westminster, he is now confined to sue in the former; but as the statute does not give any new jurisdiction to the inferior courts, *(i)* the party may still sue in the courts at Westminster for all penalties, which could not, before the passing of that statute, have been recovered in the inferior courts. *(1)* Hence, an informer may bring an action of debt in the courts at Westminster, *(k)* on the stat. 1 Jac. I. c. 22, s. 14, for the recovery of the penalties for selling leather, which had not been searched and sealed; because this statute *(l)* gives no jurisdiction to the inferior courts to distribute the penalties, but only to inquire of the premises; which inquiry means in their accustomed manner; namely, by indictment or presentment at common law. 3rdly, This statute applies to those penal statutes only, on which proceedings may be had before the justices of assize, justices of the peace, *(m)* &c.

By stat. 3 & 4 Will. IV. c. 42, s. 3, [14th Aug. 1833,] "All actions for penalties, given to party grieved, must be commenced and sued within two years after the cause of action." See *ante*, p. 622.

By stat. 18 Eliz. c. 5, s. 1, (made perpetual by statute 27 Eliz. c. 10,) "Every informer, upon any penal statute, shall sue in proper person, or by his attorney." Hence an infant cannot be a common informer; for he must sue by *prochein amy* or guardian. *(n)* *(2)*

By the 3rd section of stat. 18 Eliz., "No informer shall compound with any person that shall offend against any penal statute, *(3)* for an

(g) *Hick's case*, Salk. 373; *R. v. Galle*, *Ib.* 372; Lord Raym. 370; *Harris, q. t., v. Renny*, cited in *French, q. t., v. Cozon*, Str. 1081; *Messenger v. Robson*, cited in *Garland v. Burton*, Andr. 292.

(h) *French v. Cozon*, Str. 1081.

(i) See *R. v. Galle*, Carth. 486, and *Garland, q. t., v. Burton*, Str. 1103; Andr. 291, *S. C.*

(k) *Shipman, q. t., v. Henbest*, 4 T. R. 109; *R. v. Ferris*, H. 37 Geo. III. Exch. 1 Wms. Saund. 312, c. n. (1), S. P.

(l) See sect. 50.

(m) *Leigh v. Kent*, 3 T. R. 362.

(n) *Maggs v. Ellis*, M. 25 Geo. II. B. R. Bull. N. P. 196, and MS.

(1) Debt for a penalty is a *civil* cause within the 9th sec. of the judicial act allowing error to Circuit Court. *Jacob v. United States*, 1 Brock. 520. Where the penalty exceeds \$50, debt lies in a court of record, although plaintiff might sue in covenant before a justice. *Lewis v. Spencer*, 12 Wend. 139.

(2) Several persons cannot join as informers in a *qui tam* action. *Vinton v. Welsh*, 9 Pick. 87.

(3) An agreement that plaintiff shall discontinue the suit on defendant's paying the costs, is not a compounding of the action. *Huskins v. Newcomb*, 2 Johns. Rep. 405. Vide *Carwill v. Allen*, 10 Id. 118; *Minton v. Woodworth*, 11 Id. 474. It is in the discretion of the court, under the statute, to allow the informer or plaintiff to compound on such terms as they think fit. *Bradway v. Leworthy*, 9 Id. 251. It is commonly required that the moiety of the penalty given to the people be paid. *Ib.*

offence committed, but after answer made in court to the suit, nor after answer, but by order or consent of the court." In cases [*681] *where part of the penalty goes to the crown, leave shall not be given to compound unless notice shall have been given to the proper officer; but in other cases it may. R. G. H. T. 2 Will. IV. This statute extends to suits by common informers only, (o) and not to those by party grieved; it extends, however, as it seems, (p) to subsequent penal statutes as well as to those which were in being when it was made. A common informer cannot sue for a less penalty than the statute gives; (q) if he do, though he has a verdict, judgment will be arrested: *e. g.* if a common informer were to sue for the single value of money won at play, the statute (r) giving the treble value. The exceptions in the enacting clause of the statute, which creates the offence, must be negatived by the plaintiff in his declaration; (s) but if there be a separate proviso, although in the same section, (t) that need not be negatived in declaration, but is matter of defence, and the other party must show it to exempt himself from the penalty. (1)

Of the Pleas to Actions, founded on Penal Statutes.—A saving proviso may be given in evidence on the general issue; because if the party is within the proviso, he is not guilty on the body of the act on which the action is founded; but another statute, whereby the defendant is exempted or discharged from the penalty, must be pleaded, and cannot be given in evidence on the general issue. (u) So a recovery in another action for the same offence must be pleaded specially, (x) in order to give the plaintiff an opportunity of replying *nul tiel record*, or that it was a fraudulent recovery; and in pleading this plea, care must be taken to set forth that the plaintiff in the other action had priority of suit; otherwise the plea will be bad on demurrer. (y) (2) To this plea of

(o) *Doghead's case*, 2 Leon. 116; 2 Hawk. P. C. 279. See also s. 6, of the statute.

(p) *Pie's case*, Hutt. 35.

(q) *Cunningham v. Bennet*, 1 Geo. I. C. B. Bull. N. P. 196.

(r) 9 Ann. c. 14.

(s) *Spiers v. Parker*, 1 T. R. 141.

(t) *Steel v. Smith*, 1 B. & A. 94. [See *Sheldon v. Clark*, 1 Johns. Rep. 513; *Barnet v. Hurd*, 3 Id. 438; *Teel v. Fonda*, 4 Id. 304; *Hart v. Ellis*, 8 Id. 41; *contra*, *Plasdale v. Hewitt*, 3 Caines' Rep. 137.]

(u) Gilb. Evid. 6; *Thibault, q. t., v. Gibson*, 12 M. & W. 88.

(x) *Bredon, q. t., v. Harman*, E. 12 Geo. II. C. B. London Sitings, Eyre, C. J., Str. 701.

(y) *Jackson v. Gisling*, T. 15 Geo. II. Bull. N. P. 197.

(1) A party seeking to recover a penalty must show a case clearly within the statute. *Allaire v. Howell*, Co. 2 Green, 22. In suit for a penalty by the party aggrieved, damages may be recovered for the detention. *Secus*, if by a common informer. *Ritchie v. Shannon*, 2 Rawle, 196. An action does not lie in Ohio to enforce a penal statute of a sister state. *Indiana v. John*, 5 Ohio, 218. In debt on the statute imposing a penalty for falsely, corruptly, and wilfully certifying the attendance of a witness: Held, sufficient to prove the certificate was false, and that it lay on defendant to show it was not corrupt and wilful. *Chesley v. Brown*, 2 Fairf. 143.

(2) The person who first commences a *qui tam* action, attaches a right in himself to the penalty, which cannot be divested in a subsequent suit, brought by any other common informer; though judgment has been first recovered in such subsequent suit, and though the act declares that a recovery for the penalty shall be a bar to all prosecutions for the same offence; for this is to be construed in regard to a recovery in the suit first commenced. *Bradestone v. Sprague*, 6 Johns. Rep. 101. Not guilty, or *nul debet*, is a good plea. Buller, N. P. 197, cites Hob. 218.

a prior recovery,(z) the plaintiff may reply that the recovery was had by covin ; and if the covin be found, the plaintiff shall recover, and the defendant shall be imprisoned for two years. No release of any common person shall be available to discharge a popular action. The defendant cannot plead several matters to an action on a penal statute,(a) because the stat. 4 Ann. c. 16, (which(b) enables defendant to plead several matters,) contains a proviso that nothing in the said act shall extend to actions on any penal statute.

In an action on a penal statute,(c) it was moved by the defendant that the plaintiff should give security to pay the costs, upon *affidavit that he was a poor man. But the court refused the [*632] motion ; for the statute having given him power to sue, it is a debt due to him ; but if it appeared that the action was brought in a feigned name, they would oblige the real prosecutor to give security. The court will grant a new trial, after verdict for defendant, in a penal action, *on account of a mistake or misdirection of the judge ;*(d) but where the case is properly left to a jury, although they should draw a wrong conclusion, the court will incline against disturbing the verdict.

X. *Debt on Stat. 2 Geo. II, c. 24, Bribery at Elections. p. 632; Provisions of the Statute. p. 633; Stat. 49 Geo. III. c. 118. p. 635; Declaration. p. 636; Evidence. p. 638; Stat. 7 & 8 Will. III. c. 4, Treating Act. p. 640; 7 & 8 Geo. IV. c. 37, Penalty for giving Ribbons or Cockades. p. 642; 4 & 5 Vict. c. 57, Dispensing with Proof of Agency in the first Instance upon Questions of Bribery before Committees. p. 642.*

Wherever a person is bound by law to act without any view to his own private emolument, and another, by a corrupt contract, engages such person, on condition of the payment or promise of money, or other lucrative situation, to act in a manner which *he* shall prescribe, both parties are, by such contract, guilty of bribery.(e) There are not any traces either of action or prosecution for bribery in elections of members of parliament, in the annals of Westminster-hall,(f) until after the legislature inflicted particular penalties for this kind of bribery by stat. 2 Geo. II. c. 24. Informations for this offence were not granted until about the time of the general elections in 1754 ; and the first case, in which an information at common law for this offence was prosecuted with effect, was the case of *R. v. Pitt*, T. 2 Geo. III. B. R. 3 Burr. 1335 ; 1 Bl. R. 380, S. C.(1) From the nature of this work, the follow-

(z) Stat. 4 Hen. VII. c. 4.

(a) *Heyrick v. Foster*, 4 T. R. 701.

(b) See sect. 4.

(c) *Shinley v. Roberts*, Bull. N. P. 196, 7.

(d) *Wilson v. Rastall*, 4 T. R. 753 ; *Calcraft v. Gibbs*, 5 T. R. 19, S. P.

(e) 2 Doug. Controv. Elections, 400.

(f) *Id.*

(1) In this case, the defendant having been convicted and brought up for judgment, a doubt was raised as to the judgment which the court could or ought to give ; the time limited for prosecution, by stat. 2 Geo. II. c. 24, s. 11, (*viz.*, two years,) not having expired. The court (after consideration,) ordered the defendant to be imprisoned for a short term,

[*633] ing remarks will necessarily be *confined to stat. 2 Geo. II. c. 24.

By the 7th section, (g) "If any person having or claiming to have a right to vote in the election of any member or members to serve for the commons in parliament, shall ask, receive, or take any money, or other reward, by way of gift, loan, or other device; or agree or contract for any money, gift, office, employment, or other reward to give his vote, or to refuse or to forbear to give his vote, in any such election, or if any person by himself, or any person employed by him, shall by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt or procure any person to give or to forbear to give his vote in any such election, such person shall for every offence forfeit the sum of 500*l.*, to be recovered, with costs, by action of debt in any of the king's courts of record at Westminster." By a. 8, "If any person offending against this act shall, within twelve months next after the election, discover any other offender, so that he be thereupon convicted, the discoverer (not having been before that time convicted of any offence against this act) shall be indemnified and discharged from all penalties and disabilities which he shall then have incurred by any [*634] offence against this act." (1) If a person give or *promise money or other reward to a voter, in order to procure his vote for one candidate, although the voter afterwards vote for another candidate, the penalties of the statute are incurred by the corrupter. In an action of debt on this statute, the declaration (h) charged that the defendant corrupted one M. to vote for Lord V. and Sir R. B. (two of the

(g) Stat. 2 Geo. II. c. 24, s. 7.

(h) *Sulston v. Norton*, 3 Burr. 1235.

observing, that in inflicting this punishment they had paid regard to the circumstance of the limited time for prosecuting upon the statute not being expired. The definitions on the subject of bribery in Sir E. Coke, Hawkins, and other writers on the pleas of the crown, extend to the corruption of persons in judicial offices only. Mr. Douglas ascribes the silence of these writers on the subject of bribery at elections of members of parliament, to fear, on the part of the judges, (at the time when this species of bribery first prevailed,) that by exercising a jurisdiction over this offence, they should invade the privileges and judicial powers of the House of Commons. It was, however, remarked by Lord Mansfield, C. J., delivering the opinion of the court in *R. v. Pitt*, 1 Bl. R. 383, that bribery at elections, taken generally, was and still is punishable at common law; that the statute itself, (2 Geo. II. c. 24, s. 7,) supposed it to remain punishable at common law by the words, "or any otherwise lawfully convicted." But it did not follow, of course, that the court was obliged, *ex debito iustitiæ*, to grant information for bribery at elections of members, since the stat. 2 Geo. II., which inflicts such very severe penalties. He added, that whether the court would ever hereafter grant information for this offence until the time of limitation was expired, would be a matter of future consideration. In *R. v. Haydon*, 3 Burr. 1387; 1 Bl. R. 404, S. C., the judgment was respited until the limited time was expired, and then the court imposed a fine upon the defendant, and ordered him to be imprisoned.

(1) A verdict having been found at the assizes against the defendant, upon the 7th section of this statute, for corrupting certain voters: the defendant, at the beginning of the term next following the assizes, moved, that judgment upon the *postea* might be stayed, on the ground of his having entitled himself to the benefit of the 8th section, by having made a discovery of another person offending against the statute, who had been convicted thereof on his (the defendant's) evidence; but the court rejected the application, observing, that this was not a case wherein they ought to interpose at all upon motion. *Pugh v. Curgiven*, 3 Wils. 35.

candidates,) by *giving* him a sum of money. The fact was, that M. did not vote for Lord V. and Sir R. B., but for their opponents: whereupon it was objected, that the defendant, as he did not by any corrupt agreement procure M. to vote for Lord V. and Sir R. B., could not be said to have corrupted him so to do; but the court overruled the objection, on the authority of *Bush v. Rawlins*,⁽¹⁾ observing, "that the offence was completely committed by the corrupter, whether the party bribed should afterwards perform his promise or break it."⁽²⁾ And according to the opinion of two judges in *Henslow v. Fawcett*, 3 A. & E. 51, the offence is completely committed by the corrupter, although the party bribed never intended to vote for the person, on whose behalf the money was given, if the money was given and professedly accepted on the terms that he should so vote.

If a person, without any previous agreement,⁽ⁱ⁾ takes a sum of money, after the election is over, for *having given* his vote for a particular candidate, this is not an offence *within the foregoing statute*. To an action of debt on the statute the defendant pleaded *nil debet*;^(k) after verdict for the plaintiff, the defendant applied to the court to stay further proceedings. The grounds of the application will appear from a statement of the case, which was as follows: The defendant, on the 16th of March, had received a bribe from one Earle, and on the same day made a discovery of Earle to J. S. (an attorney and commissioner to take affidavits,) accompanied with an affidavit of the fact; whereupon an action was brought by one *Bingley* against *Earle*, and he was served with the writ in that action on the 19th of March. Two months afterwards the present action was commenced, and the defendant was served with process therein on the 18th of May. The two causes of *Bingley v. Earle* *and *Sutton v. Bishop* were set down for [*635] trial, at the assizes, on the same day; but, the cause of *Sutton v. Bishop* standing first, the judge would not invert the order, and try the cause of *Bingley v. Earle* first, although that action was commenced first. The consequence was, that Sutton obtained a verdict against Bishop. Bingley, on the other hand, had a verdict against Earle, upon the evidence of Bishop; but this verdict came too late for Bishop to avail himself of it at the trial, for a verdict had already been given against him. The court were of opinion that, under the circumstances of this case, Bishop was to be deemed a discoverer, within the meaning of the 8th section; for it was not intended that the discoverer should be plaintiff in the cause wherein the discovery was made; because, if no other witness, there could not be a verdict. It was agreed, however,

(i) *Lord Huntingtower v. Gardiner*, 1 B. & C. 297.

(k) *Sutton v. Bishop*, 4 Burr. 2283.

(1) In which case it was resolved, that the *giving* a bribe to a person to forbear voting, was an offence, although such person did not forbear to vote, but actually voted for the opposite candidate. See the case in Sayer's Rep. 289, by the name of *Bush v. Ralling*.

(2) See remarks on this case in Simeon's Law of Elections, 2d edit. 207, 208. *Sulston v. Norton* was recognized in *Henslow v. Fawcett*, 3 A. & E. 57, 8.

by *Yates Aston*, and *Willes, Js.*,⁽¹⁾ that there could not be a new trial the verdict being right: and that judgment could not be arrested, there not being error on the record. At all events, the party must proceed to enter up judgment in *Bingley v. Earle*, before any thing could be done by the court; for the term "convicted" did not mean convicted by verdict only, but by verdict followed up by judgment. At length it was resolved, that further proceedings should be stayed by a special rule, stating the particular circumstances of the case.⁽²⁾

The giving or promising money or office in order to procure the return of members, if not given to some person having a right, or claiming to have a right, to act as returning officer, or to vote at such election, not having been deemed bribery within the meaning of the preceeding statute, such gifts being contrary to the freedom of elections, it was by stat. 49 Geo. III. c. 118, [19th June, 1809,] for the better securing the independence and purity of parliament, enacted and *declared*, that any person giving, or causing to be given, directly or indirectly, or agreeing to give, any sum of money, gift, or reward, to any person, upon any agreement, that such person, to whom such gift or promise should be made, should, by himself, or by any other person at his solicitation or command, procure, or endeavour to procure, the return of any person to serve in parliament for any county, &c., or place, should, if not returned himself to parliament for such county, &c., for every such gift or promise, forfeit one thousand pounds; and the person so returned,

and so having given, or so having promised to give, or know-
[*636] ing of and consenting *to such gifts or promises, upon any such agreement, should be disabled and incapacitated to serve in that parliament for such county, &c., and deemed and taken to be no member of parliament, and enacted to be, to all intents and purposes, as if he had never been returned and elected; and any person receiving or accepting, himself, or by any other person in trust for or to his use, any such sum of money, gift, or reward, or any such promise upon any such agreement, should forfeit to his Majesty the value and amount of such sum of money, gift, or reward, over and above the sum of five hundred pounds. The same section prescribes the mode of recovering the sums forfeited, with costs of suit, by action of debt, bill, plaint, or information, in any of the king's courts of record.

Of the Declaration.

The declaration on the stat. 2 Geo. II. c. 24, sets forth, by way of inducement, the name of the county, city, or borough, where the election took place, and the number of members that it has been accustomed to send to parliament, specifying them as knights, citizens, or burgesses; it then proceeds to aver the issuing of the writ out of Chancery, for the election of members to serve in parliament, a copy of which is set forth;

(1) Lord *Mansfield*, C. J., was attending the House of Lords in the *Douglas* cause.

(2) Similar difficulties arose in the case of *Petrie v. White*, 3 T. R. 5, and *post*, 637, where an application was made for relief, founded on the 11th section of this statute, the plaintiff having been guilty of wilful delay. The court, on the authority of *Sutton v. Bishop*, stayed the proceedings by rule.

and in this part of the declaration, care must be taken that there be not a variance between the writ set forth and that produced in evidence. The delivery of the writ to the sheriff is then averred, and in some cases, the precept of the sheriff to the returning officer, to proceed to an election. It is not necessary to set out the precept, or to state that the precept was returned.^(l) The declaration then proceeds to state the election by virtue of the writ, and the names of the candidates, concluding with a precise allegation of the offence, which renders the parties liable to the penalties of the statute; and here, the general rule of pleading must be observed, *viz.* that the charge must be laid with sufficient certainty, so that the party accused may be enabled to defend himself, or have the benefit of pleading it in bar to another action for the same offence; consequently the nature and amount of the bribe must be set forth: for where, in an action on this statute, the declaration merely stated, "that the defendant received a gift or reward,"^(m) without specifying the nature of the bribe, whether money or goods; after verdict for plaintiff, judgment was arrested, on the ground that the charge was not laid with sufficient certainty. It is not necessary to allege in the declaration,⁽ⁿ⁾ that the party corrupted gave his vote, or forbore to give it, in consequence of the bribe. The eleventh section of the stat. 2 Geo. II. c. 24, provides, "That no person shall be made liable to any incapacity, disability, forfeiture, or penalty, by this act imposed, unless prosecution be commenced *within [*637] two years after such incapacity, &c., shall be incurred; or, *in case of a prosecution, the same be carried on without wilful delay.*" The stat. 9 Geo. II. c. 38, after reciting the preceding section, and also reciting that prosecutions may be commenced by suing out writs against the persons so offending, within two years after incurring any incapacity, &c., imposed by that act, and the person so suing out such writs may delay to serve the same without giving the person sued any notice thereof, by reason of which practice, the said provision for limiting the time of the prosecution of persons so offending may be evaded; for explaining and amending the said provision, enacts, "That no person shall be made liable to any incapacity, &c., unless such person has been, or shall be actually and legally arrested, summoned, or otherwise served with any such original or other writ or process, within the space of two years after any offence against the said act has been or shall be committed."

It may be remarked, that this section of the 9 Geo. II. c. 38, explains the first part of the eleventh section of the 2 Geo. II. c. 24; but, at the same time that it explains part of that clause in favour of the party prosecuted, it does not deprive such party of the advantage of that defence, which was introduced in the second branch of that proviso, and which relates to the wilful delay in the carrying on of prosecutions. An act of bribery was committed in September, 1780.^(o) An action of debt was brought for this offence, on the stat. 2 Geo. II. c. 24. The declaration was delivered in May, 1782; to which the general issue

(l) *Mead v. Robinson*, Willes, 422.

(m) *Davy v. Baker*, 4 Burr. 2471.

(n) *Bush v. Rawlins*, B. R., T. 29 & 30 Geo. II., Say. Rep. 289.

(o) *Petrie v. White*, 3 T. R. 5.

was pleaded in Trinity Term, 1782; in which term the plaintiff gave notice of trial for the next summer assizes; but the record was not carried down to trial until the summer assizes, 1788, when it was tried, and a verdict given for the plaintiff. In Michaelmas Term following, the defendant obtained a rule for staying all further proceedings; which rule was made absolute in the next term: the court being of opinion; 1st, that as the plaintiff had not assigned any reason for the delay, such delay must be considered wilful within the meaning of the eleventh section of the stat. 2 Geo. II. c. 24; 2nd, that the defendant might take advantage of the delay, by an application to the court on motion; although, by this proceeding, the objection would not appear on the record, but the judgment of the court could not be reviewed in a court of error; 3dly, that although the defendant might have claimed the benefit of the statute at an earlier stage of the cause, yet he was still entitled to it, because the application might be made at any time before judgment, the legislature having said, that if one party be guilty of a wilful delay, the other party should not be punished. It was to be considered, therefore, not as a matter of favour, but of justice and of law, that the plaintiff should not recover.

[*638]

*Evidence.

As by the eleventh section of the stat. 2 Geo. II. c. 24, proceedings for the recovery of any penalty must be commenced within two years after penalty incurred, it is incumbent on the plaintiff to show that the action was commenced within that period; either by the record, or in case it does not appear on the face of the record that the action was commenced within the limited period, then by the production of the writ.

In an action on this statute against the defendant, (p) for corrupting a voter at the election of members of parliament for the borough of Heydon in Yorkshire, the declaration alleged the issuing of the precept to the returning officer, but did not state that such precept was returned. To prove the issuing of the precept, the under-sheriff produced the precept itself, under the sheriff's seal of office, together with the indenture; which indenture, without the precept, had been returned with the writ by the sheriff, the under-sheriff proving the practice there to be, not to return the precept together with the indenture. It was objected, on the part of the defendant, that the precept ought to have been returned with the indenture, and filed in chancery; and that a copy of the precept on record ought to have been produced. But the court overruled the objection, observing, that it was not laid in the declaration that the precept was returned, but only that such precept issued; and, therefore, they were of opinion, that the evidence produced was sufficient. In an action for bribery, (q) the declaration stated the precept to have been

(p) *Mead v. Luke Robinson*, Willes, 425.

(q) *Cuming v. Sibley*, C. B., E. 9 Geo. III., cited by *Buller, J.*, in *King v. Pippot*, 1 T. R. 239.(1)

(1) This case was afterwards brought before the Court of King's Bench, by writ of error, on the ground that the judgment had been entered for damages, as well as the

directed to the *mayor only*, but the precept, which was proved, was directed to the mayor *and burgesses*; the question was, whether the precept that was proved supported the declaration? The Court of Common Pleas was of opinion that it did, and gave judgment for the plaintiff. So where the declaration stated the precept to have been directed to the bailiffs and jurats of S.,^(r) but the precept produced in evidence was directed to the bailiff (in the singular number), and jurats; it was holden, on the authority of the preceding case, that the variance was immaterial. So where in an action on this statute,^(s) the *declaration recited the writ to the sheriff for the election of [*639] members to serve in parliament, and then proceeded to state that the sheriff *made his precept* to the portreeve of the borough of Honiton, which concluded in these words: "and *if* the said election so made, distinctly and openly, under the seal of the portreeve, and the seals of those who should be present at such election, the said portreeve should certify to the said sheriff, so that the said sheriff should certify to his said Majesty, in his said Majesty's Chancery, at the day and place aforesaid, without delay, remitting to the said sheriff one part of the aforesaid indentures, so that the said sheriff might remit the same to his said Majesty, annexed to his Majesty's writ." The precept, when produced at the trial, had not the word "if;" upon which *Eyre*, Baron, nonsuited the plaintiff for the variance. But the Court of King's Bench set aside the nonsuit; and *Buller*, J., said, "The declaration in this case is much longer than it need have been. There is not any necessity to set out the precept; but being set forth, the question is, whether the variance be or be not material? I think it impossible for any person to read this part of the declaration without knowing what it should be; every one must see by it that the portreeve is absolutely to certify to the sheriff, &c. The insertion of the word 'if' is a mere mistake. The sense of the precept, as stated in the declaration, is the same as that which was proved; it commands the returning officer to proceed to an election. Therefore, as this is not a variance in sense, I am of opinion that the nonsuit should be set aside." The original^(t) precept from the sheriff to the returning officer of a borough to proceed to an election is admissible to prove that such a precept issued; so an examined copy^(u) of the precept of the returning officer taken from the original at the Crown-office is also sufficient evidence of the precept; for the regular course is for the sheriff to annex the precept to the indentures, so as to form a part of the return. A copy of the poll taken at an election for members of parliament,^(x) examined with the original, and signed by the returning officer, is admissible evidence; for being signed by the officer, it may be considered as an original; or if it be a signed copy, it is admissible in evidence as

(r) *Warre v. Harbin*, 2 H. Bl. 113.

(t) *Mead v. Robinson*, Willes, 422.

(u) *Webb v. Smith*, 4 Bingh. N. C. 373.

(s) *King v. Pippet*, 1 T. R. 235.

(x) *Mead v. Robinson*, Willes, 424.

debt; whereas, damages could not be given in a popular action for detention of the debt, no interest attaching in the plaintiff before action brought; and of this opinion were the court, who directed the judgment to be reversed, both as to the damages and the costs, which were incorporated with the damages. 4 Burr. 2489.

such, on the same ground as copies of books of a public nature, registers of births, marriages, burials, &c.(1) If A. applies to B. who has not any right to vote, and bribes him to vote for C. and D., and B. actually gives his vote for them, A. is equally guilty under this statute, [*640] as if B. had been entitled to vote : for the words of the *statute are, “any person who hath, or *claimeth to have*, a right to vote.” Hence, where the declaration charged that A. B. had a right to vote, and did vote;(y) and it was proved that A. B. voted, and that his name was entered upon the poll, and that the defendant gave him money for his vote; but it was not proved that A. B. had a right, the court of B. R. held the evidence conclusive against the defendant. So where in the declaration it was stated, that the defendant corrupted one P. B., *having a right to vote*, in the election, to give his vote for certain candidates,(2) and it was proved that P. B. did actually vote, but there was not any evidence given of his right to vote; the court were of opinion, that it was not necessary either to allege in the declaration, or to prove, that the person corrupted had a right to vote;(3) that the giving money to a person for his vote, and he standing by the presiding officer(z) at the election and giving his vote, which is received and not objected to, or controverted, is evidence, of the party bribed having a right, proper to be left to a jury; although it be not conclusive evidence of such right; and on the authority of the preceding case of *Comb v. Pitt*, the court gave judgment for the plaintiff.

Stat. 7 & 8 Will. III. c. 4, Treating Act. p. 640; 7 & 8 Geo. IV. c. 37, Penalty for giving Ribbons or Cockades. p. 642; 4 & 5 Vict. c. 57, dispensing with Proof of Agency in the first Instance upon Questions of Bribery before Committees. p. 642.

By the first clause of the statute 7 & 8 Will. III. c. 4, (commonly known by the name of the Treating Act,) it is enacted, “That no person hereafter to be elected to serve in parliament for any county, city, town, borough, port, or place, within England, Wales, or Berwick-upon-Tweed, after the teste of the writ of summons to parliament, or after the teste or the issuing out or ordering of the writ or writs of election, upon the calling or summoning of any parliament, or after [*641] any such place becomes vacant, shall by himself, *or by any other means on his behalf, or at his charge, before his election, *directly or indirectly*, give, present, or allow, to any person, having voice and vote in such election, any money, meat, drink, entertainment,

(y) *Comb v. Pitt*, cited in *Rigg v. Curgenvven*, 2 Wils. 398.

(z) *Rigg v. Curgenvven*, 2 Wils. 395.

(1) In *Rex v. Hughes*, H. 1 Geo. II. B. R. (cited Willes, 424,) the copy of the poll of the election of a mayor, was holden to be good evidence.

(2) It was not alleged that the party bribed gave his vote; nor, indeed, is such allegation necessary. See *ante*, tit. “Declaration,” 636, *Bush v. Rawlins*.

(3) So, in *Lilly v. Corne*, Worcester Sum. Ass. 1774, MSS., *Burland*, B., held, that it was immaterial whether the party corrupted had a right to vote or not, as the corrupter thought he had, and the party corrupted claimed to have a right to vote, although upon discussion of his right afterwards, it should turn out that he had none.

or provision, or make any present, gift, reward, or entertainment, or shall, at any time hereafter, make any promise, agreement, obligation, or engagement to give or allow any money, meat, &c., to or for any such person in particular, or to any such county, city, &c., in general, or to or for the use, advantage, employment, profit, or preferment of any such person or place, in order to be elected, or for being elected to serve in parliament for such county, city, &c.” An action was brought by an innkeeper against two candidates^(a) (at an election of representatives in parliament for the borough of Ipswich) upon a bill for provisions furnished to the voters. The bill consisted of three description of charges: 1st, for provisions furnished before the *teste* of the writ; 2nd, for ditto after the *teste* of the writ to voters resident in the borough; 3rd, for ditto to voters not resident in the borough. The defendants paid money into court sufficient to cover the charges of the first and last descriptions; a verdict having been found for the plaintiff, a motion was made for a new trial, on the ground of a part of the cause of action being illegal, by the above mentioned statute. The court made the rule for a new trial absolute; *Eyre*, C. J., observing, that the contract was bottomed in *malum prohibitum*, and consequently the court could not enforce it. The legislature had drawn a strict line which was not to be departed from; it is said, that after the *teste* of the writ, no meat or drink should be given to the voters by the candidate; and that being the case, the court could not give any assistance to the plaintiff, consistently with the principles which had governed the courts of justice at all times. The counsel for the plaintiff having urged, that part of the provisions having been furnished to voters resident at a distance from the borough, and a verdict being good as to that part of the demand, the plaintiff might apply the money paid into court to any other part which he might think proper; *Eyre*, C. J., in answer to this argument, said that such payment was an admission of a *legal* demand only, and the court could not allow it to be applied to an illegal account. It is to be observed, that although, in the foregoing case, money was paid into court to cover the demand for provisions furnished to non-resident voters, yet the statute makes no difference between resident and non-resident voters. Hence an action cannot be maintained by an innkeeper against a candidate for provisions supplied to non-resident, any more than to resident voters, *after the test of the writ.*^(b) No transaction falls within the provision of this act, unless the candidate, either in his own person, or by some person acting for him and on his behalf, has some share^(c) in the *transaction. Hence, where [*642] the supporters of a candidate gave orders to the landlord of a public-house, opened by the committee of the candidate, to supply voters with refreshments during the *election*, which were supplied on the credit of those who gave the orders; it was holden,^(d) that the landlord might recover against those who gave the orders; for the case was not within the Treating Act.

(a) *Ribbans v. Crickett and another*, 1 Bos. & Pul. 264.

(b) *Lofhouse v. Wharton*, Durham Ass. 1808, cor. Wood, B., 1 Campb. 550, n.

(c) *Hughes v. Marshall*, 2 Cr. & J. 118.

(d) *Hughes v. Marshall*, 2 Cr. & J. 118; *Thomas v. Harries*, 6 C. & P. 615, S. P., *Parks*, B.

By stat. 7 & 8 Geo. IV. c. 37, after reciting that it is expedient to make further regulations for preventing corrupt practices at elections of members to serve in parliament, and for diminishing the expense of such elections, by sect. 2, it is enacted, that no person to be hereafter elected to serve in parliament shall, after the teste of the writ of summons, or after such place becomes vacant in time of parliament, by himself or agent, directly give or allow to any person having a vote at such election, or to any inhabitant of the county, city, town, borough, port or place, any cockade, ribbon, or other mark of distinction; and by sect. 8, any person so giving or allowing, shall, for every such offence, forfeit the sum of 10*l.* to such person as shall sue for the same in any of his Majesty's courts of record, by action of debt.

By stat. 4 & 5 Vict. c. 57, whenever any charge of bribery shall be brought before any select committee of the House of Commons appointed to try and determine the merits of any return or election of a member to serve in parliament, the committee shall receive evidence upon the whole matter whereon it is alleged that bribery has been committed; neither shall it be necessary to prove agency, in the first instance, before giving evidence of those facts whereby the charge of bribery is to be sustained.

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*CHAPTER XV.

DECEIT.

I. OF THE ACTION ON THE CASE IN NATURE OF DECEIT.

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I. *Of the Action on the Case in Nature of Deceit.*

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1. *On an implied Warranty.* (1)—AN action on the case, in nature

(1) "By the civil law every person is bound to warrant a thing that he sells or conveys, although there be no express warranty: but the common law binds him not, unless there be a warranty, either in deed or in law; for *caveat emptor*." 1 Inst. 102, a. No custom or usage is admissible to show that the sale of any particular article implies a warranty of the goodness of that article. A custom cannot be permitted to control the general rules of law. *Thompson v. Ashton*, 14 Johns. Rep. 316. In South Carolina, it is held, that a sale for a sound price, implies a warranty, which extends to all faults known or unknown to the seller. *Barnard v. Yeates*, 1 Nott & M'C. 142; *Lester v. Graham*, 1 Rep. Con. Ct. 132; *Misroon v. Waldo*, 2 Nott & M'C. 76, &c.

of deceit, may be maintained for the breach of an implied warranty; as if a merchant sell cloth to another, *knowing* it to be badly fulled; (a) so if an innkeeper sell wine as sound and good, which he knows to be corrupt, although there be not any express warranty, yet an action on the case in nature of deceit, will lie against him; because it is a warranty in law. (b) (1) In cases of *this kind, [*644] however, which are grounded merely on the deceit, it is essentially necessary that the knowledge of the party, or, as it is technically termed, the *scienter*, should be averred in the declaration, and also proved. (2)

(a) 9 Hen. VI. 53, b.; 1 Rol. Abr. 90, (P.) pl. 3; *S. C.*, cited by *Lawrence, J.*, in *Parkinson v. Lee*, 2 East, 323.

(b) Adm. 9 Hen. VI. 53, b.

(1) "Is it not true, that in every bargain there is a covenant? for, if I buy of you a horse, although there be not an express warranty of soundness, yet if the horse be unsound, I shall have a writ of trespass on my case, and shall aver that you sold me the horse, *knowing* it to be unsound." Per *Paston, J.*, 20 Hen. VI. 35, a. It seems, that by the term "covenant," in this passage, must be understood *implied promise, or warranty*. Where a person, with a design to deceive and defraud another, makes a false representation of a matter, by which the party to whom the representation is made enters into a contract, and sustains an injury thereby, an action on the case in the nature of deceit, will lie at the suit of the party injured against the party making the fraudulent representations, although a stranger to the contract which the plaintiff entered into, by which he was injured. *Weatherford v. Fishback*, 3 Scam. 170. In an action founded on deceit, to entitle the plaintiff to recover, both fraud and damage must be proved. The suggestion of falsehood and the suppression of truth, though an injury may thence result, will not afford sufficient ground for such an action, unless such immoral conduct has proceeded from a fraudulent motive, and was intended to produce an injury. *Munro v. Gardiner*, 3 Brev. 31. In an action on the case for a fraud, the declaration must show that the plaintiff has been damaged by the deceit of the plaintiff. *Ide v. Gray*, 11 Verm. 615. Where no loss is occasioned by a falsehood, an action for deceit will not lie; nor where ordinary prudence would have prevented the deception. *Farrar v. Alston*, 1 Dev. 69; *Moore v. Lurberville*, 2 Bibb, 602.

(2) In an action on the case for deceit in the sale of India rubber shoes, the plaintiffs introduced evidence that the boxes containing the shoes were piled in an inconvenient place, and apparently so arranged as to prevent a fair and full examination. It was held, that in answer to this, the testimony of a witness was admissible, that he had examined the same shoes at about the same time, at the same place, and under the same circumstances, with a view to making a purchase; and that the defendants offered him every facility for a full examination. *Salem India Rubber Co. v. Adams*, 23 Pick. 256. In an action for deceit in the sale of goods, parol proof of a warranty, not contained in the written contract, is only competent as evidence of representation. *Ib.* Where the fact of a false and fraudulent warranty constitutes the gist of the action, it is not necessary to prove a *scienter*, although the plaintiff declares in *tort*. *McLeod v. Tutt*, 1 How. Miss. 288. A vendor is liable in an action of deceit, for false representations as to the title or qualities of a chattel sold by him; but no action for a cheat has ever been maintained by a seller against a purchaser, for the misrepresentations of the latter upon these points. *Setza v. Wilson*, 4 Iredell, 501. In an action for deceit, it is for the jury to decide on the *scienter*. *Wood v. Vane*, 1 N. & M. 197.

"In the sale of provisions for domestic use, there is an implied warranty of freshness. *Van Bracklin v. Fonda*, 12 Johns. R. 468; *Moses et al. v. Mead et al.*, 1 Denio's R. 378; *S. C.*, 5 Id. 617; but the circumstances of the sale may be such, that there will be no implied warranty; as where the vendor, equally with the vendee, relies upon the brand of the inspector, or the goods are not sold for consumption; *Emerson v. Brigham*, 10 Mass. R. 197; *Jones v. Murray, &c.*, 3 Monr. R. 83; *Moses et al. v. Mead et al.*, 1 Denio's R. 378; *S. C.*, 5 Id. 617; and generally, wherever articles are sold for a particular use or purpose, there is an implied warranty that they are fit for that purpose; *Brenton v. Davis*, 8 Blackf. R. 89; *Otto v. Alderson*, 10 Smed. & Mar. R. 480; *Singleton's Adm'r v. Kennedy*, 9 B. Monr. R. 222; *Beals v. Olmstead*, 24 Verm. R. 114; but where there is no fraud in the seller, neither *suppressio veri* nor *suggestio falsi*, and the purchaser is in possession of all the

1. The scienter must be averred in the declaration :

For where in an action on the case, in nature of deceit, (c) it was

(c) *Dale's case*, Cro. Eliz. 44.

information necessary to enable him to make a correct estimate of the value of the thing he is about to purchase, or which, from its nature, would occur to an ordinary observer, the law will not raise an implied warranty on the part of the seller, that it shall answer the purpose for which the purchaser bought it. *Carnock v. Gould*, 1 Bail. R. 179.

"Where a purchase is made without an examination, or an opportunity for it, it seems that there is an implied warranty that the thing sold shall be merchantable. *Gallagher et al. v. Waring*, 9 Wend. R. 20; *S. C.*, 18 Id. 425; *Howard et al. v. Hoery*, 23 Id. 350. And there may be an implied warranty by custom; but it must be either a general usage, or both plaintiff and defendant must be acquainted with the custom, in order to raise the warranty. *Stevens v. Smith*, 21 Verm. R. 90. Where it is customary to examine an article before shipping it away, it has been held, that the purchaser who neglects to do so admits the quality to be good. *Vanderhost & Co. v. McTaggart*, 2 Bay's R. 498; and see *Thompson v. Ashton*, 14 Johns. R. 316."

"Where an express warranty has been given, it does not matter whether the seller knew of any unsoundness in the chattel sold or not, for in either case he will be responsible. *Kimmel v. Lichty*, 3 Yeat. R. 262; *Smith v. Williams*, 1 Car. L. Rep. 263, n.; *Ricks' Adm'r v. Dillahanty*, 8 Port. R. 134; *Beeman v. Buck*, 3 Verm. R. 53; *Carley v. Wilkins*, 6 Barb. R. 557; *Tyre v. Causay*, 4 Harring. R. 425; *Bartholomew v. Bushnell*, 20 Conn. R. 271; *Trice v. Cochran*, 8 Gratt. R. 442. Such a warranty, however, does not extend to anything not included within its terms. *Porcher ads. Caldwell*, 2 M'Mull. R. 329; *Stuckey v. Clyburn*, Cheeves, L. & Eq. R. 186; *Rodrigers ads. Habersham*, 1 Spears, R. 314; *McLaughlin v. Horton*, 1 Hills, (S. C.) R. 383; *Wood, Adm'r, v. Ashe*, 1 Strobb. R. 407. Thus, a warranty of quality is no warranty of value; *Lightburn v. Cooper*, 1 Dana's R. 274; nor will one of title extend to soundness; *Smith, &c., v. Miller*, 2 Bibb's R. 617; *Wells v. Spears*, 1 M'C. R. 421; *Hughes ads. Banks*, Id. 537; nor will quantity cover quality; *Jones v. Murray*, 3 Monr. R. 83; *Laymon v. Mitchell et al.*, 1 Md. C. Decis. 496; but in those places where a sound price implies a sound article, an express warranty of title will not exclude an implied warranty of soundness. *Roderiques ads. Habersham*, 1 Spears, R. 314; *Wells v. Spears*, 1 M'C. R. 421; *Wood v. Ashe*, 3 Strobb. R. 64. Even an express warranty will not extend to open and palpable defects. *Schuyler v. Russ*, 2 Caines' R. 202; *Long v. Hicks*, 2 Humph. R. 305; *Caldwell v. Smith*, 4 Dev. & Bat. R. 64; *Stucky v. Cluburn*, Cheeves, L. & Eq. R. 186; *Mulvany v. Rosenberger*, 6 Harris, R. 203. Hence, a wilful and fraudulent representation by the seller of a fire engine, that it was as good as another designated engine, and a warranty that it would perform as well as any other in the western country, is not to be considered violated because the warranted engine is inferior to others in the country, much larger and more costly, if the inferiority be evident to a common observer. *The President, &c., v. Wadleigh*, 7 Blackf. R. 102; but see *Wilson v. Ferguson*, Cheeves, L. & Eq. R. 190. In the case of *Ott v. Alderson*, 10 Smed. & Mar. R. 480, Judge Clayton, in speaking of warranties, uses the following language: 'On this subject, the general rule is, that the purchaser buys at his own peril, *caveat emptor*, unless the seller either give an express warranty, or unless the law imply a warranty from the circumstances of the case, or the nature of the thing sold; or unless the seller be guilty of fraudulent representations or concealment, in respect to a material inducement to the sale. No particular form of words is necessary to the creation of a warranty; any affirmation, or representation in relation to the article sold, is sufficient, if it be intended to have that effect. There is certainly a tendency in modern cases to extend the doctrine of implied warranty. . . . 1st. A warranty is implied that the seller has title. 2d. That the articles are merchantable, when from their nature or situation at the time of the sale, an examination is impracticable. This rule is most frequently brought into requisition where the seller is a manufacturer. 3d. Upon an executory contract to manufacture an article, or to furnish it for a particular use or purpose, a warranty will be implied, that it is reasonably fit and proper for such purpose and use, as far as any article of such kind can be. 4th. A warranty is implied against all latent defects, in two cases; first, where the seller knew the buyer did not rely on his own judgment, but on that of the seller, who knew, or might have known, the existence of the defects; and second, where a manufacturer or producer undertakes to furnish articles of his manufacture or produce in answer to an order. 5th. That goods sold by sample correspond with the sample in quality. Another exception to the rule, that a purchaser ordinarily buys at his own risk, is where the vendor has been guilty of fraudulent rep-

stated in the declaration, that the defendant had sold certain goods as his own goods, to the plaintiff, when in truth they were the goods of another person: it was holden, that this declaration would not maintain the action, for want of an averment, that the defendant sold the goods *sciens* that they were the goods of another person; and there was judgment for the defendant. So where the declaration stated, that the defendant being a goldsmith, (d) and having skill in precious stones, sold a stone, to the plaintiff for a sum of money, affirming it to be a Bezoar stone, whereas, in truth, it was not a Bezoar stone. After verdict and judgment for the plaintiff in B. R. it was adjudged, on error in the Exchequer Chamber, that the declaration was bad, because it was not averred, that the defendant *knew* it not to be a Bezoar stone, or that he warranted it to be a Bezoar stone. (1)

2. The scienter must be proved:

In an action on the case, (e) for selling a horse as defendant's own, when in truth it was the horse of A.; it appeared that the defendant bought the horse in Smithfield, but had not taken the usual precaution of having the horse legally tolled; yet as the plaintiff could not prove, that the defendant knew that the horse belonged to A., the plaintiff was nonsuited: for the scienter or fraud is the gist of the action where there is not a warranty; if *there be a warranty, then [*645] the party takes upon himself the knowledge of the title to the horse and also of his qualities. (2) So where the declaration stated, (f) that the plaintiff bargained with the defendant to buy of him a musket, as a sound and perfect musket, for the price of two guineas and a half, and that the defendant *knowing* the musket to be unsound and imperfect, sold the same to the plaintiff as a sound and perfect

(d) *Chandelor v. Lopus*, Cro. Jac. 4. [1 Smith's Lead. Cas. 76, notes by Am. eds. to 5th ed.]

(e) *Sprigwell v. Allen*, Aleyn, 91; 2 East's Rep. 448, n. (a), S. C.

(f) *Dowding v. Mortimer*, 2 East, 450, n. (a).

resentation or concealment. Williams on Personal Property, 434, Am. ed., note by Wetherell."

(1) At the time of this decision great strictness was required in the allegation of a warranty. It was then essentially necessary that it should appear on the face of the declaration, that the warranty was contemporaneous with the sale. The usual and correct form for this purpose was, that the defendant *warrantizando vendidit*. See Cro. Jac. 630. It was on this ground, and not on the ground of any distinction in terms between an affirmation and a warranty, as I conceive, that the court, in *Chandelor v. Lopus*, observed, that there was not an averment of warranty. It must be admitted, however, that the language of the reports (see *Harvey v. Young*, Yelv. 20,) countenances this distinction, frivolous as it may seem to modern readers. See further, on this subject, the opinions of Holt, C. J., in *Medina v. Stoughton*, Salk. 210; Ld. Raym. 593, S. C.; and of Buller, J., in *Pasley v. Freeman*, 3 T. R. 57. As to what would be sufficient evidence to support the *warrantizando vendidit*, see Holt's opinion, in *Lisney v. Selby*, Ld. Raym. 1120. See also, 1 Parsons on Contr. 463.

(2) It is to be observed, that actions on the case, for the breach of an express warranty, bear a strong resemblance to these actions on the case in the nature of deceit on implied warranties: but this distinction between them ought to be attended to; that in actions on the case in the nature of deceit, the *gravamen* is the deceit, and the gist of the action is the scienter; but in the action for breach of warranty, the *gravamen* is the breach of warranty; and where the plaintiff declares in tort for such breach, it is not necessary to allege the scienter, nor, if alleged, to prove it. *Williamson v. Allison*, 2 East, 446. See *Hyatt v. Boyle*, 5 Gill & John. 110; *Beeman v. Buck*, 3 Verm. 53.

musket, &c. Plea, N. G. Lord *Kenyon*, C. J., held it to be necessary that the scienter should be proved.(1)

2. *On an express Warranty.*(2)—An action on the case, in nature

(1) Assumpsit is the proper form of action on a warranty, express or implied. *Raid v. Barber*, 3 Cowen, 272. But where the plaintiff grounds his action on deceit or fraud in the sale, and not on a breach of contract, the deceit or fraud must be substantively alleged in the declaration, otherwise no proof of fraud is admissible. *Ex'rs of Beerton v. Miles*, 6 Johns. Rep. 138; *Hallock v. Powell*, 2 Caines' Rep. 216. And the allegation of fraud, or the warranty, should be proved precisely as laid. *Saell v. Moses*, 1 Johns. Rep. 96; *Perry v. Aaron*, Ib. 129. In a sale note the words "sold A., 2000 gallons prime quality winter oil," amount to a warranty that the article sold agrees with the description. So of the same words in a bill of parcels. *Hastings v. Lovering*, 2 Pick. 214. So a statement in a bill of parcels for oil that it was "winter pressed sperm oil," was held to amount to a warranty of its being winter pressed. *Osgood v. Lewis*, 2 Har. & Gill, 495. An advertisement of property for sale which gives it a higher character than it deserves, does not amount to a warranty, if the purchaser relies upon his own examination. *Calhoun v. Vecchio*, 3 W. C. C. R. 165. See *Curcier v. Pennock*, 14 S. & R. 51, and 644, ante, note. The statute of limitations runs from the time of the deceit practised. *Rice v. White*, 4 Leigh, 474.

(2) Generally, the warranty must be at the time of sale, but if at the time of treaty the owner offers to warrant, it binds, though the sale does not take place till some days afterwards. *Wilmot v. Hurd*, 11 Wend. 584. On a sale of a slave with warranty, a bill of sale with covenant of warranty, dated on the day of sale, but not executed till some weeks afterwards, relates back to time of sale. *Buller v. Elliston*, 4 Dana, 87. The warranty of a chattel as to *quality* (as that a clock is a good time-piece,) is no warranty of its *value*. *Lightbun v. Cooper*, 1 Dana, 273.

The declaration of a constable at his sale, that the goods are the property of the debtor, is no warranty of title. *Morgan v. Fencher*, 1 Blackf. 10. A person in possession of a colored boy, and selling him as his own, warrants title. *Stoutborough v. Haviland*, 3 Green, 266. On the sale of a note there is an implied warranty that it is genuine, but none that the authority of the agent by whom it purports to have been executed, was good and sufficient. *Glass v. Reed*, 2 Dana, 168. In order to show fraud in a vendor of a slave in warranting her soundness, it is not competent for a witness to testify that he told the agent of the vendor that the slave told him she was unsound, thus showing a scienter. *Stringfellow v. Marriott*, 1 Ala. 573. The owner of a horse which had the heaves and was worthless, in the course of a negotiation for an exchange, concealed the defect and affirmed that the horse was worth \$100; and the other party not knowing of the defect, was thereby induced to make the exchange. Held, that this was sufficient to sustain an action on the case for deceit. *Stevens v. Fuller*, 8 N. Hamp. 463. In an action for deceit in the sale of a horse, it was proved that the horse went blind soon after he was sold, without any subsequent hurt or ill-usage; that in the opinion of a farrier his eyes were naturally defective, that the defect was such as would not render the horse blind suddenly; and that the defendant had bred the horse and owned him until he was nine years old. Held, that these were circumstances the judge must leave to the jury, as tending to prove the scienter; and that he had no right to say that there was "no" evidence upon that point. *Quinn v. Dinson*, 3 Ired. 47. A. agreed to buy a number of horses from B., and it was referred to an arbitrator to decide upon the value of the horses. He decided that two of them were worthless, having an incurable and contagious disease, and so informed A. Afterwards A. took them at reduced prices, by a subsequent agreement, and kept them with his other horses, whereby he lost many of them. Held, that A. could not maintain an action on the case in the nature of deceit against B. *Murray v. M'Lean*, 2 Id. 93. But an action for deceit or fraud in the sale of a horse, is not supported by evidence merely of an express warranty. *Bates v. Martin*, Brayt. 78.

In an action of deceit for selling an unsound horse, the *quo animo* is the gist of the action, and the declaration should allege that the defendant falsely and fraudulently represented the horse sound; or that he knew him to be unsound and represented him to be sound. *Baldwin v. West*, Hardin, 50.

If under a declaration in trespass on the case alleging that the defendant falsely warranted a horse to be sound, knowing him, at the time of making the warranty, to be unsound, the plaintiff prove a representation by the defendant of soundness which, at the time of making it the defendant knew to be false, it is sufficient to entitle the plaintiff to a verdict. *West v. Emery*, 17 Verm. 583. And if in such case, the declaration alleges

of a writ of deceit, may be maintained against any person who deceives, by a false assertion, and thereby injures another, who has placed a reasonable confidence in him: (1) as where a party (*g*) in possession of a personal chattel sells it, and at the time of sale affirms it to be his own, (2) when in truth it belongs to another, the vendee may recover a compensation in damages for such injury as he can prove to have been sustained in consequence of this deceit; for the possession of a personal chattel is a color of title, and it is but a reasonable confidence which the vendee places in the vendor, when he affirms it to be his own. (3)

(*g*) *Cross v. Gardner*, Carth. 90; Comb. 142, S. C.; see also *Medina v. Stoughton*, Salk. 210; Ld. Raym. 593, S. C.

an absolute representation of soundness, and a scienter by the defendant of its falsity, and the proof shows that the representation by the defendant was that the property was sound so far as he knew, and the plaintiff also prove that the defendant in fact knew at the time of making the representation that the property was unsound: this will be no variance. But if the declaration allege an absolute warranty merely, and as a breach that the fact warranted did not exist, without alleging the scienter, this will not be supported by proof of a qualified warranty. *Ib.*

In *Hughes v. Robertson*, 1 Monroe, 215, it was held that the seller of a horse was liable to this action for selling a blind horse for a sound price, knowing and not declaring his blindness, though the purchaser examined the horse, it appearing that the blindness could not be discovered at first view. But if a horse is sold "sound or unsound," the buyer takes the risk, although the seller knew of unsoundness. But if he use any misrepresentation he is liable. As if he falsely represent that his leanness is caused by a long journey, and a bunch on his neck, by bleeding. *West v. Anderson*, 9 Conn. 107. An affirmation that a horse is not lame accompanied by a declaration by the owner that he would not be afraid to warrant him, is a warranty. *Cook v. Mosely*, 13 Wend. 277.

(1) Formerly it was usual in cases of this kind to declare in tort; but it was observed by *Grose, J.*, in *Pasley v. Freeman*, 3 T. R. 54, that all the cases of deceit for misinformation might, as it seemed to him, be turned into actions of assumpsit.

(2) "The warranties which accompany a sale of chattels are of two kinds in respect to their subject-matter; they are a warranty of title, and a warranty of quality. They are also of two kinds in respect to their form, as they may be express or implied. Blackstone says "a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient without any express warranty for that purpose." But he also says, afterwards, "in contracts for sales it is constantly understood that the seller undertakes that the commodity he sells is his own, and if it proves otherwise, an action on the case lies against him, to exact damages for the deceit. From this it might be inferred, that the action is grounded on the deceit, and therefore does not lie where there is no deceit, as where one sells as his own that which is not his own, but which he verily believes to be his own. But although the English authorities are somewhat uncertain and conflicting, we consider that a rule is recognized in the English courts, or in some of them, which although not distinctly and positively asserted, nor so well supported by direct decision as the American, may yet be regarded as essentially the same. And in this country it seems to be now well settled by adjudication, in many of our states, that the seller of a chattel, if in possession, warrants by implication that it is his own, and is answerable to the purchaser if it be taken from him by one who has a better title than the seller, whether the seller knew the defect of his title or not; and whether he did or did not make a distinct affirmation of his title. But if the seller is out of possession and no affirmation of title is made, then it may be said that the purchaser buys at his peril. And this, we think, the prevailing rule of law in this country." 1 Pars. on Contr. 456, and notes.

(3) In the sale of a chattel, a warranty of title is implied. *Defreese v. Trumper*, 1 Johns. Rep. 274; *Hearmance v. Vernoy*, 6 Id. 5. Executors and other trustees are exceptions to this rule. In sales by them, if fraud exists, or there is an express warranty, they would be answerable personally. And it seems that without these, if the purchase money remains in their hands unadministered, they may be compelled to refund. *Mockbee v. Garner*, 2 Har. & Gill, 176. Where there is deceit in the sale, it is not requisite to set forth the contract between the parties, or any consideration; it is enough to state the fraud, and deceit and damages. *Barney v. Dewey*, 13 Johns. Rep. 224. The record of

But where the affirmation is (as it is termed in some of the books) a nude assertion; that is, where the party deceived may exercise his own judgment; as where it is mere matter of opinion, or where he may make inquiry into the truth of the assertion, and it becomes his own fault from laches, that he is deceived; (1) in this case an action cannot be maintained. (2) As if A., being possessed of a term for years, (h) offers to sell it to B., saying that a stranger would have given A. [*646] a certain sum of *money for this term, whereas, in truth, that sum had not been offered to A., an action on the case will not lie, although B. was, by such affirmation, deceived in the value.

A class of cases, on fraudulent affirmations, for which an action cannot be maintained, was mentioned by *Grose, J.*, in *Pasley v. Freeman*, 8 T. R. 55; that is, where the affirmation is that the thing sold has not a defect which is visible. An instance of this kind is mentioned in argument in *Bayly v. Merrel*, Cro. Jac. 387, where a person buys a horse, which the seller affirms to have two eyes, and the horse has one eye only; in such case the purchaser, unless, as is quaintly observed in one of the Year Books, he be blind, is remediless; for *vigilantibus non dormientibus jura subveniunt*. See also *Dyer v. Hargrave and others*, 10 Ves. 507, where Sir *William Grant, M. R.*, said, that it was holden at law, that a warranty is not binding, where the defect is obvious, and put the case of a horse with a visible defect; and of a house without roof or windows, warranted as in perfect repair; and see *Tindal, C. J.*, in *Margetson v. Wright*, 7 Bing. 605. (3)

Declaration that defendant, being possessed of goods, represented to plaintiff that he was legally entitled to dispose of them; that plaintiff, in consequence, at defendant's request, sold them by auction, and after deducting certain charges, which he was entitled to deduct, paid over the residue to defendant: that defendant deceived plaintiff in this—that he, defendant, was not at the time of sale entitled to dispose of the goods; that the true owner afterwards recovered the value of the plaintiff, and that the defendant refused to reimburse him. After verdict for plaintiff, it was moved, in arrest of judgment, that the declaration was neither *ex contractu* nor *ex delicto*: no allegation of fraud; no scienter; and that tort would not lie unless the misrepresentation were

(h) 1 R. A. 101, pl. 16, adjudged.

the judgment by which the rightful owner recovered against the vendee, is conclusive evidence against the vendor. *Blasdale v. Babcock*, 1 Johns. Rep. 517; *Barney v. Dewey*, 13 Id. 224. Notice from the vendee to the vendor, that a suit has been commenced for the thing sold, is sufficient; the vendor is bound to take notice of all the subsequent proceedings. *Ib.*

(1) The exception to the rule that the seller is not answerable for the quality or condition of the article sold, is where there is no opportunity of inspection at the time of sale; as of goods sold whilst at sea. The mere fact that it is attended with inconvenience or labor is not sufficient. *Hyatt v. Boyle*, 5 Gill & J. 110. Where sperm oil is adulterated with whale oil, and sold as pure, the rule of damages is the difference of value; and the opinion of persons in the trade experienced in the use of the oleometer, is sufficient evidence of its being adulterated. *Van Walkenburgh v. Watson*, 13 Wend. 76.

(2) The case of *Bayly v. Merrel*, Cro. Jac. 386, and 3 Bulst. 94, affords an useful illustration of this rule.

(3) Vide *Schuyler v. Russ*, 2 Caines' Rep. 202; *Sands v. Taylor*, 5 Johns. Rep. 395; *Hanks v. McKee*, 2 Litt. 227.

wilful, and intended to deceive. But the court was of opinion, that the declaration might be sustained :⁽ⁱ⁾ that as the defendant had not shown that he was authorized to sell at the time he affirmed he was, and as it was proved he was not authorized at the time of the sale, the court would presume that he never had authority at any time; that he had created a belief in the plaintiff that he had authority, when clearly he had no authority.

An action on the case for a deceit cannot be maintained by the seller of his share in a trade, against the buyer, who has persuaded him to sell it, at a certain price, by a representation that certain partners, whose names he will not disclose, are to be joint purchasers, and that they will give no more, although in truth they had authorized the defendant to purchase it, doing the best he could, and although the defendant charged them with a higher price than he gave.^(k) It being usual, in the sale by auction of drugs, if they are *sea-damaged, to [*647] express it in the broker's catalogue, and drugs which are repacked, or the packages which are discolored by sea-water bearing an inferior price, although not damaged, the defendants, who had purchased some sea-damaged pimento, repacked it, and advertised it in catalogues which did not notice that it was sea-damaged or repacked, but referred it to be viewed, with little facility, however, of viewing it: they exhibited impartial samples of the quality, and sold it by auction. Held, that this was equivalent to a sale of the goods, as and for goods that were not sea-damaged, and that an action lay for the fraud.^(l) N. An action on the case will lie for a breach of warranty upon the sale of a chattel, although the purchaser has not paid for it.^(m)(1)

If an order is given for an undescribed and unascertained thing, stated to be for a particular purpose, (as copper for sheathing ships, that is, a particular copper, prepared in a particular manner,) which the manufacturer supplies, he cannot sue for the price unless it does answer the purpose for which it was supplied ;⁽ⁿ⁾ but when the order was, "send me your patent hopper and apparatus to fit up my brewing

(i) *Adamson v. Jarvis*, 4 Bingh. 66.

(k) *Vernon v. Keyes*, 4 Taunt. 488, Exch. Chr. affirming judgment of B. R.

(l) *Jones v. Bowden*, 4 Taunt. 847.

(m) Per *Curiam*, 9 Hen. VII. 21, b; Bro. Abr. Deceit, pl. 24.

(n) *Jones v. Bright*, 5 Bingh. 533; 3 M. & P. 155; recognized in *Chanter v. Hopkins*, 4 M. & W. 406.

(1) Where one purchases a chattel, on sight, which the seller affirms to be worth much more than its real value, no action lies. *Davis v. Meeker*, 5 Johns. Rep. 354. It is not necessary to sustain the action, that the word *warrant* should be used. Any affirmation amounting to it, is sufficient. *Roberts v. Morgan*, 2 Cowen, 438; *Jackson v. Wetherill*, 7 S. & R. 482. In *Bacon v. Brown*, 3 Bibb, 35, it is said, that a *bare affirmation* does not amount to a warranty, there must be a *promise* or *undertaking* of the soundness of the article. The affirmation ought to be positive and unequivocal, such as is understood by the parties as an absolute assertion. *Oncida Co. v. Lawrence*, 4 Cowen, 440. And the jury must determine whether a warranty was intended, especially when the words have no technical meaning. *Duffee v. Mason*, 8 Id. 25. This is the rule with respect to *parol* contracts only. In cases of *written* contracts, the court must determine whether the instrument contain an express warranty or not. *Osgood v. Lewis*, 2 Har. & Gill, 405. An agreement to deliver "bar iron of Centre county metal," is complied with by bar iron made "out of Centre county metal," though inferior and unmerchantable, if defendant when he obtained it believed it to be good. *Kirk v. Nice*, 2 Watts, 367.

copper, with your smoke consuming furnace," it was holden,^(o) that as the purchase was of a well-defined and known machine, it was the buyer's concern whether it answered the purpose for which he wanted to use it or not. It is a distinction well founded both in reason, and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, the transaction carries with it an implied warranty, that the thing furnished shall be fit and proper for the purpose for which it was designed.^(p)

Some pockets of hops were sold by sample, with a warranty that the bulk of the commodity answered the sample; ⁽¹⁾ it was holden, that the law did not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price was given, and that the seller was not answerable, though the goods turned out to be unmerchantable, in consequence of a latent defect which existed in the commodity at the time of the sale, but which was unknown to the seller, arising from the fraud of the grower, from whom he had purchased, and not from any fraud in the seller; *Grose, J.*, and *Lawrence, J.*, laid great stress upon the fact that the seller was not the grower of the hops, and that the purchaser, by the inspection of the sample, had

as full an opportunity of judging of the quality of the hops [*648] as *the seller himself.^(q) If a ship is sold *with all faults*, the seller is not liable to an action in respect of latent defects which he knew of without disclosing at the time of the sale, unless he used some artifice to disguise them, and prevent their being discovered by the purchaser.^(r) In *Meyer v. Everth*, 4 Campb. 22, it was holden, that on a sale of goods, if the sale-note do not contain a stipulation that the goods are equal to a sample, parol evidence is inadmissible to make such stipulation part of the contract; but it may be shown that at the time of the sale a sample was fraudulently exhibited to deceive the buyers, whereby the plaintiff had been induced to purchase the commodity, which turned out of greatly inferior quality and value; provided the plaintiff has declared for a deceitful representation, and not merely on the contract as containing the stipulation. See also *Gardiner v. Gray*, 4 Campb. 144. If a representation be made before a sale, of the quality of the thing sold, with full opportunity for the purchaser to inspect and examine the truth of the representation, and a contract of sale be afterwards reduced into writing, in which that representation is not embodied, no action for a deceit lies against the vendor on the ground that the article sold is not answerable to that representation,

(o) *Chanter v. Hopkins*, 4 M. & W. 399.

(p) Per *Tindal, C. J.*, in *Brown v. Edgington*, 2 M. & Gr. 289; 2 Scott's N. R. 496; and see *Shepherd v. Pybus*, 3 M. & Gr. 868; 4 Scott's N. R. 434.

(q) *Parkinson v. Lee*, 2 East's Rep. 314. [See also *Sands v. Taylor*, 5 Johns. Rep. 395; 1 Parsons on Contr. 468, and cases cited in notes.]

(r) *Baglehole v. Walters*, 3 Campb. 154.

(1) See *post*, p. 648, note (1), and cases there cited.

whether the vendor knew of the defects or not.^(s)(1) But where the warranty is implied by law, evidence of its breach is admissible although there is a written contract.^(t)

(s) *Pickering v. Dowson*, 4 Taunt. 779. See further on this subject. *Daves v. King*, 1 Stark. N. P. C. 75.

(t) *Shepherd v. Pybus*, 3 M. & Gr. 868; 4 Scott's N. R. 434.

(1) See *ante*, p. 643, note (2). A sale by sample is tantamount to a warranty that the article sold is of the same kind as the sample. *Bradford v. Manly*, 13 Mass. Rep. 139. Where on the sale of goods, the vendor makes representations amounting to a warranty, but the sale is consummated by a written transfer without a warranty, the vendee, in an action of *assumpsit*, will not be permitted to prove the representations. *Van Ostrand v. Reed*, 1 Wend. 424. See *Peltier v. Collins*, 3 Id. 459. In *Sherwood v. Marwick*, 5 Greenl. 295, C. J. Mellon says, "It is questionable, whether an action will lie against a vendor for a false and fraudulent misrepresentation of facts, as to the ownership and character of the articles sold, where the vendee derives his title under a deed containing express covenants as to those particulars." S. P. *Oneida Company v. Lawrence*, 4 Cowen, 440; *Andrews v. Kneeland*, 6 Id. 354; *Willing v. Consequa*, 1 Peters's C. C. Rep. 317. Every sale of packed cotton must be considered in the nature of a sale by sample, which amounts to a warranty, that the whole bulk shall compare with the specimen exhibited. *Oneida Company v. Lawrence*, 4 Cow. 440; *Rose v. Beattie*, 2 Nott & M'C. 538. An agent or broker having power to sell, without any express restriction as to the mode, may sell by sample, with corresponding warranty. *The Monte Allegre*, 9 Wheat. 644; *Andrews v. Kneeland*, 6 Cowen, 354. Where one purchases goods on an examination of a specimen taken out of a small aperture of the case that contains the article, as for instance a seroon of indigo, it is a sale by sample. *Williams v. Spofford*, 8 Pick. 250. Every sale of packed cotton is a sale by sample. *Boorman v. Jenkins*, 12 Wend. 566; *Beebe v. Robert*, Ib. 413. A sale by sample is a warranty that the bulk is of same quality, and testing the correctness of the first by a second sample, does not change the character of the sale. *Gallagher v. Waring*, 9 Wend. 20.

"In cases of sales by sample, most of the decisions maintain that the vendor is responsible if the quality of the bulk of the commodity is not equal to the sample shown. *The Oneida Manufacturing Company v. Lawrence et al.*, 4 Cow. R. 440; *Rose et al. v. Beatie*, 2 N. & M'C. R. 538; *Gallagher et al. v. Waring*, 9 Wend. R. 20; *Moses et al. v. Mead et al.*, 1 Denio, R. 378; *S. C.* 7 Id. 617; *Magee v. Billingslee*, 3 Ala. 679. And this principle has been held to apply even though the purchaser himself takes a sample from the goods. *Beebe v. Robert*, 12 Wend. R. 413; *Boorman v. Jenkins*, 12 Wend. 566; *Williams v. Spafford*, 8 Pick. R. 250. But in Pennsylvania, where there is a sale by sample, there is no implied warranty that the quality of the goods shall be the same as the sample, but merely that they shall be the same in species. *Borrekins v. Bevan et al.*, 3 Raw. R. 23; *Jenkins et al. v. Gratz*, Ib. 168; *Willings et al. v. Consequa*, Pet. C. C. R. 317; *S. C.* Ib. 172; *Carson et al. v. Baillie*, 7 Harris, R. 375; *Fraley v. Bispham*, 10 Barr, R. 320. In the last of which decisions Judge Coulter says, "If that case (*Borrekins v. Bevan*) means any thing, it means this, that when the thing is sold by sample, and without express warranty, the purchaser takes it at his own risk, unless it should prove to be an article different in kind; all gradations in quality are at the hazard of the buyer. Some of the cases, however, seem to hold an intermediate doctrine, deciding that there is an implied warranty that a sample taken in the usual way, is a fair specimen of the thing sold. *Sands et al. v. Taylor et al.*, 5 Johns. R. 404; *Hargous v. Stone*, 1 Seld. R. 73; *Beirne et al. v. Dord*, 2 Sandf. S. R. 95; and in *Bradford v. Manly*, 13 Mass. R. 139, it was held, that a sale by sample is tantamount to a warranty that the article sold is of the same kind with the sample; but if an opportunity has been given for examination or inspection, it is a strong circumstance to prove that the sale has not been by sample. *Beirne et al. v. Dord*, 2 Sandf. S. R. 89;" Williams on Personal Property, 433, Am. ed., note.

"It has been very much discussed whether a bill of sale, describing the article sold, amounts to a warranty that the commodity conforms to the description. It is now well settled that it does. *Henshaw v. Robins*, 9 Metc. 83, is one of the best considered, as well as one of the most recent cases upon this subject. There the bill of sale was as follows: "Henshaw & Co., bo't of T. W. S. & Co., two cases of indigo, \$272 35." The article sold was not indigo, but principally Prussian blue. There was no fraud imputed to the vendor, and the article, was so prepared as to deceive skilful dealers in indigo. The naked question was presented, whether the bill of sale constituted a warranty that the article was indigo. The court, after an able analysis of the cases upon this point, decided in the affirmative. The same question had been very ably considered by the same court in the

Upon a sale of pictures, a bill of parcels of "Four pictures, Views in Venice, Canaletti, 160L," is evidence(u) from which a jury is at liberty to infer a warranty, that the pictures were painted by that artist.(1)

(u) *Power v. Barham*, 6 Nev. & Man. 62; 4 A. & E. 473; see also *Jendwine v. Slade*, 2 Esp. N. P. C. 572.

prior case of *Hastings v. Lovering*, 2 Pick. 214. In that case the bill of parcels was: "Sold E. T. H., 2000 gallons prime quality winter oil." The article sold was oil, but was not prime quality. In this respect, the case differs from the preceding. There the kind of commodity was different: here, only the quality. The court applied the same rule, and held the writing to be a warranty that the article was of the quality described. So in *Yates v. Prym*, 6 Taunt. 446, the article was described in the sale note as 58 bales of prime singed bacon. It was held to amount to a warranty that the bacon was prime singed. *Osgood v. Lewis*, 2 Har. & Gill, 695, supports the same view; in that case the words in the bill of parcels were, "winter pressed sperm oil." This was considered as a warranty that the oil was winter pressed. So in the *Richmond Trading, &c., Co. v. Farquhar*, 8 Blackf. 89, it was held where wool was sold in sacks, and the sacks marked by the seller, and described in the invoice as being of a certain quality, that this is an express warranty that it is of such quality. And where a vessel was advertised for sale, as being "copper fastened;" this was held to be a warranty that she was so, according to the understanding of the trade. *Shepperd v. Kaine*, 5 B. & Ald. 240. See *Patten v. Duncan*, 3 C. & P. 335; *Seesdale v. Anderson*, 4 C. & P. 198; *Wilson v. Blackhouse*, Peake's Ad. Cas. 119. So in Pennsylvania, it is held, that in a sale of goods described in a bill or sold note, there is an implied warranty that the commodity sold is the same in specie as the description given of it in the bill. *Borrekins v. Bevan*, 3 Rawle, 23. But the courts of that state refuse to extend the same doctrine to a statement of quality of the articles sold. Therefore, where the article was described in the bill of sale, as "superior sweet-scented Kentucky leaf tobacco," the seller was held not liable on a warranty, if the tobacco was Kentucky leaf, though of a very low quality, ill-favored, unfit for the market, and not sweet-scented. *Fraley v. Bispham*, 10 Barr, 320. And see *Jennings v. Gratz*, 3 Rawle, 168. See also *Hyatt v. Bogle*, 5 Gill & Johns. 110. A contract for "good fine wine," has been held to import no warranty; these words being too uncertain and indefinite to raise a warranty. *Hogins v. Plymton*, 11 Pick. 97. A warranty that certain oil "should stand the climate of Vermont without chilling," means that the oil will not chill when used in Vermont in the ordinary manner lamp oil is used. *Hart v. Hammett*, 18 Verm. 127. So a bill of sale, describing the article sold simply as "tallow," raises no implied warranty that the tallow should be of good quality and color. *Lamb v. Crofts*, 12 Metc. 353. And in a bill of sale of "certain lots of boards and dimension-stuff, now at and about the mills at P.," there is no implied warranty that the boards are merchantable. *Whitman v. Freese*, 23 Maine, 212. A bill of sale of a negro, described her as being of sound wind and limb, and free from all disease. Held, an express warranty that she was sound. *Cramer v. Bradshaw*, 10 Johns. Rep. 484. But a bill of sale of a horse, as follows: "T. W. bought of E. R., one bay horse, five years old last July, considered sound," signed by the vendor, creates no warranty of the soundness of the horse. *Wason v. Rowe*, 16 Verm. 525. See also *Towell v. Gatwood*, 2 Scam. 22; *Baird v. Matthews*, 6 Dana, 129. So in *Vinser v. Lombard*, 18 Pick. 57, the bill of sale described the article as so many "barrels, No. 1, mackerel, and so many barrels, No. 2, mackerel." The mackerel sold were, in fact, branded by the inspector as No. 1, and No. 2. It was held, there was no implied warranty that they were free from rust at the time of sale, although it was proved, that mackerel affected by rust, are not considered No. 1 and No. 2. But the general doctrine of this note was expressly recognized by Shaw, C. J., who said, "The rule being that upon a sale of goods by a written memorandum, or bill of parcels, the vendor undertakes, in the nature of warranting, that the thing sold and delivered is that which is described; this rule applies whether the description be more or less particular and exact in enumerating the qualities of the goods sold." In some early cases in America, it was held, that the description given to property in advertisements, bills of sale, sold notes, &c., did not enter into the contract, and therefore being but matters of description, created no warranty. Such are the cases of *Seixas v. Woods*, 2 Caines, 48; *Barrett v. Hall*, 1 Aikens, 269; *Swett v. Colgate*, 20 Johns. 196, and some others; but we think the more modern cases have decided that a rule of law, in itself sound, was in those instances erroneously applied. See *Henshaw v. Robins*, 9 Metc. 83; 2 Kent's Com. 489. See also the valuable notes to *Chandelor v. Lopez*, 1 Smith's Lead. Cas. 78, *et seq.*, where will be found an able examination of the whole subject of warranty." 1 Parsons on Contracts, 464, note.

(1) A description of an article in the bill of parcels as "blue paint," is a warranty that

Warranty on Sale of Horses.(1)—As actions are more frequently brought for the breach of warranties upon the sale of horses than upon the sale of any other chattel, the following remarks will be chiefly directed to that subject:—A horse being an animal subject to secret maladies which cannot be discovered by a mere trial and inspection, it is usual, and in all cases prudent, for the buyer of a horse to require from the seller a warranty of its soundness: for if a horse, having a secret malady, is sold without a warranty of soundness, and without any fraud on the part of the seller, the purchaser is without a remedy. Formerly, indeed, it was a current opinion, that a sound price given for a horse was tantamount to a warranty of soundness; but it was observed by *Grose, J.*, in *Parkinson v. Lee*, 2 East, 322, that when the doctrine came to be sifted,(2) it was found to be so loose and unsatisfactory a ground of decision, that Lord *Mansfield, C. J.*, rejected it, and said, that there must either *be an express warranty of [*649] soundness, or fraud in the seller, in order to maintain the action.(3)

it is so, and not a different article. *Borrekins v. Bevan*, 3 Rawle, 23. But if there is only an adulteration which does not destroy the distinctive character, the sale is good, and the test is whether it is merchantable under the denomination. As where "Young Hyson" is adulterated by certain leaves not belonging to the tea family. *Jennings v. Gratz*, 3 Rawle, 168. Where tobacco was described in the bill of parcels "as 21 kegs of tobacco, branded, Parkin," and was sold without examination by either party for the full price of a merchantable quality, and the brand was a favorite one in the market. Held, no warranty could be implied in relation to its quality. *Hyatt v. Boyle*, 5 Gill & J. 110. A written agreement to ship "good fine wine," does not amount to a warranty that the wine should be of any particular quality; being too indefinite. *Hegans v. Plympton*, 11 Pick. 97. A seller who does not disclose to the purchaser a latent defect in the article sold which is known to the seller, is liable to an action of deceit, although he expressly refused to warrant the soundness of the article. *Hough v. Evans*, 4 M'Cord, 169. See *ante*, p. 644, note (1).

(1) See *ante*, p. 645, note (1), and cases cited.

(2) See *Seixas v. Wood*, 2 Caines' Rep. 48; *Holden v. Dakin*, 4 Johns. Rep. 421; *Snell v. Moses*, 1 Id. 96; *Perry v. Aaron*, Id. 129; *Defreeze v. Trumper*, Id. 274; *Fleming v. Slocum*, 18 Id. 403; *Mixer v. Coburn*, 11 Metcf. 559; *Winsor v. Lombard*, 18 Pick. 59; *Johnston v. Cope*, 3 Harr. & Johns. 89; *Dean v. Mason*, 4 Conn. 428; *West v. Cunningham*, 9 Porter, 104; *Moses v. Mead*, 1 Denio, 378.

The weight of authority decidedly determines, that a sale for a sound price implies no warranty of quality, or that the article is merchantable. *Dean v. Mason*, 4 Conn. 428, an able case on this subject; *Holden v. Dakin*, 4 Johns. 421; *Snell v. Moses*, 1 Id. 96; *Jonston v. Cope*, 3 Harr. & Johns. 89; *Cozzins v. Whitaker*, 3 Stew. & Port. 322; *La Neuville v. Nourse*, 3 Campb. 351; *West v. Cunningham*, 9 Port. 104.

South Carolina and Louisiana alone, of American states, hold that a sale of a chattel for a sound price, creates a warranty against all faults, known or unknown, to the seller. *Timrod v. Schovelred*, 1 Bay, 324; *Deweese v. Morgan*, 1 Martin, 1; *State v. Gaillard*, 2 Bay, 19; *Barnard v. Yates*, 1 N. & M'C. 142; *Missroon v. Waldo*, 2 Id. 76; *Malancon v. Robichaux*, 17 Louisiana R. 97. But this does not extend to sales of real estate. *Rupart v. Dunn*, 1 Richardson, 101. And in sales of personal property, if the buyer is informed fully of all the circumstances, and has a fair opportunity of informing himself, he is bound by his contract, although it be a losing one. *Whitefield v. M'Leod*, 2 Bay, 380. And see *Carnochan v. Gould*, 1 Bailey, 179; *Rose v. Beatie*, 2 N. & M'C. 538. And if the parties expressly agree that the buyer shall take the property at his own risk, the vendor is not answerable for its soundness. *Thompson v. Lindsay*, 3 Brev. 305. And a sound price does not imply a value of the property equal to the price, but only that there is no unsoundness. And such unsoundness must materially affect the article. *Smith v. Rice*, 1 Bailey, 648.

(3) See *supra*, note (2), and *Kimmel v. Lickty*, 3 Yeates, 262; *Dixon v. M'Clutchey*, Addison, 322; *M'Lane v. Fullerton*, 4 Yeates, 522. The word "warrant," is not necessary to constitute a warranty on the sale of a horse, and whether what was said is

The advantage arising to the buyer, from an express warranty of soundness, is this—that such warranty extends to every kind of soundness, known and unknown to the seller; and if the warranty be false, the buyer has a remedy against the seller, to recover a compensation in damages. “To be sold, a black gelding, five years old; has been constantly driven in the plough—warranted;” it was holden, (x) that the warranty applied to soundness only. “Received of B. £— for a grey four-year old colt, warranted sound;” it was holden, (y) that the warranty was confined to soundness only, and that the preceding statement, as to the age, was matter of description only, for which the party is not answerable, unless it be shown to be false within his knowledge. Roaring is a malady which renders a horse less serviceable for a permanency, and therefore an unsoundness. (z) A *nerved* horse is unsound: (a) so is a chest-foundered. (b) So if the horse has a bone spavin in the hock. (c) Crib biting, which has not yet produced disease, or alteration of structure, is not an unsoundness (d) within a general warranty; but it is a vice under a warranty that a horse is sound and free from vice, (e) Mere badness of shape, (f) though rendering the horse incapable of work, or more liable to become lame at some future time, (g) is not unsoundness. A temporary lameness rendering a horse less fit for present service at the time of sale, is a breach of warranty of soundness; and it will be no defence that he afterwards recovered. (h) A man who buys a horse warranted sound, must be taken as buying him for immediate use, and has a right to expect one capable of that use, and of being immediately put to any fair work the owner chooses. The rule as to unsoundness is, that if at the time of the sale the horse has any disease, which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal; or if the horse has, either from disease or accident, undergone any alteration of structure, that either actually does at the time, or in its ordinary effects will diminish the natural usefulness of the horse, such horse is unsound. (i) (1) So if a horse has, at the time of sale, [*650] a *cough, although that may either be temporary or may prove mortal, he is unsound. (k) Some splints cause lameness, others

- (x) *Richardson v. Brown*, 1 Bingh. 344. (y) *Budd v. Fairmaner*, 8 Bingh. 48.
 (z) *Onslow v. Eames*, 2 Stark. N. P. C. 81. But see *Bassett v. Collis*, 2 Campb. 523.
 (a) *Best v. Osborne*, Ry. & Mo. 290, *Best*, C. J.
 (b) *Atterbury v. Fairmaner*, 8 B. Moore, 32. (c) *Watson v. Denton*, 7 C. & P. 85.
 (d) *Broennenburg v. Haycock*, Holt's N. P. C. 630.
 (e) *Scholefield v. Robb*, 2 M. & Rob. 210.
 (f) *Dickinson v. Follett*, 1 M. & Rob. 299; *Alderson*, J., recognized in *Brown v. Elkington*, 8 M. & W. 132.
 (g) *Brown v. Elkington*, 8 M. & W. 132.
 (h) *Elton v. Brogden*, 4 Campb. 281, Lord *Ellenborough*, C. J.
 (i) Per *Parke*, B., in *Coates v. Stephens*, 2 M. & Rob. 157, recognized in *Kiddell v. Bernard*, 9 M. & W. 668.
 (k) S. P. per Lord *Ellenborough*, C. J., in *Elton v. Brogden*, 4 Camp. 281; and per *Best*, C. J. C. B., in *Liddard v. Kain*, Midd. Sittings after E. T. 5 Geo. IV.; *Coates v. Stephens*, 2 M. & Rob. 157, S. P. But see *Bolden v. Brogden*, 2 M. & Rob. 113.

a representation of soundness or a mere expression of opinion, is for the jury. *Whitney v. Sutton*, 10 Wend. 411. See *Williams on Per. Prop.* 430, Am. ed., note by *Wetherell*.

(1) See 1 *Parsons on Contr.* 473, note (c).

do not, and the consequences of the splint are not apparent at the time, like the loss of an eye, or any visible blemish or defect, to a common observer. In an action upon a warranty, in which the defendant warranted the horse to be sound, wind and limb, "at this time;" that is, at the time of the warranty made: the jury found a verdict for plaintiff. The judge requested the jury to tell him, whether the horse was sound; or if they believed him to be unsound, whether that unsoundness arose from the splint, the existence of which was known to the plaintiff at the time of the sale. The jury, in answer, said, that although the horse exhibited no symptoms of *lameness* at the time when the contract was made, he had then upon him the seeds of unsoundness arising from the splint. The court, on motion for new trial,^(l) sustained the verdict, thinking that, by the terms of the warranty, the parties meant that this was not a splint at that time which would be the cause of future lameness, and that the jury had found that it was; and, consequently, the warranty was broken. As soon as the unsoundness is discovered, the buyer should immediately tender the horse to the seller;^(m) and if he refuses to take him back, sell the horse as soon as possible for the best price that can be procured; for the purchaser is entitled to recover for the keep of the horse for such time only as would be required to resell the horse to the best advantage.⁽ⁿ⁾⁽¹⁾ In an action^(o) for breach of warranty of a horse, the plaintiff cannot recover as special damage the loss of a bargain for resale of the horse, though the contract of resale, at a profit, had been actually completed before the unsoundness was discovered.

Where an article is warranted, and the warranty is not complied with, the vendee has three courses, any one of which he may pursue.

1st. He may refuse to accept the article. Although the vendee of a specific chattel, delivered with a warranty, may not have a right to return it, the same reason does not apply to cases of executory contracts; where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent as such is never completely accepted by the party ordering it; in this and similar cases, the party ordering may return it as soon as he discovers the defect, provided he has done nothing more in the meantime than was necessary *to [*651] give it a fair trial:^(p) but there is no authority to show that he may return it, where he has done more than was consistent with the purpose of trial.⁽²⁾

(l) *Margetson v. Wright*, 8 Bingh. 454. (m) *Caswell v. Coars*, 1 Taunt. R. 567.

(n) *Mc. Kenzie v. Hancock*, Ry. & M. 436, per *Littledale*, J., cited by *Denman*, C. J., in *Chesterman v. Lamb*, 2 A. & E. 132.

(o) *Clare v. Maynard*, 6 A. & E. 519; 1 Nev. & P. 701.

(p) See *Lorymer v. Smith*, 1 B. & C. 1.

(1) In an action for false affirmation in the sale of a horse, no damages for the keep can be recovered previous to an offer to return him. *West v. Anderson*, 9 Conn. 107.

(2) Per Lord *Tenterden*, C. J., delivering the judgment of the court in *Street v. Blay*, 2 B. & Ad. 456; where the plaintiff, on the 2nd of February, sold a horse to the defendant for 43*l.*, with a warranty of soundness. The defendant took the horse, and on the same day sold it to Bailey for 45*l.* Bailey, on the following day, parted with it in exchange to Osborne; and Osborne in two or three days afterwards sold it to the defendant

2ndly. He may accept it, and bring a cross action on the warranty. "I take it to be clear law, that if a person purchases a horse which is warranted, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer may, if he pleases, keep the horse and bring an action on the warranty, in which he will have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty ;(q) and the seller will be liable in such an action notwithstanding any length of time which may have elapsed."(r)

3rdly. He may, without bringing a cross action, use the breach of warranty in reduction of damages in an action brought for the price. Where an action was brought for the price of cinque-foin seed sold by the plaintiff to the defendant at so much per quarter, and warranted to be good new growing seed ; the defence was, that it did not correspond with the warranty. It was proved, that soon after the sale the seed had been examined and tested by a person of skill, who declared it not to be good growing seed ; the defendant, however, did not communicate this to the plaintiff, or return the seed, and afterwards sowed part and sold residue, which was not paid for, and purchaser declared he would not pay for it, because it had proved wholly unproductive. It was holden, that the defendant was not bound to return the seed without using it, and that by keeping it he had not precluded himself

[*652] from insisting on the breach *of warranty as a defence to the action ; and the jury having found for the defendant on this point, and there not being any evidence to show that the seed was of any value, the court of B. R. refused to disturb the verdict.(s) The cases have established, that a breach of the warranty may be given in evidence in mitigation of damages, *on the principle of avoiding circuity of action* ; and there is no hardship in such a defence being allowed, as the plaintiff ought to be prepared to prove compliance with his warranty, which is part of the consideration for the specific price agreed by the defendant to be paid.(t) "In all those cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract, it is competent for the defendant, not to set off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of con-

(q) Per Lord Eldon, C. J., in *Curtis v. Hannay*, 3 Esp. N. P. C. 83.

(r) Per Littledale, J., in *Poulton v. Lattimore*, 9 B. & C. 265.

(s) *Poulton v. Lattimore*, 9 B. & C. 259 ; 4 M. & Ry. 208.

(t) Per Lord Tenterden, C. J., in *Street v. Blay*, 2 B. & Ad. 462. But see *Grimaldi v. White*, 4 Esp. N. P. C. 95.

for 30l. No warranty was given on any of the three last sales. The horse was unsound at the time of the first sale ; and on the 9th of February the defendant offered to return it to the plaintiff, who refused to accept it. The plaintiff brought an action against the defendant for the price ; it was holden, that supposing it might have been competent for the defendant to return the horse after having accepted it and taken it into his possession, if he had never parted with it to another, at all events he could not do so after a resale at a profit ; the defendant, however, was entitled to give the breach of warranty in evidence in mitigation of damages.

tract, and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent; but no more."^(u) But a consequential and subsequent damage and loss, must be the subject of a cross action.^(z)

It was formerly holden, that the purchaser might, on discovering the breach of warranty, rescind the contract, return the article warranted, and if he had paid the price, recover it back;^(y) but it is now settled, that you cannot treat a contract as rescinded on the ground of a breach of warranty, except there was an original agreement that the party should be at liberty to rescind in such case, or unless both parties have consented to rescind it.^(z)

The ancient method of declaring in cases of warranty, was in tort⁽¹⁾ on the warranty broken; but of late years it has been found more convenient to declare in assumpsit. The propriety of the modern practice, which has prevailed generally for many years, was established in the case of *Stuart v. Wilkins*, Doug. 18. If a horse be warranted sound, but prove unsound, and the buyer offers to return him to the seller, who refuses to receive him, the buyer may, notwithstanding such refusal, maintain an action against the seller *for [*653] a breach of the warranty, if he can prove that the horse was unsound at the time of warranty.⁽²⁾ This was decided in *Fielder*

^(u) Per *Parke*, B., delivering the judgment of the court in *Mondel v. Steel*, 8 M. & W. 870.

^(z) *S. O.*

^(y) See *Curtis v. Hannay*, 3 Esp. N. P. C. 83.

^(z) Per Lord *Lyndhurst*, C. B., in *Gompertz v. Denton*, 1 Cr. & M. 209, recognizing *Street v. Blay*.

(1) In this form of declaration the scienter need not be charged, or, if charged, need not be proved. *Williamson v. Allison*, 2 East, 446.

(2) "I take it to be clear law, that if a person purchases a horse which is warranted, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer may, if he pleases, keep the horse and bring an action on the warranty, in which he will have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty; *Bacon v. Brown*, 4 Bibb, 91; or he may return the horse and bring an action to recover the full money paid; *Caswell v. Coare*, 1 Taunt. R. 566, S. P.; but in the latter case, the seller has a right to expect that the horse shall be returned to him in the same state he was when sold, and not by any means diminished in value; for if a person keeps a warranted article for any length of time after discovering its defects, and, when he returns it, it is in a worse state than it would have been if returned immediately after such discovery, I think the party can have no defence to an action for the price of the article, on the ground of non-compliance with the warranty; but must be left to his action on the warranty to recover the difference in the value of the article warranted, and its value when sold." Per Lord *Eldon*, C. J., C. B., in *Curtis v. Hannay*, 3 Esp. N. P. C. 83; and see *Kimble v. Cunningham*, 4 Mass. Rep. 502. The foregoing extract from Lord *Eldon's* opinion, was cited by Lord *Tenterden*, delivering the judgment of the court, in *Street v. Blay*, 2 B. & Ad. 461, with these remarks: "It is extremely difficult, indeed impossible, to reconcile this doctrine with those cases in which it has been holden, that when the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article and revest the property in the vendor, and recover the price as money paid on a consideration which has failed, but must sue upon the warranty, unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel, and thereby consented to rescind the contract, or has been guilty of a fraud, which destroys the contract altogether." On a warranty, if there is no fraud, nor right reserved to return the article, nor acceptance by the

v. *Starkin*, 1 H. Bl. 17, (recognized in *Pateshall v. Tranter*, 3 A. & E. 103; 4 Nev. & Man. 649,) where the buyer had kept the horse eight months, without giving any notice of the unsoundness, before he made an offer to return him. Lord *Loughborough*, C. J., said, "that no length of time elapsed after the sale would alter the nature of a contract originally false.⁽¹⁾ Neither is notice necessary to be given. Though the not giving notice will be a strong presumption against the buyer, that the horse at the time of sale had not the defect complained of, and will make the proof on his part much more difficult." But where there is an agreement to take a horse back, (a) if *on trial* he shall be found faulty, though it is accompanied with an express warranty,

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seller, a tender does not rescind the contract, but the action must be on the warranty. *Lightburn v. Cooper*, 1 Dana, 273. See also, *Marshall v. Peck*, Ib. 613. If a party wishes to rescind a contract on the ground of fraud, there must be a tender. *Stewart v. Dougherty*, 3 Id. 480. The case of *Street v. Blay*, 2 B. & Ad. 456, was this: The plaintiff, on the 2d of February, sold a horse to the defendant for 43*l.*, with a warranty of soundness. The defendant took the horse, and on the same day sold it to Bailey, for 45*l.* Bailey, on the following day, parted with it in exchange to Osborne; and Osborne, in two or three days afterwards, sold it to the defendant for 30*l.* No warranty was given on any of the three last sales. The horse was unsound at the time of the first sale; and on the 9th of February the defendant offered to return it to the plaintiff, who refused to accept it. The plaintiff brought an action against the defendant for the price; it was holden, that supposing it might have been competent for the defendant to return the horse after having accepted it and taken it into his possession, if he had never parted with it to another, at all events he could not do so after resale at a profit; the defendant, however, was entitled to give the breach of warranty in evidence in mitigation of damages.

Where an artist exhibits specimens of his art and skill as a painter, and affixes a certain price to them, if a person is induced to order a picture from any approbation of such specimens, and the execution of it, when delivered, is inferior to the specimen exhibited, he may refuse to receive it, or, having received it, he may return it, as not being conformable to that performance which the painter undertook to execute; but if he means to avail himself of that objection, he must return the picture; he must rescind the contract totally. Having received the article under a specific contract, he must either abide by it, or rescind it *in toto* by returning the thing sold; but he cannot keep the article received under such a specific contract, and for a certain price, and pay for it at a less price than that charged by the contract. Per *Lawrence, J.*, in *Grimaldi v. White*, 4 Esp. N. P. C. 95. "Where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put in *statu quo*." Per Lord *Ellenborough*, C. J., in *Hunt v. Silk*, 5 East, 452; *Kettletas v. Fleet*, 7 Johns. Rep. 324. But where an action was brought for the price of cinq-foin seed, sold by the plaintiff to the defendant at so much per quarter, and warranted to be good new growing seed; the defence was, that it did not correspond with the warranty. It was proved that soon after the sale the seed had been examined and tasted by a person of skill, who declared it not to be good growing seed; the defendant, however, did not communicate this to the plaintiff, or return the seed, and afterwards sowed part and sold the residue, which was not paid for, and purchaser declared he would not pay for it, because it had proved wholly unproductive. It was holden, that the defendant was not bound to return the seed without using it, and that by keeping it he had not precluded himself from insisting on the breach of warranty as a defence to the action, and the jury having found for the defendant on this point, and there not being any evidence to show that the seed was of any value, the court of B. R. refused to disturb the verdict. *Poulton v. Lattimore*, 9 B. & C. 259.

A return or tender is not necessary to an action on a warranty. It is, when the contract is disaffirmed, and plaintiff seeks to recover the money paid. *Boorman v. Jenkins*, 12 Wend. 566. And there is no difference in this respect between an express and implied warranty. *Borrekins v. Bevan*, 3 Rawle, 23.

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yet it is incumbent on the purchaser, if he discovers any fault, to use due diligence in returning the horse; for a trial means a reasonable trial. And it is expedient in all cases to give notice as early as possible of the unsoundness or defects complained of. A horse was sold at a public auction,^(b) warranted six years old and sound, and one of the conditions⁽¹⁾ of sale was, "that the purchaser of any horse warranted sound, who should conceive the same to be unsound, should return him within two days; otherwise he should be deemed sound." Ten days after the sale, the plaintiff discovered that the horse was twelve years old, and offered to return him, but the defendant refused to receive him, and thereupon plaintiff sold the horse, and brought an action on the warranty against the seller. It was proved that the horse was twelve years old. The jury were of opinion that the plaintiff, by not returning the horse sooner, had made him his own, and gave a verdict for the defendant; but the court set aside the verdict, and Lord *Kenyon*, C. J., observed, "that the question turned on the condition of sale, *which, in his opinion, ought to be confined solely to the cir- [*654] cumstance of unsoundness; that there was good sense in making such a condition at a public sale; because, notwithstanding all the care that could be taken, many accidents might happen to the horse between the time of sale and the time when the horse might be returned, if no time were limited. But the circumstance of the age of the horse was not open to the same difficulty." The vendor of a horse, who makes a contract of sale on a Sunday, but not in the exercise of his ordinary calling, may recover.^(c) The defendant was the proprietor of a stage-coach, and a horse-dealer. The plaintiff's son was travelling on a Sunday in defendant's coach, and while the horses were changing, made a verbal bargain for the horse in question for the price of thirty-nine guineas; the defendant warranted the horse to be sound, and not more than seven years old. The horse was delivered to the plaintiff on the following Tuesday, and the price then paid; there was not any evidence to show that the plaintiff or his son knew at the time when he made the bargain that defendant was a horse-dealer. An action having been brought for a breach of the warranty; it was objected, that the bargain having been made on a Sunday, was void within statute 29 Car. II. c. 7, s. 2. But it was holden,^(d) that there was not any complete contract on the Sunday, as it then rested in parol, nor until the Tuesday

(b) *Buchanan v. Parnshaw*, 2 T. R. 745.

(c) *Drury v. Defontaine*, 1 Taunt. 131. But see *Smith v. Sparrow*, 4 Bingham. 84.

(d) *Blozsome v. Williams*, 3 B. & C. 232.

(1) In *Mesnard v. Aldridge*, 3 Esp. N. P. C. 271, it was proved, that the conditions of sale were contained in a printed paper, pasted up under the auctioneer's box, and that the auctioneer, at the time of the sale, had announced that the conditions of sale were as usual. Lord *Kenyon*, C. J., held, that this was a sufficient notice to all persons who came to the sale, of the conditions under which the horses were sold; and he compared it to the case of carriers, who advertised that they would not be liable for goods lost, above a certain value, unless entered as such; in which case the posting up of a bill in the coach-office to that effect, had been holden to be sufficient notice. See *Bywater v. Richardson*, 1 A. & E. 508; 3 Nev. & M. 748; and *Smart v. Hyde*, 8 M. & W. 723. It was holden, that parol evidence was not admissible to prove a warranty of a ship which was sold by bill of sale, no fraud being pretended. *Munford v. M'Pherson*, 1 Johns. Rep. 414; *Wilson v. Marsh*, Ib. 503.

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A return or tender is not necessary to an action on a warranty. It is, when the contract is disaffirmed, and plaintiff seeks to recover the money paid. *Boorman v. Jenkins*, 12 Wend. 566. And there is no difference in this respect between an express and implied warranty. *Borrekins v. Bevan*, 3 Rawle, 23.

(1) If a party be induced to purchase an article by fraudulent misrepresentation of the seller, and after discovering the fraud continue to deal with the article as his own, he cannot recover back the money from the seller. *Campbell v. Fleming*, 1 A. & E. 40.

yet it is incumbent on the purchaser, if he discovers any fault, to use due diligence in returning the horse; for a trial means a reasonable trial. And it is expedient in all cases to give notice as early as possible of the unsoundness or defects complained of. A horse was sold at a public auction,^(b) warranted six years old and sound, and one of the conditions⁽¹⁾ of sale was, "that the purchaser of any horse warranted sound, who should conceive the same to be unsound, should return him within two days; otherwise he should be deemed sound." Ten days after the sale, the plaintiff discovered that the horse was twelve years old, and offered to return him, but the defendant refused to receive him, and thereupon plaintiff sold the horse, and brought an action on the warranty against the seller. It was proved that the horse was twelve years old. The jury were of opinion that the plaintiff, by not returning the horse sooner, had made him his own, and gave a verdict for the defendant; but the court set aside the verdict, and Lord *Kenyon*, C. J., observed, "that the question turned on the condition of sale, *which, in his opinion, ought to be confined solely to the cir- [*654] cumstance of unsoundness; that there was good sense in making such a condition at a public sale; because, notwithstanding all the care that could be taken, many accidents might happen to the horse between the time of sale and the time when the horse might be returned, if no time were limited. But the circumstance of the age of the horse was not open to the same difficulty." The vendor of a horse, who makes a contract of sale on a Sunday, but not in the exercise of his ordinary calling, may recover.^(c) The defendant was the proprietor of a stage-coach, and a horse-dealer. The plaintiff's son was travelling on a Sunday in defendant's coach, and while the horses were changing, made a verbal bargain for the horse in question for the price of thirty-nine guineas; the defendant warranted the horse to be sound, and not more than seven years old. The horse was delivered to the plaintiff on the following Tuesday, and the price then paid; there was not any evidence to show that the plaintiff or his son knew at the time when he made the bargain that defendant was a horse-dealer. An action having been brought for a breach of the warranty; it was objected, that the bargain having been made on a Sunday, was void within statute 29 Car. II. c. 7, s. 2. But it was holden,^(d) that there was not any complete contract on the Sunday, as it then rested in parol, nor until the Tuesday

(b) *Buchanan v. Parnshaw*, 2 T. R. 745.

(c) *Drury v. Defontaine*, 1 Taunt. 131. But see *Smith v. Sparrow*, 4 Bingh. 84.

(d) *Blozsome v. Williams*, 3 B. & C. 232.

(1) In *Mesnard v. Aldridge*, 3 Esp. N. P. C. 271, it was proved, that the conditions of sale were contained in a printed paper, pasted up under the auctioneer's box, and that the auctioneer, at the time of the sale, had announced that the conditions of sale were as usual. Lord *Kenyon*, C. J., held, that this was a sufficient notice to all persons who came to the sale, of the conditions under which the horses were sold; and he compared it to the case of carriers, who advertised that they would not be liable for goods lost, above a certain value, unless entered as such; in which case the posting up of a bill in the coach-office to that effect, had been holden to be sufficient notice. See *Bywater v. Richardson*, 1 A. & E. 508; 3 Nev. & M. 748; and *Smart v. Hyde*, 8 M. & W. 723. It was holden, that parol evidence was not admissible to prove a warranty of a ship which was sold by bill of sale, no fraud being pretended. *Munford v. M'Pherson*, 1 Johns. Rep. 414; *Wilson v. Marsh*, Ib. 503.

when the horse was delivered to and accepted by the plaintiff. But assuming the contract to be complete on the Sunday, as the purchaser had no knowledge of the fact that the vendor was exercising his ordinary calling, he might recover. Where a horse is sold with a warranty of soundness, (e) for a certain sum, part of which is paid at the time of sale, if the horse prove unsound, and the sum paid be equal to the value of the horse, the seller cannot recover the remainder. (1) Plaintiff sold the defendant a horse with a warranty of soundness; the defendant gave the plaintiff a bill of exchange for the price: the defendant discovering the horse to be unsound, tendered him to the plaintiff, but he refused to take him back again. An action having been [*655] brought *by the plaintiff against the defendant on the bill, the defendant proved, that the plaintiff, *at the time of sale, knew that the horse was unsound.* It was holden, (f) that the plaintiff could not recover; for it was clearly a fraud, and a person cannot recover the price of goods sold under a fraud. Where the contract of warranty is still open, it is essentially necessary that the plaintiff should declare, in a special action on the case, (g) founded on the warranty, and not merely in an action for money had and received, to recover the price of the horse. (2) In an action for money had and received, (h) to recover back the price of a horse, sold as a sound horse, and which proved to be unsound, it appeared in evidence, that there had been a warranty of soundness at the time of the original contract of sale: but in a subsequent conversation, when the plaintiff objected that the horse was unsound, the defendant said, that if the horse were unsound he would take it again, and return the money. It was contended, on the authority of *Power v. Wells*, and *Weston v. Downes*, that the action for money had and received would not lie; because this was no other than a mode of trying the warranty, which could be by a special action on the case only: and of this opinion were the court; Lord *Ellenborough*, C. J., (who delivered that opinion,) observing, "that the subsequent conversation was not to be considered as an abandonment of the original warranty, the performance of which the defendant still insisted on; but rather as a declara-

(e) *King v. Boston*, Middlesex Sittings after E. T. 1789; *Kenyon*, C. J., 7 East, 481, n.

(f) *Lewis v. Cosgrave*, 2 Taunt. 2.

(g) *Power v. Wells*, Cowp. 818; Doug. 24, n., S. C.; *Weston v. Downes*, Doug. 23, and ante, p. 98.

(h) *Payne v. Whale*, 7 East, 274, recognized in *Street v. Blay*, 2 B. & Ad. 462.

(1) In cases of this kind, it will be advisable for the defendant to give the plaintiff previous notice of the intended defence, in order that he may be prepared to meet it. But, where the sum to be paid by the defendant is not ascertained by the terms of the agreement, and the plaintiff declares on a *quantum meruit*, it is competent to the defendant, even without notice to the plaintiff, to prove that the thing sold was not worth so much as the plaintiff claims. And if it appear that the plaintiff has been paid on account as much as the thing was worth, he cannot recover. *Basten v. Butter*, 7 East, 479. See *Hills v. Bannister*, 8 Cow. 31. Breach of warranty is a defence to a suit on the last of three notes, given for articles purchased. *Judd v. Dennison*, 10 Wend. 512. In an action on a warranty, defendant cannot set off claims due from plaintiff. *Wilmott v. Hind*, 11 Id. 584. On a warranty, it is no defence that plaintiff had sold the article warranted to a third person, and that there was no recovery against plaintiff. *Tezada v. Camp*, Walker, 150.

(2) In what cases the plaintiff may declare for money had and received, see *Towers v. Barrett*, 1 T. R. 133, and ante, 99.

tion, that, if the warranty were shown to be broken, he would do that which is usually done in such cases, take back the horse and repay the money. Then, when any question on the warranty remains to be discussed, it ought to be so in a shape to give the other party notice of it, namely, in an action on the warranty."—"A warranty by one not intrusted to sell, but merely to deliver the article, and bring back the price, does not bind the principal,⁽ⁱ⁾ without showing an express authority to warrant given by the latter."

It is usual to insert the warranty in the receipt for the price of the horse: in such case, the receipt, if duly stamped with a receipt stamp, will be evidence of the warranty. It does not require an agreement stamp.^(k) And if, on the face of such a receipt, it appears that *money* was the consideration paid for the horse, it will not be competent to the defendant to prove a different consideration, in order to take advantage of a variance, as will appear by the following *case:—The plaintiff declared *in assumpsit*,^(l) that in con- [*656] sideration that the plaintiff had bought of the defendant a horse for so much money, the defendant warranted the horse to be sound. in proof of the plaintiff's case, a receipt, which had been given by the defendant, was produced, purporting to be a receipt for so much money, for a horse warranted sound. On cross-examination of the witness who produced the receipt, it appeared, that the plaintiff had given a mare as well as a sum of money in exchange for defendant's horse. It was objected, that there was a variance; but *Graham, B.*, was of a different opinion, observing that the receipt admitted that the defendant had taken the mare as money. So where the declaration stated^(m) that in consideration that the plaintiff would buy of the defendant a horse for 31*l.* 10*s.*, to be paid by the plaintiff to the defendant, the defendant promised that the horse was sound; and that the plaintiff did buy of the defendant the horse for that price, and did pay to the defendant the said 31*l.* 10*s.*, and then alleged as a breach that the horse was unsound; it appeared in the proof, that the defendant agreed to dispose of his horse, which he warranted sound, to the plaintiff, for thirty guineas, but agreed, at the same time, that if the plaintiff would take the horse at that value, he, the defendant, would purchase of the plaintiff's brother another horse for fourteen guineas, and that the difference only should be paid to the defendant. The witness described it as *one deal* between the parties, and that, but for the latter consideration, he did not believe that the bargain would have been made. It was, therefore, objected, that the proof varied from the contract as laid, and showed rather a contract for the exchange of horses, paying the difference only in money, than an entire money payment for the horse in question. But the court overruled the objection; Lord *Ellenborough, C. J.*, observing, that the parties agreed to consider the brother's horse as fourteen guineas, in their mode of reckoning the payment for the defendant's horse; but still the consideration for the latter was thirty guineas, and the defend-

(i) Per *Bayley, B.*, *Woodin v. Burford*, 4 Tyrw. 265; 2 Cr. & M. 392.

(k) *Skrine v. Elmore*, 2 Campb. 407.

(l) *Brown v. Fry*, Devon. Summ. Ass. 1808, MS.

(m) *Hands v. Burton*, 9 East, 349; recognized in *Saxty v. Wilkin*, 11 M. & W. 622.

ant received thirty guineas in money and value. But where declaration in assumpsit stated, that a defendant warranted a horse to be sound, and the proof was, that the defendant warranted the horse to be sound every where except a kick on the leg; (n) it was holden, that this was a qualified, and not a general warranty, and consequently that there was a variance.(1)

[*657] *II. *Of the Modern Action on the Case grounded on Fraudulent Misrepresentations by Persons not Parties to the Contract*, 9 Geo. IV. c. 14, s. 6.

Where a person, with a design to deceive and defraud another,(2) makes a false representation of a matter inquired of him, in consequence of which the person to whom the representation is made enters into a contract, and thereby sustains an injury, an action on the case, in the nature of deceit, will lie at the suit of the party injured, against the party making the fraudulent misrepresentation, although a stranger to the contract, from the entering into which the plaintiff was damaged.(3) This was for the first time decided in the case of *Pasley and another v. Freeman*, H. T. 1789, 3 T. R. 51, which came before the court on a motion in arrest of judgment on the third count of the declaration. That count stated, "that the defendant, intending to deceive and defraud the plaintiffs, did wrongfully and deceitfully encourage and persuade them to sell and deliver certain goods to one Falch, upon credit, and for that purpose did falsely, deceitfully, and fraudulently assert, that Falch was a person safely to be trusted, &c., whereas, in truth, Falch was not a person safely to be trusted, and the defendant well knew the same, &c." The question was, whether, admitting all the facts as stated to be true, the action could be maintained. Lord Kenyon, C. J., *Ashurst and Buller, Js.*, were of opinion, that it might be maintained; *Grose, J.*, was of opinion, that it was not maintainable.(4)

(n) *Jones v. Cowley*, 4 B. & C. 445.

(1) A warranty of the soundness of a slave, includes soundness of mind as well as of body. *Stinson v. Piper*, 3 M'Cord, 251. Of a warranty of the soundness of an animal, any unsoundness, whether known or not, is a breach. A bare representation requires, in the person making it, a knowledge of the unsoundness. *Case v. Boughten*, 11 Wend. 106. See ante, 644-648, notes.

(2) Where a general recommendation of credit is given, it is not necessary to show an intent to defraud any particular person. *William v. Wood*, 14 Wend. 126; *Allen v. Ad-dington*, 7 Id. 1.

(3) But although an action lies for a false affirmation, as to the credit of a third person, by which the plaintiff is induced to sell him goods, yet it will not lie on the ground of parol promise to indorse for such third person, by which the plaintiff was induced to sell, though the defendant knew that such third person was insolvent at the time. *Gallager v. Brunel*, 6 Cowen, 347. But where the holder of a note drawn by persons whom he knew to be insolvent, passed it away for a horse, affirming that it was "as good as gold dust," and would be paid in two or three days, it was held, that he was liable to an action of deceit. *Watson v. Pickett*, 2 Rep. Conn. Ct. 222. See *Munro v. Gardner*, 1 Id. 328, 475. See post, 660, note (1).

(4) The old cases were confined to fraudulent assertions by one of the contracting

The principle of this case was extended much further by the Court of Exchequer in the case of *Langridge and Levy*,^(o) which was an action for falsely and fraudulently warranting a gun to have been made by Nock, and selling it as such to the plaintiff's father for the use of himself and sons, one of whom, the plaintiff, confiding in the warranty, used the gun, which burst and injured him; *Parke*, B., in delivering the judgment of the court, said, "As there is fraud, and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible *to the party [*658] injured."⁽¹⁾ So where the defendant, being about to sell a public house, falsely represented to B., who had agreed to purchase it, that the receipts were 180*l.* a month, B., having to the knowledge of the defendant communicated this statement to the plaintiff, who became the purchaser instead of B.; it was holden,^(p) that an action was maintainable for the deceit by the party eventually injured.

It seems, that no representation is necessary; it is enough if a party allow another to enter into a contract under a delusion as to material facts which he might have removed.^(q)

In cases of this kind it is not necessary that the defendant should have derived any advantage from the deceit;^(r) or that he should have colluded with the person who did derive the advantage; but there must be fraud⁽²⁾ in the defendant, in order to support the action;^(s) for in

(o) 2 M. & W. 519, confirmed on Error, 4 M. & W. 337.

(p) *Pilmore v. Hood*, 5 Bingham N. C. 97.

(q) See *Hill v. Gray*, 1 Stark. N. P. C. 434, cited by *Coltman*, J., in *Pilmore v. Hood*, 5 Bingham N. C. 109.

(r) *Pasley v. Freeman*, 3 T. R. 51; and per *Kenyon*, C. J., in *Egre v. Dunsford*, 1 East, 328, 9.

(s) *Tapp v. Lee*, 3 Bos. & Pul. 367, recognized by *Park*, J., 7 Bingham 107.

parties, (as was justly observed by *Grose*, J., in his elaborate argument in *Pasley v. Freeman*, 3 T. R. 53,) and proceeded upon the breach of a *promise*, either express or implied, that the fact misrepresented was true, and in these respects they differ from *Pasley v. Freeman*, and subsequent cases decided on the authority of that case. See Lord *Eldon's* remarks on this case in 6 Vesey, 182, and in 3 Ves. & Beames, 110.

(1) See 4 M. & W. 337, where the Court of Exchequer Chamber recognized this dictum of *Parke*, B., as the ground of their decision. In *Winterbottom v. Wright*, 10 M. & W. 114, Lord *Abinger*, C. B., said, in reference to the case of *Levy v. Langridge*: We ought not to attempt to extend the principle of that decision; the gun was bought for the use of the son, the plaintiff in that action, who could not make the bargain himself, but was really and substantially the party contracting: and *Alderson*, B., added, the principle of that case was simply this, that the father having bought the gun for the very purpose of being used by the plaintiff, the defendant made representations by which he was induced to use it. There a distinct fraud was committed on the plaintiff: the falsehood of the representation was also alleged to have been within the knowledge of the defendant who made it, and he was properly held liable for the consequences.

(2) "By fraud, I understand an intention to deceive; whether it be from any expectation of advantage to the party himself, or from ill-will towards the other, is immaterial." Per *Le Blanc*, J., in *Haycraft v. Creasy*, 2 East's R. 108. "Fraud may consist as well in the suppression of what is true, as in the representation of what is false." Per *Chambre*, J., 3 Bos. & Pul. 371. "Fraud and falsehood must concur to sustain this action;" Per *Gibbs*, C. J., *Ashlin v. White*, Holt's N. P. C. 387. But as respects fraud, fraud in law is sufficient. "It is fraud in law, if a party makes representations which he knows to be false, although the motive from which the representations proceeded may not have been bad." *Tindal*, C. J., 7 Bingham 107. See also *Foster v. Charles*, 6 Id. 396; 7 Id. 105;

a case where there was not any fraud or deceit in the party [*659] making the representation, although he had *incautiously asserted that to be within his own knowledge, (t) which in strictness he could not be said to have known, but had reasonable and probable cause only to believe; it was holden by *Grose, Lawrence, and Le Blanc, Js.*, that the action was not maintainable. But *Kenyon, C. J.*, was of a different opinion. The defendant, having had a credit lodged with him by a foreign house, (u) in favour of one T. to a certain amount, upon an express stipulation, that there should be previously lodged in the defendant's hands goods to treble the amount, and having been applied to, by the plaintiffs, for information respecting the responsibility of T., answered, that he (defendant) did not know any thing of T., except what he had learned from his correspondent, but that he had a credit lodged with him to a certain amount by a respectable house, which he held at the disposal of T., (omitting to mention the stipulation on which the foreign house had given T. credit,) and that, upon a view of all the circumstances which had come to the defendant's knowledge, the plaintiffs might execute T.'s order with safety, (viz. an order for the sale and delivery of goods upon credit :) It was holden, that on the part of the defendant, there was a material suppression of the truth, and evidence sufficient for the jury to find fraud, which was the gist of this action; although at the time the defendant made the representation, he added, that he gave the advice without prejudice to himself. It is not necessary for the plaintiff to show that the false statement of the defendant was accompanied with an intention to injure the plaintiff. (x) Plaintiff being about to furnish defendant's son with goods on credit, inquired of the defendant, by letter, whether his son had, as he asserted, 300*l.* of his own property; the defendant answered that he had; the fact being, that the defendant had lent his son 300*l.* on his promissory note, payable with interest on demand, and had received interest on the note. The son having afterwards become insolvent; it was holden, (y) that this was a misrepresentation for which the defendant was liable in damages; for the statement being false within the defendant's knowledge, fraud might be inferred. The making a representation, which a party knows to be untrue, and which is calculated, from the mode in which it is made, to induce another to act on the faith of it so that he may incur damage, is a *fraud in law*. (1) Hence, where a bill was presented for acceptance at the office of the drawee, when he was absent, and A., who lived in the same house with the drawee, being assured by one of the payees that the bill was perfectly regular, was induced to write on the bill an acceptance as by the procuration of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the drawee. But the bill was dishonoured when due. The in-

(t) *Haycraft v. Creasy*, 2 East, 92.

(u) *Eyre and another v. Dunsford*, B. R. H. 41 Geo. III., 1 East, 318.

(x) *Foster v. Charles*, 7 Bingh. 105.

(y) *Corbett v. Brown*, 8 Bingh. 33.

Shrewsbury v. Blount, 2 M. & Gr. 475; 2 Scott's N. R. 588; *Pontifex v. Bignold*, 3 M. & Gr. 63; 3 Scott's N. R. 390.

(1) See *post*, p. 660, note (1).

dorsee, having sued the drawee, was nonsuited on the above facts; *the indorsee then brought an action against A. for [*660] falsely, fraudently, and deceitfully representing that he was authorized to accept by procuration; and although the jury negatived fraud in fact, yet it was holden,^(z) that A. was liable, for there was a fraud in law. In the foregoing case, there was a direct assertion of that which the defendant knew to be untrue; but in order to constitute fraud for which this action will lie, it is not necessary to show that the defendants knew the fact they stated to be untrue; it is enough that the fact is untrue if they communicated that fact for a deceitful purpose.^(a) But where the party making the representation does not know it to be untrue, and there is no fraud in fact, the action cannot^(b) be maintained.⁽¹⁾

^(z) *Polhill v. Walter*, 3 B. & Ad. 114.

^(a) Per *Parke*, B., delivering the judgment of the court in *Taylor v. Ashton*, 11 M. & W. 415, recognizing the cases of *Pasley v. Freeman*, and *Haycraft v. Creasy*.

^(b) *Freeman v. Baker*, 5 B. & Ad. 797; see *Moens v. Heyworth*, 10 M. & W. 147; *Wilson v. Fuller*, 3 Q. B. 68, 1009; 2 G. & D. 460; *ante*, p. 66, n.

(1) To maintain an action as for a deceit on a parol representation as to the credit and responsibility of a third person, the plaintiff must prove actual fraud in the defendant, or intention to deceive the plaintiff by false representations; deceit being the gist of the action. *Young v. Covell*, 8 Johns. 23. Advice rashly and indiscreetly given, but without any fraudulent intention, will not support the action. *Ib.* Where goods are sold to A. on credit, upon the fraudulent representations of B., and a loss ensues, B. is liable in an action on the case, although other inducements besides the representations made may have operated in the giving of the credit; it is enough if the vendor be moved by such representations so that the goods would not have been parted with without them. *Addington v. Allen*, 11 Wend. 375. The author of a letter, written with the fraudulent intent to enable a person to obtain goods on credit, is answerable to the party injured, if goods are obtained by means of such letter, and the vendor is defrauded, although no particular person was had in view at the time of the writing of the letter. *Ib.*

A. represented N. to B. as a friend of his, residing in the neighborhood, and thereby induced B. to sell to him certain slaves for a less price than they were worth, with an understanding that they were to be kept by A. and N. in the neighborhood; whereas the slaves were intended for N., who was a slave dealer, and who removed those so purchased out of the state into South Carolina. B. brought an action against A. to recover damages for the fraud and deceit. Held, that this was a cheat and fraud on the part of A., for which he was liable to B., and not a verbal undertaking to answer for the default of another, and so void under the statute of frauds. *Adams v. Anderson*, 4 Har. & J. 558.

An action upon the case for deceit, will lie for false representations made by the defendant by words and actions, with intent to deceive the plaintiff, whereby the plaintiff sustained damage, though the defendant had no interest in making such representations. *Hart v. Tallmadge*, 2 Day, 382. Where A., by combination with B., enabled him to obtain a fraudulent credit of C., as by a loan of money, A. is liable to C. in an action of deceit, though he had been unknown to him throughout the transaction. *Windover v. Robbins*, 2 Tyler, 1.

A., in a written representation that B. was entitled to credit, concealed the fact that B. was a minor, with a view to give him a credit, knowing or believing that he would not obtain credit if that fact was known. C. sold goods to B. on credit, upon the faith of A.'s representation. B. did not pay for the goods, but left the country and went on a whaling voyage. Held, that A. was guilty of an actionable fraud, and that C. was entitled to recover of him the amount of the goods without first bringing an action therefor against B. *Kidney v. Stoddard*, 7 Metc. 252. In an action for obtaining credit to a third person for goods sold by means of false and fraudulent representations, it is not necessary to attempt a literal recital of the representation; the substance of it is necessary. *Cutter v. Adams*, 15 Verm. 237. Where one who represents the credit and character of a merchant alleges that to be true which he knows to be false, or fraudulently conceals what he ought to have revealed, an action for consequential damages will lie against him. *Ramsey v. Lovell*, Anthon, 17. See *post*, p. 661, note (2).

By stat 9 Geo. IV. c. 14, s. 6, "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given, concerning or relating to the character, conduct, credit, ability, trade, or dealings of *any other person*,⁽¹⁾ to the intent or purpose that such other person may obtain credit, money, or goods upon,^(c) unless such representation or assurance be made in writing, signed by the party to be charged therewith."

This provision was framed to prevent an evasion of the Statute of Frauds, 29 Car. II. c. 3, s. 4, which had prevailed since the decision in *Pasley v. Freeman*, ante, p. 657. Parties who were thereby prevented from suing as upon "a special promise to answer for the debt, default, or miscarriage of another, because there was not any guarantee in writing, brought actions on the misrepresentation." But this provision is not confined to cases under the Statute of Frauds, which is not mentioned in the act till afterwards.^(d)

In *Lyde v. Barnard*, 1 M. & W. 101, the foregoing section of the 9 Geo. IV., c. 14, was fully discussed. It was an action on the case for falsely representing that the life interest of Lord E. Thynne, in certain trust funds was charged with only three annuities, whereby the plaintiff was induced to advance to the said Lord E. Thynne, [*661] 999*l.*, for the purchase of an annuity secured by **his* covenant, bond, warrant of attorney, and an assignment of his life interest in the said fund; whereas the defendant well knew that the said interest was charged, not only with three annuities, but also with a mortgage for 20,000*l.* The representation having been made by parol, Lord Abinger, C. B., at the trial, nonsuited the plaintiff, on the ground that the case was within the statute. On motion for a new trial, the court was equally divided; Lord Abinger and Gurney B., conceiving the case to be within the statute, relying on the word "ability" therein; Parke, B., and Alderson, B., considered the case not within the statute: the case was never decided; but it appears from subsequent cases that the construction contended for by the learned Chief Baron would be that one adopted by the courts. See *Haslock v. Fergusson*, 7 A. & E. 86; *Swann v. Phillips*, 8 A. & E. 457.

In ordinary cases, the person who gives a representation of the credit of a third person is not liable beyond the value of the goods furnished on the facts of the representation:^(e) but circumstances may exist which will render him liable to losses arising from subsequent dealings.^(f)⁽²⁾

(c) Sic.

(d) Per Tindal, C. J., in *Devaux v. Steinkeller*, 6 Bingh. N. C. 88.

(e) *De Graves v. Smith*, 2 Campb. 533.

(f) *Hutchinson v. Bell*, 1 Taunt. 558.

(1) A representation made by the defendant alone, who was in partnership with two other persons, that the *firm* was trustworthy, is a representation as to the credit of others within the meaning of the statute, and must be in writing, to make it binding. *Devaux v. Steinkeller*, 6 Bingh. N. C. 84.

(2) In this action, the party, whose credit is misrepresented, is a competent witness for the plaintiff.

The principle that a fraudulent misrepresentation of the credit of third persons, will subject the person making it to the damages sustained by the party who confides in such misrepresentations, has been recognised in the courts of this country. But though the

*CHAPTER XVI.

DETINUE.(1)

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I. Of the Action of Detinue, and in what Cases it may be maintained.
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THE action of detinue may be maintained by any person who has either an absolute or a special property in goods against another, who is in actual possession, either by delivery or finding,(a) &c.,(2) of such

(a) 1 Inst. 286, b.

representation made by the person sought to be charged, may have been, at the time, untrue in point of fact, yet if he was ignorant of it, and so far as appears by the evidence, actually believed that it was true, he is not held responsible for the loss sustained by the other party intrusting to the representation. *Russell v. Clarke's executors*, 7 Cranch, Rep. 69. Knowledge of facts, and a deceitful intent, are necessary to a liability for misrepresentation, in consequence of which credit is given. *Ball v. Lively*, 4 Dana, 370; *Stewart v. Dougherty*, 3 Id. 480. An action on the case lies for a false recommendation as to another's credit, made with intent to deceive, and acted on; and the suppression of truth is as much fraud as the assertion of falsehood. Nor is it necessary any benefit should accrue to the person making the false affirmation; nor that it should be made directly by him, nor directly to the party who is injured. *Allen v. Addington*, 7 Wend. 1. The principal may sue for false representation made to his agent, whether factor, commission merchant, or clerk. *Raymond v. Howland*, 12 Wend. 176. Case lies for a knowingly false certificate that a person is an honest, industrious, good citizen, and would, in the opinion of the person giving it, honorably endeavor to perform his engagements in any matter of business or credit, if goods are obtained on its credit. Nor can defendant show it was given for another purpose; but he may that he himself was deceived in the person's character. And plaintiff may show that such person was insolvent and worthless at the time the certificate was given. *Williams v. Wood*, 14 Wend. 126. See note, ante, p. 660.

(1) This action fell into disuse on account of the defendant having been permitted to wage his law; but wager of law is now abolished. See ante, p. 68. Not in use in Mississippi. *Jennings v. Gibson*, Walker, 234. Has been allowed in Pennsylvania, in debt on simple contract. *Barnet v. Ihrie*, 17 S. & R. 212.

(2) In *Kettle v. Bromsall*, Willes, 118; it was holden, that detinue would lie for things lost and found, (F. N. B. 324, ed. 4to, S. P.) as well as for things delivered. If A. bargains and sells goods to B. upon condition, that if A. pays B. a certain sum of money at a day fixed, the sale shall be void; if A. pays the money, he may have detinue for the goods, although they came not to the hands of B. by bailment, but by bargain and sale. *Bateman v. Elman*, Cro. Eliz. 866. Detinue lies in every case in which the owner wishes to recover the specific property, whether it came into possession of the defendant rightfully or wrongfully. *Pierce v. Hill*, 9 Port. 151. A trustee to whom slaves are conveyed in trust by a debtor to secure the payment of debts, may maintain an action of detinue against the *cestui que trust* for the recovery of the slaves. *Newman v. Montgomery*, 5 How. Miss. 742. Or a mortgagee of property to indemnify himself as surety for the mortgagor in a bond, may maintain detinue for the property when the debt becomes due and is unpaid. *Spaulding v. Scanland*, 4 B. Monr. 365.

A special property in the things detained, as of an executor or one holding under an

goods, and refuses to re-deliver them.(1) In this action the plaintiff seeks to recover the goods in specie, or in failure thereof the value, (for it is in the election of the defendant,(2) whether he will deliver the specific goods,(b) or pay the value thereof,) and also damages for the detention.

(b) See *distringas ad deliberand.* Aston's Ent. pl. 202; Dalton's Shff. 322; Rastall's Ent. 212.

order of the court, will sustain the action. *Wade v. Edwards*, C. & N. 416. But it cannot be maintained after the destruction or death of the chattel sued for. *Lindsey v. Perry*, 1 Ala. 203.

(1) Possession alone is sufficient to maintain an action of detinue, until a right to dispossess is shown. *Berry v. Hale*, 1 How. (Miss.) 315. Thus a bailee of chattels may maintain detinue for them upon his right of possession as bailee. *Boyle v. Townes*, 9 Leigh, 158; *Caldwell v. Ford*, Riley, 277. The plaintiff must have a property, either general or special, in the chattel; if special, it must grow out of an actual possession or be coupled with an interest therein. *Ramsey v. Bancroft*, 2 Mis. 151. To maintain an action of detinue for goods, the plaintiff must have the right of property in himself, and the immediate right of possession; the gist of the action being the wrongful detainer, and not the original taking. *Melton v. M'Donald*, 2 Mis. 45. But it may be maintained against a defendant who has had possession of the chattel sued for, but has parted with the possession before the date of the writ. *Pool v. Adkisson*, 1 Dana, 110. Detinue will lie against him who carries away and sells the property of another without his assent. *Ib.*

The gist of the action of detinue, is the wrongful detainer at the date of the writ, and not the original taking of the chattel. It is generally, therefore, incumbent on the plaintiff in this action, to show an actual possession or a general controlling power over the chattel by the defendant at the date of the writ. *Charles v. Elliott*, 4 Dev. & Batt. 468. And it will lie although the defendant has parted with the possession of the property before demand and suit brought. *Haley v. Rowan*, 5 Yerg. 301; *Kershaw v. Baykin*, 1 Brev. 301. And although possession of the defendant must be proved, yet it is not necessary that it should continue up to the time of commencing suit, to entitle the plaintiff to recover, unless the defendant has been lawfully dispossessed. *Lowry v. Houston*, 3 How. (Miss.) 394; *Burton v. Brashaw*, 3 A. K. Marsh. 276. A wrongful dispossession will not defeat the action. Thus, where an administrator delivered up property which was not assets, to be taken on execution against him as administrator, it is a wrongful dispossession and detinue will lie to recover the same. *Ib.* If the plaintiff prove that he had title at the time of the action brought, and that the defendant then had the possession, the defendant, in order to defeat the action, must show that he has been divested of the property in due course of law. *Lynch v. Thomas*, 3 Leigh, 682. It is not necessary to prove that the plaintiff has had actual possession. *Tunstall v. M'Clelland*, 1 Bibb, 186. The plaintiff must prove property in himself, and possession in the defendant; but proof of a possession anterior to the bringing of the action is sufficient, unless he has been legally dispossessed, and this the defendant is to show. *Burnley v. Lambert*, 1 Wash. 308.

In detinue, brought in behalf of an infant for a slave, it appeared that the slave had been given to the infant, and left by the donor with the infant's mother, for his benefit, the father being dead. Held, that the possession by the mother was to be considered the possession of the infant. *Mortimer v. Brumfield*, 3 Munf. 122. In North Carolina, detinue lies in every case in which the property is detained, without regard to the manner in which the defendant acquired possession. *Johnson v. Pasteur*, Cameron & Nor. 464. One tenant in common cannot maintain this action against another to recover possession of a slave. *Chinn v. Respass*, 1 Monroe, 29; *Brown v. Latham*, 1 Ired. 271. But a surviving partner may maintain detinue against the representatives of a deceased partner to recover the books of account and other papers. *Murray v. Mumford*, 6 Cowen, 441. Detinue will lie against an infant for goods delivered on a special contract for a specific purpose, after the contract is avoided. Per *Rogers*, J. *Penrose v. Curran*, 3 Rawle, 453.

(2) A plaintiff in detinue is entitled to execution for the *very thing* recovered; and a tender of the alternative damages does not discharge the judgment, unless accepted, or the court is satisfied that, without his fault, defendant cannot deliver it. And the officer must take the *posse comitatus*, if necessary, and may break into defendant's dwelling-house, if he finds it closed, and has good reason to believe the thing is there. *Keith v. Johnson*, 1 Dana, 604. If the specific property cannot be had, plaintiff must take the alternative value assessed; and if released by mistake of law, no new action of detinue lies. *Jennings v. Gibson*, Walker, 234.

As this action proceeds on the ground of property in the plaintiff, **at the time of action brought*, it cannot be main- [*668] tained, if the defendant took the goods tortiously, (c) for by the trespass the property of the plaintiff is divested. (1) Hence, also, if a person detain the goods of a feme covert, (d) which came to his hands before the marriage, the husband alone must bring the action; because the property is in him *at the time of action brought*. (2) Property in the plaintiff without ever having had possession is sufficient. (3) Hence an heir may maintain detinue for an heir-loom. (e) So if it be enacted by a statute, (f) that goods imported in any other manner than as therein directed, shall be forfeited, one moiety to the king, and the other moiety to him who will inform, seize, or sue for them: a subject may have detinue for the moiety of goods imported contrary to the provisions of the statute; for by the illegal importation the property is divested out of the owners; and by bringing the action it is vested in the plaintiff, by relation, from the time of the offence committed. (4) So if I deliver goods to A. (g) to deliver to B., B. may have detinue; for the property is vested in him by the delivery to his use. The goods demanded (5) must be such as can be distinguished from other property,

(c) 9 Hen. VII. 9, a.; Bro. Abr. Detinue, pl. 53, per *Brian*, C. J., may have replevin pl. 36.

(d) Bull. N. P. 50.

(e) Bro. Abr. Detinue, pl. 30.

(f) See stat. 12 Car. II. c. 18; *Roberts q. t. v. Withered*, 5 Mod. 193; 12 Mod. 92; Salk. 223, S. C.

(g) 1 Rol. Abr. 606, (C.) pl. 1.

(1) Trespass, trover, or detinue, lies against one who carries away and sells another's property without his assent. *Pool v. Adkisson*, 1 Dana, 121. As to property in plaintiff, see *ante*, 662, note (1), and cases there cited.

(2) This position is cited in Com. Dig. and other books; but the opinion of *Vavasour*, J., to the contrary, in the same case, seems to be better founded. See the reasoning of *Anderson* and *Warburton*, Js., in *Bishop v. Montague*, Cro. Eliz. 824, to the same effect, but applied to the action of trover. See *Johnson v. Pasteur*, 2 Hayw. 306, where it is said that the action must be in the name of both.

(3) See *Tunstal v. McLelland*, 1 Bibb, 186; *Meriwether v. Booker*, 5 Littell, 256.

(4) This case was recognized in *Wilkins v. Despard*, 5 T. R. 112, where it was holden, that if a ship be seized as forfeited under the Navigation Act, (12 Car. II. c. 18,) by a governor of a foreign country, under the dominion of Great Britain, the owner cannot maintain trespass against the governor, although there has not been any sentence of condemnation; because the forfeiture is complete by the seizure, and the property is thereby divested out of the owner.

(5) In detinue, demand before suit is not necessary, except for the purpose of entitling the plaintiff to damages for detention between the time of the demand and the commencement of the suit. *Tunstal v. McLelland*, 1 Bibb, 186; *Cole v. Cole*, 4 Id. 340; *Cox v. Robertson*, 1 Id. 604; *Anon.*, 2 Hay. 136; *Irwin v. Wells*, 1 Mis. 9; *Jones v. Henry*, 3 Litt. 46. An action can be maintained for a deed, note, or any other muniment of title or document of debt, if the plaintiff has the property, a right to the immediate possession, and it can be identified. *Lewis v. Hoover*, 1 J. J. Marsh, 500.

The writ is a sufficient demand of the thing detained; and a previous demand is not otherwise necessary than to enable the plaintiff to recover damages for the detention, before suit brought. *Geutry v. McKehen*, 5 Dana, 34; *Carraway v. McNiece*, Walker, 538; *Vaughan v. Wood*, 5 Ala. 304. But it may be necessary to prove a previous demand, where the plaintiff seeks to recover damages for detention previous to suit. *Ib.* A previous demand is not necessary, if the defendant had the possession and claimed the property at the institution of the suit; and it seems that a demand is not necessary in any case except to fix the one then in possession with a liability to an action of this nature, although he may part from the possession before suit actually brought, or except for the purpose of putting an end to a bailment. *Jones v. Green*, 4 Dev. & Batt. 356.

by certain discriminating marks: as money in a bag; (*h*) a horse; a cow; (*i*) a piece of gold, value twenty-one shillings; deeds concerning the inheritance of the plaintiff's land, (*k*) if he can describe what they are, and what land they concern, (*l*) or if such deeds are in a chest: (*m*) and the like. But for money (not in a bag or chest), or corn, (*n*) and other things which cannot be distinguished from property of the same kind or description, detinue will not lie. The gist of the action is the detainer; (*o*)—Hence, if the bailee of goods die, detinue will [*664] not lie against his *personal representative, unless he takes possession of the goods. (*p*) (1) But if, after the death of the bailee, a stranger takes the goods, detinue lies against the stranger. (*q*) The action lies though the defendant quitted the possession before action brought, by delivery of the goods to another. (*r*) (2) But it does not lie against him who never had possession of the chattel, though it does against one who once had, but has improperly parted with the possession of it. (*s*) If goods be delivered to husband and wife, detinue ought to be brought against the husband only. (*t*) But if they are delivered to the wife before marriage, the action must be brought against husband and wife. (*u*) (3) From the preceding cases it may be collected, that the grounds of the action of detinue are,

1. A property in the plaintiff, either absolute or special (at the times of action brought,) in personal goods which are capable of being ascertained.

2. A possession in the defendant by bailment, finding, &c.

3. An unjust detention on the part of the defendant. (4)

Detinue falls within that class of action called actions of contract,

(*h*) 1 Inst. 286, b.; 1 Rol. Abr. 606, (A.) pl. 1.

(*i*) F. N. B. 322, (A.) ed. 4to.

(*k*) 1 Inst. 286, b.

(*l*) *Ib.*

(*m*) *Banks v. Whetston*, Cro. Eliz. 457.

(*n*) 1 Inst. 286, b.

(*o*) 2 Bulst. 308; *Gledstane v. Hewitt*, 1 Cr. & J. 565; and 1 Tyrw. 445.

(*p*) 1 Rol. Abr. 607, (D.) pl. 1.

(*q*) *Ib.* pl. 2.

(*r*) Com. Dig. Detinue, (A.)

(*s*) *Jones v. Dowle*, 9 M. & W. 19.

(*t*) 38 Edw. III. 1, a.

(*u*) 1 Inst. 351, b.

(1) Executors are chargeable in this action on the ground of possession only. Bro. Abr. Detinue de biens, pl. 19. If there are three executors, and one hath possession, detinue lies against him only. *Ib.* See *Walker v. Hawkins*, 1 Hayw. 398; *Royal v. Epper*, 2 Munf. 479; *Mansell v. Israel*, 3 Bibb, 510.

(2) In detinue, if plaintiff show title at the time of action brought, and that defendant then had possession, defendant, to defeat the action, must show he has been divested by due course of law. *Lynch v. Thomas*, 3 Leigh, 682. Detinue lies against one who had possession, but has parted with it, (without being divested by law,) before the date of the writ. *Pool v. Adkisson*, 1 Dana, 118. But not where the chattel was not in existence at the time suit was brought, as for a slave after his death. But it does where it was in existence then, but perished afterwards. *Calowell v. Fenwick*, 2 Id. 332; *Lindsey v. Perry*, 1 Ala. 203.

In North Carolina, detinue lies, though the defendant have parted with the possession of the chattel before suit. *Merrit v. Warmouth*, 1 Hayw. 12; *Skipper v. Hargrove*, Martin. (N. C.) 74. In Kentucky, it is held, that a defendant in detinue is liable for the value of a slave, if he die pending the suit. *Carrol v. Early*, 4 Bibb, 270; *Gentry v. Bernet*, 6 Monr. 113. See *ante*, 662, note (1).

(3) See *Johnston v. Pasteur*, Cam. & Nor. 464; *Norfeet v. Harris*, *Ib.* 517.

(4) Where a verdict in detinue "found the property in plaintiff, and the value sixty dollars," judgment was arrested because no unlawful detainer was shown. *Crouch v. Martin*. 3 Blackf. 256.

and is therefore within the 3 & 4 Will. IV. c. 42, s. 17, so as to be triable before the sheriff.(x)

II. Of the Pleadings and Evidence.

THE manner in which the goods came into the possession of the defendant is matter of inducement only; hence, if the plaintiff declares on a bailment, the defendant cannot plead that the plaintiff did not bail the goods: for the bailment is not traversable.(y) So where the plaintiff declares, that the goods came to the hands of the defendant by finding,(z) and the evidence was, that the plaintiff had delivered the goods to the defendant (an infant) for a special purpose, and the defendant refused to re-deliver them; it was holden, that the evidence supported the declaration.(1) If the action be brought for several articles,(a) it is not necessary to set forth the separate value of each in the declaration; it is sufficient if the *jury sever the [*665] values by their verdict.(2) The plaintiff must prove the detainer of the goods precisely as laid in the declaration. Hence, in detinue for a bond for 100*l.* upon bailment,(b) if defendant plead that he did not receive a bond for such sum, and it is found that he received a bond for a greater sum, there must be a verdict for the defendant; because the bond is not the same as that which the plaintiff demands. The plea of non detinet shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence(c) than such denial shall be admissible under that plea.(d)(3) Under a plea that the goods were not the goods of the plaintiff's, the defendant may set up a lien.(e)(4) Plaintiff had deliv-

(x) *Walker v. Needham*, 3 M. & Gr. 557; 4 Scott's N. R. 222.

(y) *Walker v. Jones*, 2 Cr. & M. 672; 4 Tyrw. 915; Bro. Abr. Detinue de biens, pl. 50.

(z) *Mills v. Graham*, 1 Bos. & Pul. N. R. 140. (a) *Pawly v. Holly*, 2 Bl. R. 853.

(b) 2 Roll. Abr. 703, Trial, pl. 11. (c) R. G. H. T. 4 Will. IV.

(d) See *Richards v. Frankum*, 6 M. & W. 420.

(e) *Lane v. Tewson*, 12 A. & E. 116, (n); 1 G. & D. 584.

(1) A declaration in detinue, not containing a demand, was held good after verdict. *Bogges v. Bogges*, 6 Munf. 486. See *Justall v. McClellen*, 1 Bibb, 186. In detinue, the service of the writ is a sufficient demand. *Caraway v. McNiece*, Walker, 538.

(2) See *Thomas v. Tanner*, 6 Monr. 59.

(3) Upon this issue the defendant cannot give in evidence that the goods were pawned to him for money which has not been paid, for such matter ought to be pleaded specially; but he may give in evidence a gift from the plaintiff, for this proves that he does not detain the plaintiff's goods. 1 Inst. 283, a. An officer sued in detinue for a chattel taken and held under order of court, must show by his plea how he holds it. Evidence of his right is not admissible under non detinet. *Cromwell v. Clay*, 1 Dana, 579.

(4) The Court of Exchequer have recently decided (denying the authority of the case of *Lane v. Tewson*,) that the defendant cannot, under the plea of non detinet, and not possessed, show that he had a common interest with the plaintiff in the property sought to be recovered; but that such a defence ought to be specially pleaded: and *Alderson*, B. in delivering the judgment of the court, said, "The plea of not possessed, puts only the property of the plaintiff in issue; and if thereupon the plaintiff has such a property as will enable him to maintain detinue, it is enough. A plaintiff entitled to a share of a chattel, may maintain this action. That was decided in *Broadbent v. Ledward*, 11 A. & E. 209; 3 P. & D. 45. And if the defendant has any right to detain, arising out of a joint interest, or out of a lien or a pledge, he must plead such right specially on the record." *Mason v. Farnell*, 12 M. & W. 684.

ered to defendant the title deeds of plaintiff's wife's estate; plaintiff afterwards levied a fine of the estate to the use of his son. Plaintiff afterwards commenced an action of detinue against the defendant for the deeds; it was holden, (f) that as the muniments of an estate belong to the person who has the legal interest in it, plaintiff could not recover; for at the time the action commenced, the deeds were not the property of the plaintiff, but of the son; who being the true owner, ought to sue for them at once. If one joint tenant bring an action of detinue, the objection that the other tenants should have joined can be taken only by plea in abatement. (g)

III. Of the Judgment.

THE form of the judgment in this action is, (h) that the plaintiff do recover the goods in question, or the value thereof, if the plaintiff cannot have the goods, and his damages; (1) that is, damages for the detention. (2) The language of the judgment being in the alternative, that the plaintiff do recover the goods, or the value thereof, it is incumbent on the jury to find the value, (3) and an omission in this re-

(f) *Philips v. Robinson*, 4 Bingh. 106.

(g) *Broadbent v. Ledward*, 3 P. & D. 45; 11 A. & E. 209.

(h) Townsend's 1st Book of Judgments, 344; 2nd Book of Judgments, 82, 83, 84, 85; Aston's Entries, 202, pl. 8; *Peters v. Heyward*, Cro. Jac. 681, 2; Keilw. 64, b.; per Frowick, C. J.

(1) The damages in detinue should be the entire value of the chattel, wherever the recovery bars a subsequent action, as in case of a bailee, who recovers for himself and bailor. But where the plaintiff has only a particular estate, and another the remainder, the value of his separate interest is the measure of damages, as the action of the remainder-man is not barred. *Glascock v. Hays*, 4 Dana, 60. The plaintiff in detinue may recover the worth of the use of the thing detained in damages, as the hire of a slave during the unauthorized detention. *Ib.* 62; *Jennings v. Gibson*, Walker, 234.

In detinue for a slave, the death of the slave pending the action will not prevent a recovery for the value. *White v. Ross*, 5 Stew. & Port. 123. The jury found for the plaintiff, in detinue, but that the slave died after the suit was brought and gave no damages. Held, that the court must give judgment for the value of the slave as found, though she was dead, the death not being put in issue by plea *puis darrein continuance*. *Austin v. Jones*, Gilmer, 341.

(2) If several things are demanded, the jury ought to find the value of each particular thing. East, T. 3 H. 6, 43, a. The jury should assess the value of each article separately; but if not done, under the statute of Mississippi, a writ of inquiry lies. *Careway v. M'Niece*, Walker, 538. The judgment in trover is, "that the plaintiff do recover his damages." *Knight v. Bourne*, Cro. Eliz. 116.

(3) An action of detinue cannot be maintained on a judgment in a former action of detinue for the same property. *Foster v. Smoot*, 1 Marsh. 394; *Withers v. Withers*, 6 Munf. 11. In detinue for two horses, a verdict for the plaintiff must find the separate value of each. *Buckner v. Haggin*, 3 Monr. 59. A verdict in detinue for a part of the things demanded, is good for the plaintiff as to those found for him; and for the defendant as to the remainder. *Thomas v. Tanner*, 6 Id. 52. The omission of the jury, in an action of detinue for slaves, to find the value of a mother and each child, although of tender years, is fatal to the judgment. *Bell v. Pharr*, 7 Ala. 807. In detinue for a cow and her calf, and fourteen hogs, it is not error if the jury assess an aggregate sum as the value of the cow and calf, and another sum as the value of the hogs. *Haynes v. Crutchfield*, *Ib.* 189. So also in detinue for several articles, judgment should be rendered for the separate value of each. *Millikin v. Greer*, 5 Mis. 489; *Thomas v. Tanner*, 6 Monr.

spect cannot be supplied by a writ of inquiry of damages.(i)(1) If several things are demanded, the jury ought to find the value of each particular thing.(k)(2)

***CHAPTER XVII.**

[*666]

DISTRESS.

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I. Of the Nature and Origin of a Distress.

THE power of distraining was given to the lord, (in lieu of the forfeiture of the land,) for the purpose of enforcing the tenant to perform those services which were the consideration of his enjoyment of the land.(3) Hence the distress was considered merely as a pledge, and

(i) Per Coke, in *Cheney's case*, 10 Rep. 119, b., recognized by Holt, C. J., in *Herbert v. Waters*, Salk. 206, where he said, that he thought that a contrary determination in *Burton v. Robinson*, Sir T. Raym. 124, and 1 Sid. 246, was not law.

(k) East. T. 3 Hen. VI. 43, a.

52. In detinue, judgment for the plaintiff should be entered in the alternative for the specific article claimed, or its value in money, or it will be error. *Brown v. Brown*, 5 Ala. 508.

(1) In an action of detinue for several articles, a verdict, giving several damages for each article, is erroneous, and a judgment thereon must be reversed. *Thomas v. Blunt*, Litt. Sel. Cas. 114. Whether the judgment for the alternative value be satisfied or not, no new action of detinue lies. *Jennings v. Gibson*, Walker, 234. Where the mother of a slave is recovered in detinue, no new action lies for her issue born before the commencement of the suit. *Ib.*

(2) As to recognisance of bail in detinue, vide *Cloud v. Catlett*, 4 Leigh, 462.

(3) The common law upon this subject of distresses for rent, has been adopted very generally in the United States; and the legislatures of the different states have, with more or less conformity, adopted the amendments which have been from time to time engrafted on the law by the Parliament of Great Britain. In Pennsylvania and New York, for instance, the provisions of 8 Anne and 11 Geo. II., have been re-enacted, with some variations. The Pennsylvania Act of 21st March, 1772, § 14, follows the provisions of the statute of Anne, as to the right of distress after the expiration of the lease, pro-

for refusing to take the customary oath, when elected to the office of a constable; (i) for non-payment of an amercement in a court leet, for a nuisance, (k) or for an offence done in court; (l) lastly, at common law, goods or cattle damage feasant may be distrained. (m) A landlord cannot distrain, (n) (1) unless there be an actual demise to the tenant at a fixed rent. Hence where tenant holds under an agreement for a future lease, and no lease has been executed and no rent subsequently paid, the landlord cannot distrain. (2) But payment (o) of rent under such an agreement will constitute an acknowledgment of a tenancy from year to year, under which the landlord will be authorized to distrain; and so will admission (p) of a charge of half a year's rent in an account between the parties. Secus, where tenant holds over after notice to quit by landlord, and there is not any evidence of renewal of tenancy. (q)

By stat. 6 Geo. IV. c. 16, s. 74, no distress for rent made and levied after an act of bankruptcy, upon the goods of any bankrupt, (whether before or after the issuing the commission,) shall be available for more than one year's rent, accrued prior to the date of the [*668] *commission, but the landlord, or party to whom the rent shall be due, shall be allowed to come in as a creditor for the overplus of the rent due, and for which the distress shall not be available. This section applies only to rent accrued due before the bankruptcy. (r)

By the recent act for amending the law of insolvency, 7 & 8 Vict. c. 96, s. 18, no distress for rent made and levied, after the filing of any petition for protection from process, upon the goods of the petitioner

(i) 8 Co. 41, a.

(k) *Prat v. Stern*, Cro. Jac. 382.

(l) 1 Rol. Abr. 666, l. 1.

(m) 1 Inst. 142, a., 161, a.

(n) *Dunk v. Hunter*, 5 B. & A. 322; *Regnart v. Porter*, 7 Bingh. 451; *Riseley v. Ryle*, 11 M. & W. 16.

(o) *Knight v. Bennett*, 3 Bingh. 361; *Mann v. Lovejoy*, Ry. & M. 355; recognized in *Desdem. Thompson v. Amey*, 12 A. & E. 476; 4 P. & D. 177.

(p) *Coz v. Bent*, 5 Bingh. 185; 2 Moo. & P. 281; recognized in *Braythwayte v. Hitchcock*, 10 M. & W. 494.

(q) *Jenner v. Clegg*, 1 M. & Rob. 213, *Parks, J.*

(r) *Briggs v. Sowry*, 8 M. & W. 729.

(1) See *Grier v. Cowan*, Addis, 347; *Jacks v. Smith*, 1 Bay, 315, 443. In *Warren v. Forney*, 13 S. & R. 52, it seems to have been doubted by the court, whether a right of distress existed where the rent was payable in grain or other produce, and it was held that a distress in such case for money, was illegal. The reservation of rent *eo nomine* necessarily constitutes a lease as one third of all grain raised. *Hoskins v. Rhoads*, 1 Gill & J. 266. Distress lies for rent payable in grain or repairs or labour if for a sum certain stipulated by contract, but otherwise not as one third of the corn to be raised. *Clark v. Farley*, 3 Blackf. 264. A lease of a grist mill for one year rendering "one third of the toll," creates the relation of landlord and tenant and distress lies. *Fry v. Jones*, 2 Rawle, 11. In Kentucky, it has been held, that a landlord may distrain for rent payable in specific articles, but he cannot sell the goods distrained. *Owen v. Connor*, 1 Bibb, 606.

(2) Rent may be payable in advance, and distrained for accordingly. *Russel v. Doty*, 4 Cowen, 576; *Peters v. Newkirk*, 6 Id. 103. In *Diller v. Roberts*, 13 S. & R. 60, the court declined giving an opinion on this point. But afterwards it was held that distress would lie for rent payable in advance. *Boyer v. Feustermacher*, 2 Whart. 95; *Conway v. Stackwether*, 1 Denio, 113. A tender of rent makes a distress wrongful, though the tender be not made until after the rent day. *Hunter v. Le Conte*, 6 Cowen, 728; *Williams v. Howard*, 3 Munf. 277.

shall be available for more than one year's rent, but the landlord or party to whom the rent shall be due, shall be a creditor for the over-plus.

By Prescription.—By prescription, a distress may be taken for an amerciamment in a court baron ;(s) for a penalty imposed for a breach of a by-law ;(t) for a toll in a fair.(u)(1)

3. *By Statute.*—It would be an endless task to enumerate all the statutes which give a remedy by distress ; the following, however, cannot be omitted :—

By stat. 4 Geo. II. c. 28, s. 5, "Every person, body politic and corporate, may have the like remedy by distress, and by impounding and selling the same, in cases of rent-seck,(2) rents of assize, and chief rents, which have been duly answered or paid, for the space of three years, within the space of twenty years before the 23rd day of January, 1731, or shall be thereafter created, as in case of rent reserved upon lease." In *Bradbury v. Wright*, Doug. 624,(x) the court were of opinion that a rent reserved on a grant in fee(3) made after the statute of *quia emptores*, and before the *4 Geo. II. c. [*669] 28, was in its nature a rent-seck, and that it could not be distrained for except under the preceding statute ; in which case the distrainer, in his avowry, ought to have alleged, that the rent had been duly answered or paid, for the space of three years, within the space of twenty years, before the first day of the session of parliament in which this statute was made. By stat. 11 Geo. II. c. 19, s. 18, (*ante*, p. 622,) "Landlords may distrain for double rent, upon tenants who do not deliver up possession after having given notice of their intention to

(s) 1 Rol. Abr. 666, l. 6.

(t) Dyer, 321, b., 322, a., pl. 23.

(x) Cited in *Rivis v. Watson*, 5 M. & W. 255.

(u) 1 Rol. Abr. 666, l. 10, 15.

(1) A distress may be taken, where the custom warrants it, for an amerciamment, or fine imposed by the steward of a court baron. Co. Ent. tit. Replevin, pl. 1.

(2) There cannot be a rent-seck issuing out of a term for years. Hence, if a lessee for years assign his term, reserving to himself a rent, he cannot enforce the payment of such rent by distress ; because a rent so reserved was not distrainable for at common law, and not being a rent-seck, it cannot be distrained for under the operation of this statute. — *v. Cooper*, O. B. 2 Wils. 375 ; *Parmenter v. Webber*, 2 Moore, (C. P.) 656. So if termor lease for remainder of term ; *Preecs v. Corrie*, 5 Bingh. 24 ; but in such case an action of debt is maintainable ; *Newcomb v. Harvey*, Carth. 161 ; or assumpsit ; 5 Bingh. 27. A tenant from year to year, underletting from year to year, has a sufficient reversion entitling him to distrain. *Ege v. Ege*, 5 Watts, 134 ; and see by Ld. *Tenterden*, C. J., *Curtis v. Wheeler*, 1 M. & Malk. 493.

(3) A rent of this kind, prior to the statute of *quia emptores*, would have been properly denominated a fee-farm rent. The word *fee-farm* imports every rent or service, whatever the quantum may be, which is reserved on a grant in fee. It is not properly applicable to any rents, except rent-service. Hence, since the statute of *quia emptores*, the granting in fee-farm, except by the king, is become impracticable ; for, by the operation of that statute, the grantor parting with the fee is without any reversion and without a reversion there cannot be a rent-service. Litt. sec. 216. But a grant in fee, reserving a perpetual rent, with a power of distress, will be good as a rent-charge. Harg. 1 Inst. 143, b. n. 5. And it seems, that if such a rent were created at this day, without a power of distress, as it must be considered as a rent-seck, it would be distrainable for under the before-mentioned statute, 4 Geo. II. c. 28, s. 5. A bequest "of 60 dollars as an annuity to be paid out of the profits of real estate annually," is an annuity, and not a rent-charge, and no distress lies. *Robinson v. Townshend*, 3 Gill & J. 413.

quit, during all the time such tenants continue in possession." This statute applies to those cases only, where the tenant has the power of determining his tenancy by a notice; and where he actually gives a valid notice sufficient to determine it.^(y) In a cognizance by defendant as bailiff for double rent under the 18th section of this statute, the terms of the tenancy, and of the notice to quit, should be so shown that the tenant's power to determine the tenancy by notice to his landlord for that purpose, and the sufficiency in law of the notice actually given may appear.^(z) Where there are rents for which the party cannot distrain, yet remedy may be had for such rents in a court of equity.^(a)(1)

III. *Of the Things which may, and the Things which may not be Distrained.*

1. *For Rent Arrear.*—It may be laid down as a general proposition, that all moveable chattels of the tenant may be distrained for rent arrear, if they are found upon the land demised,^(b)(2) out of which the

^(y) *Johnstone v. Hudlestone*, 4 B. & C. 922.

^(z) *Humberstone v. Dubois*, 10 M. & W. 765.

^(a) Per *Comyns*, B., Exch. Trin. 5 & 6 Geo. II. MSS.

^(b) Com. Dig. Distress, B. 1; and 4 T. R. 567, S. P. Per Lord *Kenyon*, C. J., in *Gorton v. Falkner*.

(1) The right to distrain at the end of the year, is not affected by an agreement in the lease that the landlord may re-enter, if the rent be unpaid at a stipulated period after the expiration of the year. *Smith v. Meanor*, 16 S. & R. 375.

(2) And the goods of a stranger found upon the demised premises, may be distrained for rent. *Adams v. Lecombe*, 1 Dall. 440; *Kessler v. M'Conachy*, 1 Rawle, 440. In Kentucky, by statute the goods of a stranger are not liable to distress. *Craddock v. Riddler-burger*, 2 Dana, 212.

A chattel is privileged against distress which is upon the premises, in consequence of its having been delivered to the owner, to be wrought, worked up, or managed in the way of his trade or employment. On this principle proceeded *Brown v. Sherill*, 2 A. & E. 138, (29 E. C. L. R. 82,) in which the carcass of a beast sent to a butcher to be slaughtered, was held to be privileged from distress in respect of the butcher's rent. Still, though this sort of privilege is no doubt very beneficial, and has, to use the words of Sir John Bailey, in the case I have just cited, "been from time to time, increased in extent, according to the new modes of dealing established between parties by the change of times and circumstances," the courts have latterly shown a strong disposition to restrain it from exceeding the limit strictly warranted by that principle; instances of which disposition on part of the courts, may be found in the cases of *Muspratt v. Gregory*, 1 M. & W. 633; *S. C.* in error, 3 Id. 677, and *Juell v. Jackson*, 7 Id. 450. The American cases go the whole length of this doctrine, and even further, for it has been held, that when the business of the tenant is such as naturally to draw to his premises the goods of other people, the landlord shall not be allowed to distrain them for rent. Thus, it has been held, that the goods of a lodger in a boarding house, and cattle received by a tenant to be pastured, for hire, are exempt from distress for the rent. *Brown v. Sims*, 17 S. & R. 138; *Riddle v. Weldon*, 5 Whart. 9; *Cadwalader v. Tindall*, 8 Harris, 422; *Youngblood v. Lowry*, 2 M'Cord, 39; *Stone v. Mathews*, 7 Hill, 428. In New York, the goods of a lodger in a boarding house were exempted from distress by the revised statutes. The Act of 1846 has abolished distress for rent altogether. *Smith's Land. and Ten.* 145, and note to Amer. ed.

By the laws of New Brunswick, being in that respect the same as those of England, a common warehouse, in the sense in which the word is used in relation to distress for rent in arrear, is a building or an apartment in one, used and appropriated by the occupant, not for the deposit and safe-keeping or selling of his own goods, but for the purpose of storing the goods of others, placed there in the regular course of commercial

rent issues, but no where else.(1) Hence where the *exclusive use* of the land of the river Thames opposite and in front of a wharf between high and low water-mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf, but the land itself between high and low water was not demised; it was holden,(c) that the lessor could not distrain, for rent arrear, barges, the property of the tenant, lying in the space between high and low water-mark, and attached to the wharf by ropes.

If the cattle of a *stranger* are *trespassers* on the land of the tenant, the lord may distrain them, although the stranger made fresh suit,(d) and although the cattle be not levant and couchant.(e) But if the cattle of their own accord leave the land, the lord cannot *distrain them.(f) And if the landlord either expressly or [*670] impliedly consent that the stranger's chattels shall be free from

(c) *Capel v. Buszard*, Exch. Ch. 6 Bingh. 150; 3 Moo. & P. 480.

(d) 7 Hen. VII. 1, b., 2, a.

(e) 15 Hen. VII. 17, b.

(f) 11 Hen. VII. 4, a.

dealing and trade, to be again removed or reshipped. *Owen v. Boyle*, 9 Shep. 47. And goods so deposited in a warehouse, in that province, are not liable to be taken in distress for rent in arrear due from the lessee to his landlord. *Ib.* And, if so taken and sold, the landlord becoming the purchaser, he would not have such a property therein as would support replevin by him against the depositor of the goods. *Ib.* Goods deposited with another to await an opportunity to be sold, are not liable, in New York, to distress for rent owing by the bailee. *Connah v. Hale*, 23 Wend. 462.

Goods consigned to a commission merchant to be stored or sold, are not subject to distress for rent, or execution for the debt of the consignee. But it is otherwise with goods in the hands of one not a commission merchant, and it not clearly appearing in what character he holds them. *Beven v. Crooks*, 7 Watts & Serg. 452. Goods of a third person, in the store of one who takes merchandize on storage, cannot be distrained for rent. *Brown v. Simms*, 17 S. & R. 138. Goods deposited for safe-keeping in the storehouse of a factor who underlet from a commission merchant, are not subject to distress for rent due the first lessor. *Walker v. Johnson*, 4 M'Cord, 552.

Where an undivided moiety of a room was demised, together with the right of common passage along an entry leading to and from the room, through the yard into the street, it was held that the landlord could not distrain furniture of the tenant kept in the passage-way. *Winslow v. Henry*, 5 Hill, 481. The property of a boarder, if in the use of the tenant, with the boarder's consent, is liable to distress unless the consent of the landlord is also obtained. *Mathews v. Stone*, 1 Hill, 565.

(1) The goods of a tenant cannot be distrained for rent, unless they have been on the premises. *Bradley v. Peggott*, Walker, 348; *Humely v. Wyatt*, 1 Bay, 102. Goods of an outgoing tenant, *bonâ fide* sold to his successor, and remaining on the premises, are not liable for rent due from the former. *Clifford v. Beames*, 3 Watts, 246. A distress made on goods of assignee, or sub-lessee, does not discharge lessee from rent subsequently accruing. *Manly v. Dupuy*, 2 Whart. 162. Personal chattels alone are distrainable; and they cannot be distrained upon after they are levied upon under an execution. *Hamilton v. Reedy*, 3 M'Cord, 38. The case of *Bull v. Horlbeck*, 1 Bay, 301, seems to establish the doctrine, that a negro, found accidentally upon a tenant's premises, is, in South Carolina, distrainable for rent; but the act of Assembly of December, 1799, has made the reverse the law in that state. It has also been held, that a negro boy, bound out to learn a trade, is not liable to be distrained for rent due by the master to whom he was bound. *Phaelon v. M'Bride*, *Ib.* 170.

To make one's goods liable for distress for rent, there need not be a perfect privity between the plaintiff and defendant. *Howard v. Ramsey*, 7 Har. & J. 113. A. contracted with B. to build him a sloop, for which C. was to pay as the work progressed, and furnish all the materials and labor, except what belonged to the ship-carpenter's work. The vessel, while in A.'s possession, not entirely paid for, and nearly finished, was levied on by the landlord of the shipyard, as a distress for rent. Held, that A. had an interest in the vessel to the extent of his work not then paid for, which was liable to distress for rent due by him. *M'Elderry v. Flannagan*, 1 Har. & Gill, 308.

distress, he is a trespasser if he distrain them.(g) So a lessor cannot distrain a stranger's cattle which escape from a close belonging to a stranger, into the land whence the rent issues, through defect of fences, which either the lessor(h) or his tenant(i) was bound to repair.(1) The grantee of a rent-charge may distrain the goods of a stranger who is not shown to hold by a title paramount to the rent-charge.(k)

Where cattle are distrained damage feasant, and put into a sufficient pound and escape without default or neglect of the distrainor, he may maintain trespass;(l) for otherwise he would be left without remedy.

If the estate of tenant at will be determined either by his own death,(m) or by the act of the landlord, he or his executors may reap the corn sown by him. And therefore, such corn, though purchased by another person cannot be distrained (in case of the death of the tenant at will) for rent due from a subsequent tenant. So growing corn sold(n) under a *fieri facias* is protected from a distress for rent.

With respect to those things which by law are privileged from distress, it may be observed that some are privileged absolutely, and some conditionally. In the first class may be numbered,—1, Animals, *feræ naturæ*, whereof a valuable property is not in any person; as bucks, does, &c. Deer kept within an enclosure do not fall within this class, for they may be distrained.(o)

[*671] *2. Such things as cannot be restored to the owner in the same plight and condition as they were in at the time of taking them. This exemption proceeds on the ground of the distress having been considered at common law, merely as a pledge;(p) and for this reason, sheaves(q) and shocks of corn were not distrainable;(2) but now by stat. 2 Will. & Ma. c. 5, s. 3, "sheaves or cocks of corn, or loose corn, and hay, lying upon any part of the land charged with the rent,

(g) *Horsford v. Webster*, 5 Tyrwh. 409; 1 C. M. & R. 696.

(h) 2 Leon. 7.

(i) Dyer, 317, b., 318, a.

(k) *Saffery v. Elgood*, 1 A. & E. 191; *Johnson v. Faulkner*, 2 Q. B. 925; 2 G. & D. 184.

(l) *Williams v. Price*, 3 B. & Ad. 695.

(m) *Eaton v. Southby*, Willes, 131.

(n) *Peacock v. Purvis*, 2 B. & B. 362; *Wright v. Dewes*, 1 A. & E. 641; 3 Nev. & Man. 790.

(o) *Davies v. Powell*, Willes, 47.

(p) 1 Inst. 47, a.; *Darby v. Harris*, 1 Q. B. 895; 1 G. & D. 234.

(q) *Wilson v. Duckett*, 2 Mod. 61.

(1) "There is a difference between a lord distraining within his seignory, and a landlord distraining for rent reserved on his own lease; for the lord has nothing to do with the land or the fences, and so it is not material to him whether the fences are repaired or not: but it is otherwise of a landlord; for he himself ought to repair, or to provide that his tenant repairs them, else he would take advantage of his own wrong. And this diversity seems to be warranted by the books, Dy. 317, 318; 22 Edw. IV. 49, b.; 7 Hen. VII. 1; 10 Id. 21; 15 Id. 17. But if the cattle escape into the land without any defect of the fences, or where the tenant of the land in which they are distrained is not bound to repair the fences, through the defect of which the cattle escape and are distrained, it is immaterial to the lord or landlord, whether they are *levant* and *couchant* or not." Per *Saunders*, in *Poole v. Longueville*, 2 Saund. 289. See also, *Kemp v. Cruces*, 2 Lutw. 1580. Where A. owns a close on one side of a highway, and B. on the other, and A.'s cattle, through defects in his fence, escape into the highway, and thence into B.'s close, through defects in his fence, B. may lawfully distrain them as *damage feasant*. *Mills v. Stark*, 4 N. Hamp. R. 512.

(2) See *Given v. Blann*, 3 Blackf. 64.

may be seized, secured, and locked up in the place where found, in the nature of a distress, until replevied; but the same must not be removed to the damage of the owner from such place.”(r)

3. Things fixed to the freehold;—as furnaces, cauldrons, kitchen ranges, stoves, coppers, grates,(s) the doors or windows of a house, or the like.(t(1) At common law, corn growing could not be distrained,

(r) See *Johnson v. Faulkner*, 2 Q. B. 925.

(s) *Darby v. Harris*, *ub. sup.*

(t) 1 Inst. 47, a.

(1) A copper boiler or kettle, fixed in a brewery, was held part of the freehold. *Gray v. Holdship*, 17 S. & R. 413. So a steam engine, used for propelling a saw mill. *Morgan v. Arthurs*, 3 Watts, 140. But these were erected by the owner of the inheritance; and in *Lemar v. Miles*, 4 Watts, 332, a steam engine, set up by the tenant, was held to be personal property. “The doctrine of fixtures, by which the nature and legal incidents of this property must be determined, is involved in no inconsiderable degree of uncertainty, and not settled by consistent and clearly defined principles of general application. It rests upon a long course of judicial decisions, made at different periods of time, and under a variety of circumstances, and running into numerous, complex and conflicting distinctions, arising out of the peculiar relation of the parties, and the peculiar circumstances of each particular case, so that it has been found extremely difficult to reduce this branch of law to any consistent and uniform system.

“According to the decisions, an article may be a fixture, constituting a part of the realty, as between vendor and vendee, which would not, under like circumstances, be such as between landlord and tenant; so also, an article may be such fixture, as between heir and executor, which, under like circumstances of annexation, would not be such as between tenant for life, and the remainder-man or reversioner. And also, according to the decisions, an article, affixed to the premises for purposes merely agricultural, may pass by a conveyance of the whole as a fixture, which would not be such fixture under like annexation, if erected or affixed for the purposes of trade or manufacture. And an article attached to the realty may be removable at one period of time as a chattel, which, with the same annexation at another period, would not be removable, because it constituted a part of the realty. In some cases it has been determined, that in order to constitute a fixture, the article should be so united by physical annexation to the land, or to some substance previously belonging thereto, that it cannot be detached without injury to the property; while in other cases, articles have been determined to be fixtures, and, as such, to pass by a conveyance of the freehold, with but a slight attachment to the realty, and, in some instances, without any actual, but by simply a constructive attachment.

“The term fixture, itself, although always applied to articles of the nature of personal property, which have been affixed to land, has been used with different significations, until it has become a term of ambiguous meaning. And this ambiguity, which has attended the use of this word in various adjudications and by different writers, has been productive of much of the uncertainty which has perplexed investigations falling under this branch of the law. The term fixture, has been used by various writers, and in numerous reported decisions, as denoting personal chattels annexed to land, which may be severed and removed against the will of the owner of the freehold, by the party who has annexed them, or his personal representatives. *Amos & Ferrard on the Law of Fixtures*, 2; *Gibbons' Manual of the Law of Fixtures*, 2; *Grady's Law of Fixtures* 1; 2 *Bouvier's Institutes of Am. Law*, 162; 2 *Kent's Com.* 344.

“There may be some propriety in this definition of the term, when confined in its application to the relation of landlord and tenant, or tenant for life, or years, and remainder-man or reversioner, to which several of the elementary authors have chiefly confined their attention. But it does not appear to express the accurate meaning of the term in its general application. An article attached to the realty, but which is removable against the will of the owner of the land, has not lost the nature and incidents of chattel property. It is still movable property; passes to the executor, and not to the heir; on the death of the owner, may be taken on execution and sold as other chattels, &c. A removable fixture, as a term of general application, is a solecism—a contradiction in words. There does not appear to be any necessity or propriety in classifying movable articles, which may be, for temporary purposes, somewhat attached to the land, under any general denomination, distinguishing them from other chattel property. A tree, growing upon the soil, or any other article belonging to the freehold, may be converted into a chattel by a

because it adhered to the freehold.(u) But now by stat. 11 Geo. II. c. 19, s. 8, "Landlords, or their bailiffs, or other persons empowered by

(u) 1 Rol. Abr. 666, (H.) pl. 3.

severance from the land. It is an ancient maxim of the law, that whatever becomes fixed to the realty, thereby becomes accessory to the freehold, and partakes of all its legal incidents and properties; cannot be severed and removed without the consent of the owner. *Quicquid plantatur solo, solo cedit*, is the language of antiquity, in which the maxim has been expressed. The term fixture, in its ordinary signification, is expressive of the act of annexation, and denotes the change which has occurred in the nature and legal incidents of the property, and appears to be not only appropriate but necessary, to distinguish this class of property from movable property, possessing the nature and incidents of chattels. It is in this sense that the term is used in far greater part of the adjudicated cases. 10 H. 7 Pl. 2; Co. Lit. 53 a, 4; Co. 53; 2 Smith's Lead. Cas. 214; Ch. Kent's note (a), 2 Kent's Com. 345; *Dudly v. Ward*, Ambl. 113; *Eluces v. Mares*, 3 East, 57.

"It is said that this rule has been greatly relaxed by exceptions to it, established in favor of trade, and also in favor of the tenant, as between landlord and tenant. And the attempt to establish the whole doctrine of fixtures upon these exceptions to the general rule, has occasioned much confusion and misunderstanding on this subject.

"Amos and Ferrard, in their treatise on the law of fixtures, mention the division of the subject into removable and irremovable fixtures, and give a definition of each class. (See Amos & Ferrard on Fixtures, 11.) And they remark, that it is difficult to determine in which of the above senses it is most frequently employed. This classification of fixtures may be essential to a correct understanding of the double sense in which the term has been frequently used in the authorities, but it would not seem to be needed for any other purpose.

"The civil law has been commended for its simple and natural classification of property into the obvious and universal distinction of things movable and things immovable, things tangible and things intangible. Whatever would be movable property by the civil law, would fall under the denomination of chattels personal, by the common law. And everything attached to the freehold *perpetui usus causa* belonged to the *res immobiles* of the civil law. Taylor's Elements of the Civil Law, 475. This simple division of property seems to be founded in reason and the nature of things.

"The great difficulty which has always perplexed investigation upon this subject, has been the want of some certain, settled, and unvarying standard, by which it could be determined what amounts to a fixture, or what connection with the land will deprive a chattel of its peculiar legal qualities, as such, and make it accessory to the freehold. Fixtures belong to that class of property which stands upon the boundary line between the two grand divisions, of things real and things personal, into which the law has classified property; a distinction not merely artificial, but founded on reason and the nature of things—regarding not only the natural qualities of immobility on the one hand and mobility on the other, but also the legal constitution and incidents to which each class respectively is subject. In the great order of nature, when we compare a thing at the extremity of one class with a thing at the extremity of another, the difference is glaring; but when we approach the connecting link between the two great divisions, it is often difficult to discover the precise point where the dividing line is drawn.

"There are some matters, having their foundation in things real, which are, nevertheless, by principles of the common law, attended with some of the qualities of things personal, and therefore termed chattels real; such as estates less than freehold, easements, rents, emblements, &c. These, however, are easily identified, and have no connection with fixtures. And, again, there are others which, though movable in their nature, and apparently forming within the definition of things personal, are, in respect of their legal qualities, of the nature of things real. Belonging to this class are heir-looms and things in the nature of heir-looms, which, by special custom, pass with the inheritance; also, animals *feræ naturæ*, not domesticated so as to fall under the denomination of chattels, yet so confined to the realty as to become appurtenant to it; such as deer in a park, pigeons in a pigeon-house, conies in a warren, fish in a pond, &c.; also, articles sometimes called fixtures on the principle of constructive attachment, such as the deeds and other papers which constitute the muniments of title to the land, the keys of a house, &c., which belong to realty, and pass with it, not upon the principle of fixtures, but upon the principle of being necessary and essential incidents to it, and of no value abstracted from it. None of these articles acquire their legal qualities upon the principle of a fixture. A fixture is an article which was a chattel, but, by being physically annexed

them may distrain corn, grass, or other product, growing on any part of the land demised." The word "product," in the foregoing section,

or affixed to the realty, became accessory to it and parcel of it. But the precise point in the connection with the realty, where the article loses the legal qualities of the chattel and acquires those of the realty, often presents a question of great nicety, and sometimes difficult of determination. And a review of the authorities, from the time of the year-books down to the present period, does not furnish any one established and certain criterion of universal application, by which this line of demarkation can be clearly ascertained and pointed out. It may, however, be useful, to examine the authorities, and endeavor to extract from them the most uniform, reasonable, and consistent principle, as a standard by which a fixture can be always determined.

"If there be any thing well settled in the doctrine of fixtures, it is this, that to constitute a fixture, it is an essential requisite that the article be actually affixed or annexed to the realty. The term itself implies this. *Walker v. Sherman*, 20 Wend. 636. But the mode or degree of the annexation, which is essential, is a matter about which the authorities are greatly in conflict. Amos and Ferrard, in their work above referred to, page 2, lay down the rule as follows: 'It is necessary, in order to constitute a fixture, that the article should be let into or united to the land, or to substances previously connected therewith.' The manual of Gibbon, and the work of Grady, on fixtures, are to the same effect. And numerous adjudicated cases are referred to by these elementary writers establishing the same doctrine. A number of the authorities, both English and American, decide, that to give chattels the character of fixtures, and deprive them of that of personality, they must be so firmly affixed to the real estate that they cannot be removed without injury to the freehold by the act of removal, and apart from the abstraction of the thing removed. *Farrer v. Chauffeats*, 5 Denio, 337. This doctrine, however, does not furnish a criterion of uniform application, or one which will bear the test of examination. Millstones in a mill, and even the waterwheel, and a great variety of other articles well established by authority, and universally admitted to be fixtures, may often be removed without any actual injury to the structure or building by the act of removal. Fences, which are undeniably fixtures, and so admitted by all the authorities referring to them, although actually annexed to and in connection with the land, are yet not let into the ground, or fastened to any thing which is imbedded in the earth. The doors, windows, window-shutters, &c., of a mansion-house, may be raised and removed without any actual or physical injury either to the building or to the article removed; so also in a mill, with the mill-stones, hoppers, and bolting apparatus, as usually fixed in a mill, yet it has never been questioned that these articles are fixtures.

"There is another class of authorities, in which it is laid down, that the true test of a fixture is the application of the article to the use or purpose to which the realty is appropriated, however slight its physical connection with it. *Farrar v. Stackpole*, 6 Greenl. 157; *Gray v. Holdship*, 17 Serg. & Rawle, 413. And some cases have gone so far as to make this the only test, and even dispense with actual or physical annexation. *Voorhees v. Freeman*, 2 Watts & Serg. 114; *Pyle v. Pennock*, Ib. 391. This rule is in conflict with those authorities which make the mode of the physical annexation *the test*; and it will not bear examination as a criterion of general application. If adaptation and necessity for the use and enjoyment of the realty be the sole test of a fixture, then the implements and the domestic animals necessary for the cultivation of a farm, and a great variety of other articles subjected to the use of the land or its appurtenances, which never have been and never can be recognized as such, would be fixtures. It would utterly confound the rule by which the rights of the vendor and vendee, heir, and executor, &c., have been heretofore governed. In the case of the *Despatch Line v. Billany*, 12 N. H. R. 205, the court expressed the opinion, that actual annexation to the freehold, and adaptation to its purpose, must both unite, in order to render personal property incident and appurtenant to real estate.

"In some of the authorities, the intention of the party making the annexation is laid down as the true test of a fixture. *Winslow v. The Merchants Ins. Co.*, 4 Metc. 306.

"Mr. Dane, in his *Abridgment of American Law*, vol. 3, p. 156, remarks: 'It is very difficult to extract from all the cases as to fixtures in the books, any one principle on which they have been decided, though being fixed or fastened to the soil, house, or freehold, seems to have been the leading one in some cases, yet not the only one.' And he adds, in reference to this matter, not the mere fixing, or fastening, is alone to be regarded, but the use, nature, and intention. From the examination which I have been enabled to give to this subject, and after a careful review of the authorities, I have reached the

applies to such products of the land only as are similar to those specified; to all of which the process of becoming ripe, and of being cut, gathered, made, and laid up when ripe, is incidental. Hence trees, shrubs, and plants, growing in a nursery-ground, cannot be distrained(*x*) for rent.

4. Things delivered to a person exercising a trade(*y*) or employment, to be carried,(*z*) wrought, or manufactured in the way of his trade, are not distrainable,—as cloth delivered to a tailor;(1) goods sent to an auctioneer to be sold on premises(*a*) occupied by him; worsted yarn to a stocking-weaver;(b) a bullock(*c*) sent by one butcher to the shop of another to be slaughtered. So a horse standing in a smith's shop, for the purpose of being shod, or in a common inn,(2) cannot be [*672] distrained, because it must be presumed *that such things so found belong to strangers. So goods of the principal, in the hands of his factor, cannot be distrained,(*d*) by the landlord of the factor's premises, for arrears of rent due to him from the factor;(3) for the advancement of trade equally requires that goods should be placed in the hands of a factor for sale, as that they should be placed in the hands of a carrier for carriage; and the instances enumerated by Sir *Edward Coke*, under the exception in favour of trade, are only put by way of example. So goods landed at a wharf, and deposited by a factor to whom they were consigned, in a warehouse on the wharf, until an opportunity for sale should arise, are not distrainable for rent due(*e*) in respect of the wharf and warehouse. But in the following case the judges said, they would not extend the principle

(*x*) *Clark v. Gaskarth*, 8 Taunt. 431.

(*y*) 1 Inst. 47, a.

(*z*) Per Cur., in *Gisbourn v. Hurst*, Salk. 249, cited in *Brown v. Sherill*, 2 A. & E. 138.

(*a*) *Adams v. Grane*, 1 Crompton & Meeson, 380; 3 Tyrw. 326, S. C.

(*b*) *Wood v. Clarke*, 1 Cr. & J. 484; 1 Tyrw. 314, S. C. But the privilege is confined to the materials which the employer supplies, and does not extend to the machinery by which the working up is effected. S. C.

(*c*) *Brown v. Shevill*, 2 A. & E. 138; 4 Nev. & Man. 277, recognized in *Gibson v. Ireson*, 3 Q. B. 39.

(*d*) *Gilman v. Elton*, 3 B. & B. 75.

(*e*) *Thompson v. Mashiter*, 1 Bingh. 283.

conclusion that the united application of the following requisites will be found the safest criterion of a fixture:

"1st. Actual annexation to the realty, or something appurtenant thereto.

"2nd. Application to the use or purpose of that part of the realty with which it is connected.

"3rd. The intention of the party making the annexation to make the article a permanent accession to the freehold—this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of the annexation, and the purpose or use for which the annexation has been made." *Teaff v. Hewitt*, 1st Am. Law. Reg. 728, 734, per *Bartley*, C. J. See 2 Smith's L. Cas. 99 and 248, 5th Am. ed., notes.

(1) The exemption of cloth sent to a fulling mill to be wrought, extends only to goods of strangers, and not to those of the tenant himself. *Hoskins v. Paul*, 4 Halstead, 110.

(2) It seems that the privilege of a common inn does not extend to a livery stable. See *Francis v. Wyatt*, 1 Bl. R. 483, and 3 Burr. 1498, where the question was, "whether a carriage standing in the yard of a livery-stable was distrainable for rent due to the landlord from the keeper of the livery-stable?" This case was twice argued; but the court appearing to be strongly inclined in favor of the distress, the owner of the carriage declined bringing the question to a third argument which had been directed by the court.

(3) *S. P. Brown v. Sims*, 17 Serg. & Rawle, 138. So of goods sent to an auctioneer for sale. *Himely v. Wyatt*, 1 Bay, 102.

beyond the decided cases. Hence where salt was manufactured and publicly sold at certain salt-works, and carried away in boats of the purchasers, which came for the purpose of being loaded with it into a cut or canal on the premises, communicating with a public navigation; and the boat of A., an alkali-manufacturer, was lying in the cut or canal for the purpose of receiving and carrying away salt bought by A. for the purposes of his manufactures; it was holden, *(f)* that the boat was not privileged from distress for arrears of an annuity issuing out of the land on which the salt works were erected, and granted by the manufacturer and seller of the salt. So brewer's casks, left by the brewer in a public-house until the liquor contained in them has been consumed, are not exempt from a distress for rent arrear in respect of the public-house. *(g)*

5. Goods distrained, damage feasant: for they are in the custody of the law. *(h)* (1) But goods seized by a messenger under a fiat in bankruptcy are not while in his custody privileged from distress for rent due from the bankrupt to his landlord. *(i)*

Among those things which are privileged from distress, conditionally, may be numbered,—1. Beasts of the plough, which are exempt, if there be a sufficient distress besides on the land whence the rent issues: *(k)* (2) “The landlord has a right to resort to the *subjects of distress which are *immediately* available to raise [*673] the arrears of rent by sale, and is not bound to take those which cannot be productive till a future period, as growing crops. If there are other moveable chattels to the amount of the rent and expenses, besides *averia carucae*, he would not be justifiable in taking the latter; but if there are not, he has a right to take all, or as many of the beasts of the plough as may be necessary with the other moveable and saleable chattels to satisfy the arrears and charges.” *(l)*

2. Implements of trade, as a stocking-frame, *(m)* or a loom, *(n)* if they are in actual use, and there is sufficient distress *(o)* besides. So where a threshing-machine was not in use, and there was not any evidence of other goods being on the premises; it was holden, *(p)* that the threshing-machine was not privileged from distress. (3)

(f) *Muspratt v. Gregory*, 3 M. & W. 677, on error in Exch. Ch., affirming judgment of Court of Exchequer, 1 M. & W. 633.

(g) *Joule v. Jackson*, 7 M. & W. 450.

(h) 1 Inst. 47, a.

(i) *Briggs v. Sowry*, 8 M. & W. 729.

(k) 1 Inst. 47, a. b., 161, a.

(l) Per Parke, B., delivering judgment, *Piggott v. Birtles*, 1 M. & W. 441.

(m) *Simpson v. Hartopp*, Willes, 512; *Watts v. Davies*, Scacc. H. 20 Geo. III. MS. S. P.

(n) *Gorton v. Falkner*, 4 T. R. 565.

(o) *Roberts v. Jackson*, Peake's Additional Cases, p. 37, *Kenyon*, C. J.

(p) *Fenton v. Logan*, 9 Bingh. 676; 3 M. & Sec. 82, *S. C.*, recognizing *Wood v. Clark*, 1 Cr. & J. 484.

(1) It seems that the same rule holds with respect to goods taken in execution, and for the same reason. *Eaton v. Southby*, Willes, 131.

(2) But beasts of the plough may be distrained for the poor-rates, although there are other distrainable goods on the premises, more than sufficient to answer the value of the demand. *Hutchins v. Chambers*, 1 Burr. 579. This decision proceeded on the ground, that a seizure under the statute 43 Eliz. c. 2, and similar acts, resembled a common law distress only in being replevisable; and that it was in other respects analogous to a common law execution, under which any goods of the debtor may be seized.

(3) The exemption of certain privileged goods from distress may be waived by consent

8. Other things in actual use, as a horse wheron a person is riding,(*q*) or an axe in the hands of a person cutting wood, &c. The two last instances of exemption proceed on this ground, that if in such cases a power of distress were given by law, the exercise of it would frequently lead to a breach of the peace. With respect to those things which may be distrained damage feasant, it may be laid down as a general rule, that all chattels trespassing on the land may be distrained damage feasant. The law, indeed, has extended this principle so far as to permit A. to distrain the cattle of B. damage feasant,(*r*) in the close of A., although they were put there by a stranger, without the privity of B. It is to be observed, however, that a horse whereon a man is riding, cannot be distrained damage feasant;(s) nor a horse and cart in the actual possession and under the personal care of and being used by any person;(t) for the same exemption is allowed here as in cases of distress for rent arrear, and for the same reason; lest by the permission of such distress a breach of the peace should ensue. By stat. 7 Ann. c. 12, s. 8, it is enacted and declared, that process of distress against the goods of any ambassador, or other public minister of a foreign state, or of their domestic servants, shall be void.

[*674]

*IV. *Who may Distrain.*

The king may reserve a rent out of a franchise or matter incorporeal, as well as out of lands, and may distrain for it on any other lands of the tenant not subject to the rent; but not on such other lands of the tenant as are let out by tenant or extended. And by stat. 22 Car. II. c. 6, the grantee of a fee-farm rent has the same power of distress as the king had.(u)(1)

1. *By Statute.*(2) By stat. 7 Hen. VIII. c. 4, it is enacted,(x)

(*q*) 1 Inst. 47, a.

(*r*) 1 Rol. Abr. 665, 1, 25

(*s*) *Story v. Robinson*, 6 T. R. 138; per *Denison, J.*, in *Collins v. Renison*, Say. R. 139.

(*t*) *Field v. Adames*, 12 A. & E. 649; 4 P. & D. 504. See *Bunch v. Kennington*, 1 Q. B. 679; 4 P. & D. 509, n.

(*u*) *Attorney-General v. Mayor of Coventry*, 1 P. Wms. 306.

(*z*) See 1 Inst. 104, b.

of tenants. *M'Kinney v. Reader*, 6 Watts, 34. The "necessary tools of a tradesman," exempt from distress by statute, include not merely instruments taken into the hand, but all those without which a tradesman cannot work at his trade. *M'Dowell v. Shotwell*, 2 Whart. 26.

In Pennsylvania, by the Act of 1849, property to the value of three hundred dollars, exclusive of all wearing apparel of the defendant and his family, and all Bibles and school books in use in the family, is exempted from levy, and sale, or execution, or by distress, for rent. Act 9th April, 1849, § 1, Pam. Law, p. 533; Brightly's *Purd. Dig.* 331, 8th ed. As to New Jersey, see *Nixon's Dig.* 204.

(1) In New York it is held that a distress may in all cases be made upon a lease by parol, which would be valid by the statute of frauds, where the lessor retains the reversion. *Cornell v. Lamb*, 2 Cowen, 652; *Schuyler v. Legget*, Ib. 660. A parol authority is sufficient for a distress. *Franciscus v. Reigart*, 4 Watts, 98. See *Smith's Land. and Tenant*, 140.

(2) The provisions of statute, 13 Edw. I. c. 37, that no distress shall be taken but by bailiffs sworn and known, do not apply to a distress for rent. *Begbie v. Hayne*, 2 Bingh. N. C. 124.

“That the recoverors of manors, lands, and advowsons, their heirs and assigns, may distrain for rents, services, and customs, due and unpaid, and make avowry and justify the same, and have like remedy for recovering them as the recoverees might have done or had, although the recoverors were never seised thereof.” By stat. 32 Hen. VIII. c. 37, s. 1, “The personal representatives of tenants in fee, tail, or for life, of rent-services, rent-charges, rent-seck, and fee-farms, may distrain for the arrears, upon the land charged with the payment, *so long as the lands continue in the seisin or possession of the tenant in demesne, who ought to have paid the rent or fee-farm, or of some person claiming under him by purchase, gift, or descent.*” This statute provides a remedy where the testator dies seised of a rent to him and his heirs, or for life, and where by his death there was not any remedy for the executor at the common law;^(y) hence, executor of tenant for life of a rent-charge may distrain for rent arrear under this statute; but where the executor has remedy by the common law by action of debt, as in the case of an executor of tenant for years of a rent-charge, *if he lives so long*, this statute does not apply.^(z) Neither does this statute extend to copyhold rents.^(a)(1) By sect. 3, “Husbands seised in right of their wives, in fee, tail, or for life, of any rents or fee-farms, may distrain, after the death of their wives, for arrears during their lifetime.” And by sect. 4, “Tenants *per autre vie*, of rents and fee-farms, and their personal representatives, may distrain on the land charged after the death of *cestui que vie*,” for arrears due in the lifetime of *cestui que vie*. A. seised in fee, let to the plaintiff for twenty-one years, and afterwards dying seised of the reversion, the defendant administered,^(b) and distrained for half a year’s rent due to the intestate, for which he avowed. On demurrer to the avowry, it was objected *that there was not any privity of estate between the administrator and the lessor, and therefore the avowry, which is in the realty, could not be maintained by him. And it was observed, this was a case out of the stat. of 32 Hen. VIII. c. 37, for that only gives a remedy by way of distress for rents of freehold; and of this opinion the court seemed.⁽²⁾ 1 Inst. 162, a.; 4

(y) *Hool v. Bell*, 1 Ld. Raym. 172.

(z) *Turner v. Lee*, Cro. Car. 471; but see *Prescott v. Boucher*, 3 B. & Ad. 858.

(a) *Appleton v. Doily*, Yelv. 135.

(b) *Renvin v. Watkin*, M. 5 Geo. II. B. R. MSS.

(1) The executor of a lessor who was seised of the demised premises in fee, cannot distrain for rent (though due on a lease for years) which accrued subsequently to the testator’s death. Such rent goes to the heir or devisee. *Wright v. Williams*, 5 Cowen, 501.

(2) But in *Powell v. Killick*, Middlesex Sittings, M. 25 Geo. II., where in trespass for entering plaintiff’s house, and carrying away his goods, upon not guilty, defendant gave in evidence that he was executor of A., who was plaintiff’s landlord of the house, and that he distrained for rent due to his testator at the time of his death; it was objected, for plaintiff, that executor was empowered to distrain only by virtue of the stat. 32 Henry VIII. c. 37, and that the statute extended to the executors and administrators of those persons only, to whom rent-services, rent-charges, rent-seck, or fee-farms were due, and that the present case did not fall within either of those descriptions. But *Lee*, C. J., overruled the objection, and said, this was a rent-service, the testator being in his lifetime seised in fee, and the plaintiff holding under a tenure which implied fealty. Serj. Hill’s MSS. 14 D. 72, and Bull N. P. 57, S. C. See further on this subject, *Meriton v. Gilbee*, 8 Taunt. 159; 2 Moore, 48, S. C.; and *Martin v. Burton*, 1 B. & B. 279; 3 Moore,

Rep. 50; Cro. Car. 471; Latch. 211; *Wade v. Marsh* were cited. In *Prescott v. Boucher*, 3 B. & Ad. 849, this point was again raised; and after time taken to consider, it was holden, that a person who was seised in fee of land and demised it for a term of years, reserving a rent, though he be not tenant for years of the rent, is still not within the meaning or words of this statute, "tenant in fee simple, fee tail, or for term of lives of the rent," and is indeed not tenant at all of the rent; and consequently that his executor cannot distrain for arrears of rent accrued in the testator's lifetime. But this question is now set at rest; for by stat. 3 & 4 Will. IV. c. 42, s. 37, it shall be lawful for the executors or administrators of any lessor or landlord to distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime. And by sect. 38, such arrearages may be distrained for after the end of such term or lease at will, in the same manner as if such term or lease had not been ended; provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due. Provided also, that all the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to the distresses so made.

In a case where the testator had given the defendant an authority to distrain, but died almost immediately before the distress [*676] was *taken, and after it had been taken in the name of the testator, his executrix before probate recognized and adopted the defendant's act of distraining; it was holden,^(c) that the defendant might make cognizance as the bailiff of the executrix, under the stat. 82 Hen. VIII. c. 37.

One entitled to the separate herbage and feeding of a close,^(d) for a certain time, may distrain cattle belonging to the owner of the close, damage feasant there during that time. If a terre-tenant, holding under two tenants in common,^(e) pay the whole rent to one, after notice from the other not to pay it, the tenant in common who gave the notice may distrain for his share. One tenant in common may take a distress without his companions, and avow solely.^(f) Grant of rent to testator for years, with a clause of distress, that the grantee and his heir may distrain.^(g) Adjudged, that the executor should distrain, and not the heir.

A mortgagee after giving notice of the mortgage to the tenant in possession, is entitled to such rent as shall be in arrear at the time of notice, and to the rent which accrues afterwards, and may distrain for the same after such notice, if the lease under which the tenant holds be before the mortgage.^(h) But where the lease is made by the mort-

(c) *Whitehead v. Taylor*, 2 P. & D. 367.

(e) *Harrison v. Barnby*, 5 T. R. 246.

(g) *Darrel v. Wilson*, Cro. Eliz. 644.

(d) *Burt v. Moor*, 5 T. R. 329.

(f) Cro. Eliz. 530.

(h) *Moss v. Gallimore*, Doug. 279.

608, S. C.; *Staniford v. Sinclair*, 2 Bingham. 193; and the remarks of Tenterden, C. J., in *Powell v. Killick*, in *Prescott v. Boucher*, 3 B. & Ad. 862; *Jones v. Jones*, Ib. 967.

gagor alone after the mortgage, and no new tenancy has been created between the mortgagee and tenant, the mortgagee has no remedy but by ejectment, and cannot distrain.⁽ⁱ⁾ Nor will a mere recognition on the part of the mortgagee of the tenant in possession as his tenant enable him to distrain; there must be a mutual agreement; since "the relation of landlord and tenant cannot be created without the consent of both parties."^(k)

If by a custom the lord is precluded from turning cattle on the common during a certain season of the year,^(l) a commoner may distrain the lord's cattle which are turned on during that time. Wherever there is a colour of right for turning cattle on a common,^(m) a commoner cannot distrain, because it would be judging for himself in a cause which depends on a more competent inquiry. Hence, where the right of common was for two sheep for every acre of land in the possession of each commoner; it was holden, that one commoner could not distrain the sheep of another for a surcharge.⁽¹⁾ The general rule, however, that one commoner cannot distrain the *cattle of [*677] another, may be superseded by a special agreement;⁽ⁿ⁾ as where A., being possessed of a quantity of land in a common field, and having a right of common over the whole field, and B. having a right of common over the whole field, they entered into an agreement, for their mutual advantage and convenience, not to exercise their respective rights for a certain term of years, and each party covenanted to that effect. During the term, the cattle of B. came upon the land of A.; it was holden, that A. might distrain them damage feasant; for, by the operation of the agreement, B. stood in the situation of a stranger with regard to A. A tenant holding over after the expiration of his term, cannot distrain the landlord's cattle, which were put on the land by the landlord for the purpose of taking possession.^(o) Lessee for years *assigns* his term, reserving a rent; he cannot distrain for such rent arrear at common law;^(p)⁽²⁾ because he has not any reversion; nor can he distrain for it under stat. 4 Geo. II. c. 28, s. 5, as a rent-seck; because a rent-seck cannot issue out of a term of years; so if termor lease for remainder of term;^(q) but in such case an action of debt is maintainable,^(r) or assumpsit.^(s) A tenant from year to year, under-letting from year to year, has a sufficient reversion entitling him to distrain.^(t) Although receivers^(u) appointed by the Court

(i) *Evans v. Elliot*, 9 A. & E. 342; see *Pope v. Biggs*, 9 B. & C. 245.

(k) *Brown v. Storey*, 1 M. & Gr. 117; 1 Scott, N. R. 9.

(l) 1 Roll. Abr. 405, 406, (A.) pl. 6. (m) *Hall v. Harding*, 4 Burr. 2426.

(n) *Whiteman v. King*, 2 H. Bl. 4.

(o) *Taunton v. Costar*, 7 T. R. 431, recognized by Bayley, J., in *Butcher v. Butcher*, 7 B. & C. 402.

(p) ——— v. *Cooper*, 2 Wils. 375; *Parmenter v. Webber*, 2 Moore, 656.

(q) *Preece v. Corrie*, 5 Bingh. 24, recognized in *Pascoe v. Pascoe*, 3 Bingh. N. C. 905.

(r) *Newcomb v. Harvey*, Carth. 161, 2. (s) See *Preece v. Corrie*, 5 Bingh. 27.

(t) Per Lord Tenderden, C. J.; *Curtis v. Wheeler*, 1 M. & Malk. 493.

(u) Per Lord Hardwicke, C., *Pitt v. Snowden*, 3 Atk. 750; *Bennett v. Robins*, 5 C. & P. 379, *Tindal*, C. J.

(1) But where cattle are turned on the common without any colour or pretence of right, a commoner may distrain them. Admitted in *Hall v. Harding*, 4 Burr. 2426.

(2) See *Ege v. Ege*, 5 Watts, 134.

of Chancery have a power, where they see it necessary, to distrain for rent, and need not apply first to the court for a particular order for that purpose; yet an authority(x) to tenants to pay rent to J. S., whose receipt shall be their discharge, does not entitle J. S. to distrain.

V. *Of the Time at which a Distress may be taken.*

As rent is not due until the last minute of the natural day, on which it is reserved,(y) it follows, that a distress for rent arrear cannot be made on that day.(1) At the common law, if a lease was made at Michaelmas, for a year, reserving rent on the feasts of the Annunciation and St. Michael the Archangel, the lessor was deprived of his [*678] remedy by distress for the rent due at Michaelmas; *because he could not distrain after the expiration of the term.(z) But now by stat. 8 Ann. c. 14, s. 6, "Any person having any rent in arrear upon any lease for life or lives, or for years, or at will, may distrain for such arrears after the determination of the lease: provided(a) such distress be made within six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due."(2) Although this proviso is in terms confined to the possession of the tenant; yet it has been holden,(b) that where the tenant dies before the term expires, and his personal representative continues in possession during the remainder, and after the expiration of the term, the landlord may distrain within six calendar months after the end of the term for rent due for the whole term. So where a tenant, by permission of the landlord, remained in possession of part of a farm after the expiration of the tenancy; it was holden,(c) that the landlord might distrain on that part within six calendar months after the expiration of the tenancy; for the operation of the statute is not confined to cases of a tortious holding, or to a holding of the whole. In *Lewis v. Harris*, 1 H. Bl. 7, n. a., it was holden by *Skynner*, C. B., that the term was continued by the custom of the country, for the purpose of giving a right to the landlord to distrain on the premises in which the waygoing crop remained. See also *Beavan v. Delahay*, 1 H. Bl. 5 S. P., recognized by *Bayley*, J., in *Boraston v. Green*, 16 East, 81, and *Park*, J., in *Knight v. Benett*, 3 Bingh. 366. "The statute of Anne applies only to cases in which the tenancy has been determined by lapse of time, or perhaps by notice to quit, and not to cases where it

(x) *Ward v. Shew*, 9 Bingh. 608.

(z) 1 Inst. 47, b.

(b) *Braithwaite v. Cooksey*, 1 H. Bl. 465.

(y) *Duppa v. Mayo*, 1 Saund. 282.

(a) Sect. 7.

(c) *Nuttall v. Staunton*, 4 B. & C. 51.

(1) "One cannot distrain the same day the rent grows due, but it must be the day after." 21 Hen. VI. 40; vide 14 Hen. VI. 31. Sir M. Hale, MSS. cited by Mr. Hargrave, 1 Inst. 47, b. n. 6. But a warrant given on that day to make distress, generally is good. *Glans v. Hart*, Hardin, 297.

(2) Under the statute of New York, it has been held, that the landlord cannot distrain either on or off the premises, where the term has expired and the tenant has abandoned or yielded up possession to the landlord. *Williams v. Terboss*, 2 Wend. 148.

has been put an end to by the tenant's own wrongful disclaimer." Per *Patteson, J., Doe v. Williams*, 7 C. & P. 328. And "To make the statute applicable, there must be a keeping as the party's own, to the exclusion of other people." Hence, where the tenant of a farm having remained a few days after the expiration of his term, and after entry by a new tenant, went away, leaving a cow and some pigs, but not giving any further intimation of a purpose to return, or to continue holding any part of the farm; it was adjudged, *(d)* that the landlord could not justify distraining the goods so left for rent arrear, under the statute. A distress for rent arrear can be taken only during the day-time; *(e)* *(1)* but cattle damage feasant may be distrained not *only in the day-time, but during the night also; otherwise [*679] they might escape. Distresses for the recovery of any rent may be made at any time within twenty years next after the time at which the right to make such distress shall have first accrued; *(f)* but no *arrears* of rent can be recovered by distress for more than six years. *(g)*

Rent (whether the demise be by parol or deed) is a debt of equal degree with a debt by specialty. *(h)* Hence a promissory note, *(i)* as it constitutes a debt of an inferior degree, cannot extinguish a claim for rent; nor does the receipt of such note of itself suspend the right of distraining. *(2)*

VI. Of the Place where a Distress may be taken. *(3)*

A distress for rent-service may be taken in any part of the land holden: so for a rent charged or reserved upon a lease upon any part of the land out of which the rent issues. And if a house be upon the land demised or charged, *(k)* a distress may be taken in the house, if the outer door be open. *(4)* For a rent-service or rent-charge issuing out

(d) *Taylorson v. Peters*, 7 A. & E. 110; 2 Nev. & P. 622.

(e) 1 Inst. 142, a.

(f) 3 & 4 Will. IV. c. 27, s. 2. *(g)* Sec. 42. *(h)* *Gage v. Acton*, 1 Salk. 326.

(i) *Davis v. Gyde*, 2 A. & E. 623; 4 Nev. & M. 462.

(k) 1 Rol. Abr. 671, l. 5.

(1) "Before sun-rising or after sun-set no man may distrain but for damage feasant." *Mirroure*, c. 2, s. 26. See also 7 Rep. 7, a., that a distress for rent or service cannot be taken in the night. See 6 C. & P. 213, *Aldenburgh v. People*, when *Parks, J.*, ruled, that no one had a right to take a distress after dark.

(2) A promissory note for the amount of the rent does not bar a distress; nor does a recovery of judgment in covenant. *Snyder v. Kunkleman*, 3 Penn. R. 487.

(3) The place of taking a distress for rent is material and traversable. *Jackson v. Rogers*, 11 Johns. 33. In Kentucky, by statute a distress-warrant may be levied any where in the county; consequently, the common law doctrine which made the *locus in quo* traversable is inapplicable, and a plea of *cepit in alio loco* is immaterial. *Lougee v. Colton*, 9 Dana, 123. A constable of a town where the demised premises are situate, may pursue goods fraudulently removed into another town. *Christman v. Floyd*, 9 Wend. 340.

(4) A distress may be taken in a house through the doors or windows. *Com. Dig. tit. Distress*, (A. 3.) "If an outward door be open, an inner door may be broken in order to take a distress," per Lord *Hardwicke*, C. J., in *Browning v. Dann and others*, Ca. Temp. Hardw. 168. "But a padlock put on a barn door cannot be opened by force for the purpose of distraining the corn," per Lord *Hardwicke*, C. J. N. Gates or inclosures cannot

of the land, which lies in different counties, a distress for the whole may be taken in one county.^(l) So if a rent-charge issue out [*680] of land in the possession of many tenants, a *distress may be taken upon the possession of one for the whole rent, for it issues out of each part.^(m) But where there are separate and distinct demises, there must be separate distresses on the several premises subject to the distinct rents, although the several premises are demised to the same tenant.⁽ⁿ⁾ By stat. 11 Geo. II. c. 19, s. 8, "The landlord may distrain any cattle or stock of the tenant, depasturing on any common appendant or appurtenant, or any way belonging to the premises demised." If the lord come to distrain cattle which he sees then within his fee,^(o) and the tenant or any person, to prevent the lord from distraining, drive the cattle out of the lord's fee into some other place, yet may the lord freshly follow and distrain the cattle; for in judgment of law the distress will be considered as taken within his fee. A different rule holds with respect to distresses for damages feasant;^(p) for if the owner of the beasts chase them out of the soil, even with a view to evade the distress, yet the owner of the soil cannot distrain them; because the beasts must be damage feasant at the time of the distress.

By stat. 11 Geo. II. c. 19, s. 1,⁽¹⁾ "If lessee for life, Y. W. or otherwise, of lands or tenements, upon the demise whereof any rents are reserved, shall fraudulently or clandestinely carry off *his* goods from such demised premises, to prevent a distress, the lessor, or any empowered by him, may, within thirty days after carrying off, distrain *such* goods, wherever found, for the rent arrear, and sell or dispose of the same, as if distrained on the premises: provided,^(q) before the seizure, such goods have not been sold, *bona fide*, and for a valuable consideration, to a person not privy to the fraud."⁽²⁾ But the rent must be due; for

(l) 1 Rol. Abr. 671, l. 27, 30.

(m) 1 Rol. Abr. 671, l. 33.

(n) *Rogers v. Birkmire*, Str. 1040.

(o) 1 Inst. 161, a.

(p) *Ib.*

(q) Sect. 2. This section is copied from the 3rd of the 8 Ann. c. 14, with the exception of the words in *italics*.

be broken open or thrown down to take a distress. 1 Inst. 161, a. By stat. 11 Geo. II. c. 19, s. 7, "Any place, in which goods or chattels, fraudulently or clandestinely conveyed away, are locked up or secured, so as to prevent the same from being taken as a distress for rent arrear, may be broken open and entered in the day-time by the party distraining; first calling to his assistance the constable or other peace-officer of the place where the goods are suspected to be concealed; and in case of a dwelling-house, oath being first made before a justice of the peace of a reasonable ground to suspect that such goods are therein; and the same may be taken and seized, for the arrears of rent, as if they had been in an open place." An order of justices adjudging a party to pay double the value of the goods, under the 4th section of this statute, must show on the face of it that the party removing the goods was tenant. *Rex v. Davis*, 5 B. & Ad. 551.

(1) This section is copied from the second section of the fourteenth chapter of the 8th of Anne, and differs from it only as to the time allowed for the seizing of the goods after the carrying off; the statute of Anne allowing only five, and this statute thirty days.

(2) See *Bun v. Van Buskirk*, 3 Cowen, 263. A mortgage of goods is not a sale so as to prevent their being followed. *Reynolds v. Shuter*, 5 Id. 323. A landlord cannot distrain after the term has expired, and the tenant has removed from the premises, though the thirty days have not expired. *Terbose v. Williams*, 5 Id. 407; *S. C.* in error, 2 Wend. 148. See *Pemberton v. Rensselaer*, 1 Id. 307. A mere removal of goods in the day-time, without the knowledge of the landlord, is not sufficient to authorize him to follow them. *Grace v. Shively*, 12 Serg. & Rawle, 216. See *Kelly v. Davenport*, 1 Browne, 231.

the landlord cannot distrain under this statute *before* the rent becomes due.^(r) By sect. 3, "If any *tenant* shall fraudulently remove or convey away his goods, or if any person shall wilfully and knowingly assist such tenant in such fraudulent conveying away or carrying off any part of *his* goods, or in concealing the same, the party offending shall forfeit and pay to the landlord double the value of the goods carried off or concealed." A creditor(s) may, with the assent of the debtor, take possession of the goods of his debtor, and remove them from the premises, without incurring the penalty in the foregoing section; although the *creditor takes possession, know- [*681] ing the debtor to be in distressed circumstances, and under an apprehension that the landlord will distrain. In an action(t) against a party for aiding and assisting the tenant in the fraudulent removal of his goods, with intent to prevent the landlord from distraining them, it is incumbent on the landlord not only to prove that the defendant assisted the tenant in such fraudulent removal, but also that he was privy to the fraudulent intent of the tenant. The 4th section gives the landlord a remedy by complaint to two magistrates, when the goods do not exceed the value of 50*l.*, but the landlord may elect which remedy he will pursue.(u) This statute applies to the goods of the tenant only, and not to the goods of a stranger,(x) or lodger.(y)(1)

VII. *The Manner of disposing of Distresses, and herein of the Sale of Distresses for Rent Arrear.*

At the common law, the party distraining might have driven the distress from the place where it was taken, into any other place, even in a distant county. It is obvious,(z) that the exercise of such a power must have been attended with great oppression; more especially, as the tenant was obliged to provide sustenance for his beasts, if they were impounded in an open pound; and the beasts being driven into a foreign county, the tenant must frequently have been at a loss where to make a replevin. A partial remedy for this evil was afforded by stat. 52 Hen. III. c. 4, which prohibited all persons from driving the distress out of the county where it was taken. But the stat. 1 & 2 Phil. & Ma. c. 12, has given a further check to it. By the last-mentioned statute it is enacted, "That no distress of cattle shall be driven out of the hundred, rape, wapentake, or lath, where the distress is taken, except it be to a pound overt within the same shire, not above three miles distant from the place where the distress is taken; and no cattle or other goods distrained for any manner of cause at one time, shall be impounded in several places, upon pain of forfeiting, to the party grieved, one hun-

(r) *Rand v. Vaughan*, 1 Bingh. N. C. 767.

(s) *Bach v. Meats*, 5 M. & S. 200.

(t) *Brooke v. Noakes*, 8 B. & C. 537.

(u) *Bromley v. Holden*, 1 M. & Malk. 175.

(x) *Thornton v. Adams and others*, 5 M. & S. 38.

(y) *Postman v. Harrell*, 6 C. & P. 225.

(z) 2 Inst. 106.

(1) See *Adam v. La Combe*, 1 Dall. 440; *Davis v. Payne*, 4 Randolph, 332.

dred shillings and treble damages." If the hundred, in which the cattle were distrained, be in one county, and the hundred into which they were driven be in another, the venue may be laid in either county.(a) Persons distraining for rent arrear(b) may impound the distress in any convenient part of the land chargeable with the rent.(1) The stat. 11 Geo. II. c. 19, s. 8, which empowers the landlord to seize growing crops as a distress, authorizes him to "cut, gather, and [*682] *lay up the same, when ripe, in barns, or other proper places on the premises, if any; if not, then in other barns or proper places, as near as may be to the premises, notice thereof being given(c) to, or left at the last place of abode of the tenant, within one week after the lodging of the distress." By stat. 5 & 6 Will. IV. c. 59, s. 4, parties impounding cattle are required to provide sufficient food for them, and then may recover before a justice of the peace not exceeding double the value of such food from the owner. And by s. 5, where animals have been impounded without sufficient food for more than twenty-four hours, any person may enter the pound and supply them with food, without being liable to an action of trespass or other proceeding.

Distrainers are bound(d) to see that the pound to which they take the distress is in a fit and proper state to receive it at the time of impounding. It is no defence,(e) for abusing the distress by putting the animals distrained in a muddy pound, that the place was the manor-pound, and was generally in a proper state.

Sale of Distress for Rent Arrear.—At the common law, distresses for rent arrear could not be sold, but only detained as pledges for the enforcing the payment of such rent; but now, by the stat. 2 Will. & Ma. sess. 1, c. 5, s. 2, it is enacted, "That, where any *goods or chattels* shall be distrained for any *rent*(2) reserved and due upon any contract, and the tenant or owner of the goods shall not within five(3) days next after such distress, and notice thereof, with the cause of such taking left at the chief mansion-house or other most notorious place on the premises charged with the rent, replevy the same, the person distraining

(a) *Pope v. Davis*, 2 Taunt. 252.

(b) Stat. 11 Geo. II. c. 19, s. 10.

(c) Sect. 9.

(d) *Wilder v. Speer*, 3 Nev. & P. 536; 8 A. & E. 547.

(e) *S. C.*

(1) This is the practice of Pennsylvania, although the clause of the statute 11 Geo. II., which gives this power, is not contained in the Act of Assembly. *Woglam v. Cooperthwaite*, 2 Dall. 68.

(2) "This statute does not affect distresses damage feasant; consequently they remain, as they were at common law, mere pledges; and the sale of them will make the party distraining a trespasser *ab initio*." Per Lord Hardwicke, C. J., in *Dorton v. Pickup*, Sittings after M. T. 9 Geo. II. MSS.

(3) Five days, that is, five times twenty-four hours, must elapse, before sale. *Harper v. Taswell*, 6 C. & P. 166, *Tindal*, C. J. The five days are reckoned inclusive of the day of sale. *Wallace v. King*, 1 H. Bl. 13, and a reasonable time after the expiration of the five days is allowed to the landlord for appraising and selling goods. *Pitt v. Shew*, 4 B. & A. 208. But if goods remain on the premises longer than the five days without tenant's consent, distrainer, after the expiration of that time, becomes a trespasser. *Griffin v. Scott*, 2 Str. 717; 2 Ld. Raym. 1424. In computing the time when replevy may be made, the day of the distress is excluded; and if the fifth day be Sunday, the ensuing Monday is included, and the landlord may impound the distress on the premises during that time. *McKinny v. Reeder*, 6 Watts, 34; *Woolrych on Legal Time*, 146-149.

may, with the sheriff or under-sheriff of the county, or constable of the hundred, parish, or place, where the distress is taken, cause the distress to be appraised by two sworn(1) appraisers, whom such sheriff, &c., *shall swear to appraise them truly, and after such [*683] appraisement, *may* sell the same towards satisfaction of the rent, and the charges of the distress and appraisement, leaving the overplus, if any, in the hands of the sheriff, &c. for the owner's use.

It is not necessary to set forth in the notice at what time the rent became due. Per *Buller, J.*, in *Moss v. Gallimore*, Doug. 280. When the notice was for more than was actually due, but the goods distrained only covered the amount actually due, *Parke, B.*, allowed a verdict for nominal damages to be taken on the count for distraining for more rent than was due, subject to the question of its validity. *Wilkinson v. Terry*, 1 M. & Rob. 877. But in the later case of *Taylor v. Henniker*, 12 A. & E. 488, 4 P. & D. 242, it was holden, that where a landlord distrains for more than is due, an action on the case lies at the suit of the tenant, though the goods distrained are of less value than the rent really due; Lord *Denman, C. J.*, in delivering the judgment of the court, said, "It is true that, in replevin, a landlord may avow for less rent than he has distrained for; but then the plaintiff complains of the taking altogether, and not of the excess, here he complains of the excess; and that excess really took place. There was a wrongful act of the defendant; and though by reason of the value of the goods taken, falling short of the actual rent due, no real damage was sustained, yet there was a legal damage, and cause of action, for which the plaintiff was entitled to a verdict."

In *Walter v. Rumbal*, *Ld. Raym.* 53; it was holden that notice to the tenant was good notice under this act, the sole object of the statute being, that the party should have notice: which object was more effectually attained by a notice given to the party himself, than by a notice left at the mansion-house, or most notorious place on the premises.

This statute, although it authorizes a sale after the five days, does not take away the right to replevy,(f) after the five days, in case the distress is not sold; for it does not contain any negative words, and at common law the distress was at all times replevisable. Secus after a sale; for then the purchaser is entitled to take the goods and retain them.(g)

*By stat. 11 Geo. II. c. 19, s. 10, any person lawfully taking any distress for any kind of rent may impound or [*684] otherwise secure the distress so made on the most fit and con-

(f) *Jacob v. King*, 5 Taunt. 451.

(g) Admitted by *Gibbs, C. J.*, in *Jacob v. King*, 5 Taunt. 451.

(1) *I. e.*, sworn before the constable of the parish where distress is taken; it will not suffice, if sworn before constable of adjoining parish. *Avenall v. Croker*, M. & Malk. 172. See *Christman v. Floyd*, 9 Wend. 340; *Vannerson v. Staunton*, Walker, 358. And a constable must attend with the appraisers at the time the goods are appraised, and must swear them before they make their appraisement. *Kenney v. May and another*, 1 M. & Rob. 56. The party distraining ought not to be sworn as one of the appraisers, (*Andrews v. Russell and another*, Middlesex Sittings after Easter Term, 1786; Bull. N. P. 81, 5th ed., S. P., ruled by *Eyre, C. J.*, in C. B. Sittings, M. S. *Le Blanc*, J. S. P. admitted in *Westwood v. Cowne*, 1 Stark. N. P. C. 172,) for he is interested in the business.

venient part of the premises chargeable with the rent, and appraise, sell, and dispose of the same *upon* the premises, in like manner and under the like directions and restraints as may be done off the premises by virtue of the foregoing statute, 2 Will. & Ma. c. 5. The 1 & 2 Phil. & Ma. c. 12, s. 2, which enacts, "that no person shall take for keeping in pound, impounding or poundage of any distress, above 4*d.* for any one whole distress that may be so impounded," does not extend(*h*) to cases where goods are impounded under the foregoing 10th section of the 11th Geo. II. c. 19.

An appraisement on the premises under this stat. of Geo. II. does not so change(*i*) the property, that the tenant may not replevy them, before an actual sale.

The sale of growing crops is not authorized by the statute of 2 Will. & Ma. Hence a tenant whose growing crops have been seized as a distress for rent before they were ripe, cannot maintain an action upon the case against the landlord for selling the same before the five days, or a reasonable time have elapsed, such sale being wholly void(*k*) The notice of distress may be abandoned; for a party may distrain for rent, and avow for fealty(*l*) (1)

In order to prevent excessive charges by brokers and other persons employed to make distresses on poor tenants, it was enacted by stat. 57 Geo. III. c. 93, [10th July, 1817,] that no person making any distress for rent, where the sum due shall not exceed 20*l.*, shall take any other charges than those mentioned in the schedule annexed to the act, which are as follows:

	s.	d.
Levying distress	3	0
Man in possession, per day	2	6
Appraisement, 6 <i>d.</i> in the pound on value on goods.		
Stamp, lawful amount.		
All expenses of advertisement, if any such	10	0
Commission and delivery of goods, 1 <i>s.</i> in the pound, on net produce of sale.		

Under this act, parties aggrieved may apply to a J. P. See [*685] *sections 2, 3, 4, & 5. But the sixth section is general, for by that "every broker or other person making and levying *any* distress, shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him to the person on whose goods the distress is levied, although the amount of rent demanded exceed 20*l.* This statute has not repealed the provisions of the stat. 2 Will. & Ma. sess. 1, c. 5, s. 2, (*ante*, p. 682,) so as to make an appraisement by one broker sufficient(*m*) The sixth section only

(*h*) *Child v. Chamberlain*, 5 B. & Ad. 1049.

(*i*) *Jacob v. King*, 5 Taunt. 451.

(*k*) *Owen v. Legh*, 3 B. & A. 470.

(*l*) Per Lord Kenyon, C. J., in *Gwinnet v. Phillips*, 3 T. R. 646.

(*m*) *Allen v. Flicker*, 18 A. & E. 640, overruling *Fletcher v. Saunders*, 1 M. & Rob. 375, *Lyndhurst*, C. B. See *Bishop v. Bryant*, 6 C. & P. 484.

(1) It is still a disputed point whether a landlord who has seized his tenant's hay and straw under a distress for rent, may sell it subject to a condition that the purchaser shall consume it on the premises according to the custom of the country. *Fruisher v. Lee*, 10 M. & W. 709, in which doubt is thrown on the case of *Abbey v. Petch*, 8 M. & W. 419.

applies to persons *actually*(n) interfering in making the distress; and therefore a landlord who does not personally interfere in the distress, is not liable for the neglect of the broker employed by him, in not delivering a copy of his charges.

The provisions of the 57 Geo. III. c. 93, have, by stat 7 & 8 Geo. IV. c. 17, been extended to distresses for land-tax, assessed taxes, rates, tithes, &c., for any sum not exceeding 20*l*.

VIII. Pound Breach and Rescous.

1. Of Pound Breach.

An action for a pound breach lies,(o) where a person distrains cattle damage feasant in his land, or for rent or services, and puts them into the common pound, or into another pound or place, which shall be said to be a lawful pound, and the owner of the cattle, or other person takes the cattle out of the pound, and drives them where he pleases. See the form of the writ in this action, *F. N. B.* 100, a. 100, b. 101, a. there called a writ *de parco fracto*. If a person sends his servant to distrain for rent or services,(p) and the servant distrains the cattle, and impounds them, and a stranger takes them out of the pound, the action must be brought by the master and not the servant: for it is the master's pound. If a person distrains cattle for damage feasant, and puts them in the pound,(q) and the owner, who *had common there*, make fresh suit, and find the door unlocked, he may justify the taking away the cattle in a *parco fracto*. If the owner break the pound, and take away his goods, the party distraining may have his action *de parco fracto*, and he may also take his goods that were distrained wheresoever he find them, and impound them again. A pound keeper is bound to receive every thing offered to his custody, and is not answerable whether the thing were legally impounded or not.(r) If the cattle be wrongfully taken, the person who brings *the cattle is answer- [*686] able, and not the pound-keeper, unless it can be proved that he has transgressed the limits of his duty, and assented to the trespass. When the cattle are once impounded, he cannot let them go without a replevin, or without the consent of the party. When the cattle are in the pound, they are in the custody of the law; and if the pound is broken, the pound-keeper cannot bring an action, but the person who distrained them. See the statute 2 Will. & Ma. first sess. c. 5, *infra*.

By stat. 6 & 7 Vict. c. 30, persons releasing or attempting to release cattle which shall be lawfully seized for the purpose of being impounded, from the pound or place where the same shall be so impounded, or on the way to or from any such pound or place, or damaging any pound or place, &c., shall, upon conviction before two justices, forfeit 5*l*. and expenses, and in default of payment be imprisoned. But the justices are (sect. 2) prohibited from determining cases in which any question of title, &c., shall arise.

(n) *Hart v. Leach*, 1 Tyr. & Gr. 1010, 1 M. & W. 560.

(p) *Id.* 100, b.

(r) *Badkin v. Powell*, Cowp. 476, cited by Buller, J., in *Brandling v. Kent*, 1 T. R. 62.

(o) *F. N. B.* 100, a.

(q) 1 Inst. 47, b.

2. Of Rescous.

Rescous, as far as the same relates to distress, means the taking away and setting at liberty, against law, a distress taken.^(s) Rescous lies, where a person distrains for rent or services, or for damage feasant, and is desirous of impounding the distress, and another person rescues the distress from him.^(t) The party distraining must be in possession of the distress, otherwise there cannot be a rescue.^(u) But although rescue will not lie at the suit of a person who is prevented by another from making a distress, yet an action on the case will lie for the disturbance. If a person send a person to distrain,^(x) and rescous be made upon the servant, the action must be brought by the master who sustains the injury, and not by the servant. If a distress is taken without cause, as where rent is not due,^(y) the owner may make rescous before the distress is impounded.^(z) So, if the owner tender the rent before distress taken.^(a) But, after the distress is impounded, the owner cannot break the pound, and take the distress out of the pound; for it is then in the custody of the law.^(b) The action of rescous has fallen into disuse; the usual remedy at this time is by an action on the case. By stat. 2 Will. & Ma. first sess. c. 5, s. 4, it is enacted, "That upon any pound breach, or rescous of goods or chattels distrained for rent, the party grieved shall, in a special action on the case, for the wrong thereby sustained, recover treble damages and costs against the offenders, or against the owners of the distress, in case the same be afterwards found to have come to their use or possession." The [*687] construction put on this statute has *been,^(c) that the word treble shall be referred as well to the word costs as to the word damages. Proof of a tender of the rent, after the impounding of distress, will not bar an action on this statute.^(d)

IX. Of abusing the Distress, and of Irregularity in the Proceedings by the Party Distraining.

An abuse of the distress makes the party distraining a trespasser *ab initio*, except where it is otherwise provided by statute.^(e)(1) Where a landlord distrains for rent, amongst other things goods which are not distrainable in law, and the tenant pays the amount of the rent and the costs of distress, upon which the distress is withdrawn altogether, the tenant is entitled, in an action of trespass, to recover only the actual

(s) 1 Inst. 160, b.

(u) *Id.* 102, b.

(y) Inst. 160, b.

(a) *Id.* 160, b.

(c) *Lawson v. Story*, Lord Raym. 19; Carth. 321, S. C.

(d) *Wirth v. Purvis*, 5 T. R. 432, cited in *Thomas v. Harries*, 1 M. & Gr. 695; 1 Scott, N. R. 524; *Ellis v. Taylor*, 8 M. & W. 415.

(e) See *infra*, 11 Geo. II. c. 19, s. 19, and 17 Geo. II. c. 38, s. 3; 7 & 8 Vict. c. 96, s. 69.

(t) F. N. B. 101, a.

(x) *Id.* 101, b.

(z) *Id.* 47, b.

(b) *Id.* 47, b.

(1) See *Blake v. Johnson*, 1 New Hamp. 91.

damage sustained by the taking of those particular goods, and not the whole amount paid by him; and in such a case the distrainer is a trespasser *ab initio* only as to the goods which were not distrainable.^(f) In trespass for breaking and entering the plaintiff's house,^(g) and taking and carrying away his goods, the defendant justified the taking and carrying away the goods, as a distress for damage feasant: replication, that after the distress, the defendant converted them to his own use: on demurrer, it was urged, that the replication was a departure; for it did not support the plaintiff's declaration in trespass, but showed rather that he ought to have brought trover on the conversion: but the court overruled the objection, observing that he *who abuses a distress* is a trespasser *ab initio*, and, therefore, if in trespass the defendant justifies *nomine districtionis*, the plaintiff may show an abuse, and it is not a departure, but will support the declaration: and so it does in this case: for the conversion is a trespass or trover at the plaintiff's election; and the matter disclosed in the replication makes good his election; for it proves it a trespass as well as a trover. See *Dye v. Leatherdale*, 3 Wils. 20, where the same point was ruled, and the authority of the preceding case recognized. By stat. 11 Geo. II. c. 19, s. 19, "Where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent; the distress shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*, but the party grieved may recover satisfaction for the special damage in an action of trespass, or on the case,^(h) at the election of the plaintiff; and if he recover, he shall have full *costs."⁽¹⁾ In case for an irregular distress [*688] under the foregoing clause, it is necessary to state correctly⁽ⁱ⁾ to whom the rent distrained for is due. But by s. 20, of the same statute, it is provided, "That no tenant or lessee shall recover in such action, if tender of amends has been made before action brought. Since this statute trover will not lie for goods irregularly sold under a distress, whether the whole,^(k) or any,^(l) of the rent distrained for be due at the time of seizure. [In case^(m) for selling goods distrained for rent without an appraisement, the measure of damages is the value of the goods minus the rent.] By stat. 17 Geo. II. c. 38, s. 8, "Where any distress shall be made for money justly due for the relief of the poor, the distress shall not be deemed unlawful, nor the party making

(f) *Harvey v. Pocock*, 11 M. & W. 740.

(g) *Gargrave v. Smith*, Salk. 221.

(h) See *Winterbourne v. Morgan*, 11 East, 395, and *post*, tit. "Trespass;" *Virtue v. Beasley*, 1 M. & Rob. 21.

(i) *Ireland v. Johnson*, 1 Bingh. N. C. 162; 4 M. & Sc. 706.

(k) *Wallace v. King*, 1 H. Bl. 13.

(l) *Whitworth v. Smith*, 1 M. & Rob. 193.

(m) *Biggins v. Goode*, 2 Cr. & J. 364; 2 Tyrw. 451.

(1) It has been decided that this section of the statute is not in force in Pennsylvania, and that a landlord who sells the goods without having them appraised, and without giving notice of sale, becomes a trespasser *ab initio*. *Kerr v. Sharp*, 14 Serg. & Rawle, 399. But the omission to give notice, where the goods were replevied before sale, does not make landlord a trespasser *ab initio*. *McKinney v. Reader*, 6 Watts, 34. In trespass for taking goods under a distress, defendant must not only show a warrant, but that a *certain* rent was in arrear, and that, although he was a bailiff. *Wells v. Hornish*, 3 Penns. R. 30. An execution creditor cannot sue landlord in trespass or trover for distraining goods levied on. *Taylor v. Manderson*, 1 Ashm. 130.

it a trespasser, on account of any defect or want of form in the warrant of appointment of overseers, or in the rate of assessment, or in the warrant of distress thereupon: nor shall the party distraining be deemed a trespasser *ab initio*, on account of any irregularity which shall be afterwards done by him, but the party grieved may recover satisfaction for the special damage in an action of trespass, or on the case,⁽ⁿ⁾ with full costs; unless tender or amends is made before action brought."^(o) By the recent act for amending the law for insolvency, 7 & 8 Vict. c. 96, s. 60, where any distress shall be made for any sum of money to be levied by virtue of that act, the distress itself shall not be deemed unlawful, nor the party making the same be deemed a trespasser on account of any defect or want of form in the information, summons, or conviction, warrant of distress, or other proceeding relating thereto, nor shall the party distraining be deemed a trespasser from the beginning, on account of any irregularity which shall afterwards be committed by the party so distraining, but the person aggrieved by such irregularity may recover full satisfaction for the special damages in an action upon the case. A party making a distress for two causes, as to one of which he is justified, and entitled to notice of action, is nevertheless liable in trespass as to the other.^(p) Trespass lies against a landlord,^(q) who, on making a distress for rent, turns the tenant's family out of possession, and continues in possession after the rent is paid. But trespass will not lie for an excessive distress merely.⁽¹⁾ Plaintiff *brought trespass in C. B. for taking an excessive distress,^(r) and recovered; but on error in B. R. the judgment was reversed on the ground that trespass would not lie; the entry and distress being lawful, in part, for the rent due, the whole being one act; and that it was not like the case where there was a subsequent abuse of the distress. The proper remedy for an excessive distress is an action on the case, founded on the statute of Marlbridge, 52 Hen. III. c. 4, which provides, "that distresses shall be reasonable, and that person taking unreasonable distresses shall be

(n) Sect. 9.

(o) Sect. 10.

(p) *Lamont v. Southall*, 5 M. & W. 416.

(q) *Etherton v. Popplewell*, 1 East, 139.

(r) *Lynn v. Moody*, Fitzg. 85; 2 Str. 851, S. C.

(1) *Hutchins v. Chambers*, 1 Burr. 590, S. P. In this case the rule was settled, "that trespass will not lie for an excessive distress;" but it was said, that there was one excepted case, (*Moir v. Munday*, B. R. H. 28 Geo. II., cited in Burr. 582, and by *Kenyon*, C. J., in *Crowther v. Ramsbottom*, 7 T. R. 658,) namely, where gold or silver was taken to an excess, apparent on the face of it: as where six ounces of gold and one hundred ounces of silver were taken for 6s. 8d.; but that proceeds on the ground, that gold and silver are of a certain and known value, and the measure of the value of other things. See S. P. *McKinney v. Reeder*, 6 Watts, 34; *Peters v. Newkirk*, 6 Cowen, 103; *Hunter v. Le Conte*, Ib. 728; *Hartshorn v. Kierman*, 2 Halst. 29. The Act of Pennsylvania of 1772, provides, that where a distress is made when no rent is in arrear, the owner of the goods may, by action of trespass, or on the case, recover double the value of the goods. It has been held, that notwithstanding this provision, the party aggrieved may maintain an action at common law for entering his close, &c., in which he may recover damages to a greater amount than double the value of the goods. *Rees v. Emerick*, 6 Serg. & Rawle, 286. The right of action for taking an excessive distress, dies with the plaintiff, and does not pass to his assignees, if insolvent. *O'Donnell v. Seybert*, 13 Id. 64. See *Smith v. Meanor*, 16 Id. 375.

grievously amerced for the excess of such distresses." In this action the plaintiff need not allege or prove(s) the precise amount of the rent due. Nor is it any bar to such action, that between distress and sale of the goods distrained, the parties came to an arrangement(t) respecting the sale. But this action cannot be maintained after a judgment recovered in replevin.(u) Where plaintiff has received the taxed costs of his replevin on the distress, he cannot,(x) in the action for excessive distress, recover as damages the extra costs incurred by the replevin.(1) In case for an excessive distress, though the warrant of distress be for a greater sum than is really due, the plaintiff is not entitled to a verdict, unless the goods seized are excessive in regard to the sum really due.(y) The landlord is not bound(z) to calculate very nicely the value of the property seized; he ought, however, to take care that some proportion is kept between that and the sum for which he is entitled to take it. To determine whether a distress be excessive, it must be ascertained what the goods seized would have sold for at a broker's sale.(a) After the distress has been impounded, a tender of the rent and costs is too late;(b) and no action lies for selling the distress notwithstanding such tender.(c)

(s) *Sells v. Hoare*, 1 Bingh. 401.

(t) *Ib. S. C.*; *Willoughby v. Backhouse and another*, 2 B. & C. 821, S. P.

(u) *Phillips v. Berryman*, Trin. 23 Geo. III. B. R. MS.

(x) *Grace v. Morgan*, 2 Bingh. N. C. 534, recognizing *Jenkins v. Biddulph*, 4 Bingh. 160.

(y) *Crowder v. Self*, 2 M. & Rob. 190, Lord Abinger, C. B.

(z) Per Bayley, J., *Willoughby v. Backhouse*, 2 B. & C. 823.

(a) Per Parke, B., in *Wells v. Moody*, 7 C. & P. 59.

(b) See *post*, tit. "Replevin, Tender of Arrears."

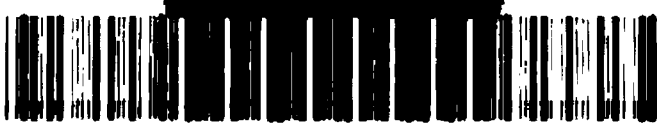
(c) *Ellis v. Taylor*, 8 M. & W. 415.

(1) Assumpsit does not lie by tenant against landlord for money paid under an impending distress, when the latter had color of right, and was not oppressive. It should be trespass or replevin. *Colwell v. Peden*, 3 Watts, 327.

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